DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-277
Title: Wal-Mart Stores, Inc., Petitioner
v.
Betty Dukes, et al.
Docketed: August 25, 2010
Linked with 10A19
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (04-16688, 04-16720)
Decision Date: April 26, 2010
Questions Presented

---Date---	-------Proceedings and Orders---------------------
Jul 2 2010	Application (10A19) to extend the time to file a petition for a writ of certiorari from July 25, 2010 to August 25, 2010, submitted to Justice Kennedy.
Jul 7 2010	Application (10A19) granted by Justice Kennedy extending the time to file until August 25, 2010.
Aug 25 2010	Petition for a writ of certiorari filed. (Response due September 24, 2010)
Sep 3 2010	Order extending time to file response to petition to and including October 25, 2010.
Sep 13 2010	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Sep 14 2010	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondents.
Sep 24 2010	Brief amicus curiae of Intel Corporation filed.
Sep 24 2010	Brief amicus curiae of Chamber of Commerce of the United States filed.
Sep 24 2010	Brief amicus curiae of DRI - The Voice of the Defense Bar filed.
Sep 24 2010	Brief amicus curiae of Equal Employment Advisory Council filed.
Sep 24 2010	Brief amicus curiae of Washington Legal Foundation filed.
Sep 24 2010	Brief amici curiae of Altria Group, Inc., et al. filed.
Sep 24 2010	Brief amicus curiae of Pacific Legal Foundation filed.
Sep 24 2010	Brief amicus curiae of Retail Litigation Center, Inc. filed.
Sep 24 2010	Brief amicus curiae of California Employment Law Council filed.
Oct 21 2010	Brief of respondents Betty Dukes, et al. in opposition filed.
Oct 29 2010	Reply of petitioner Wal-Mart Stores, Incorporated filed.
Nov 1 2010	DISTRIBUTED for Conference of November 23, 2010.
Nov 29 2010	DISTRIBUTED for Conference of December 3, 2010.
Dec 6 2010	Petition GRANTED limited to Question I presented by the petition. In addition to

	Question I: the parties are directed to brief and argue the following question: "Whether the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a)."
Dec 23 2010	SET FOR ARGUMENT Tuesday, March 29, 2011
Dec 29 2010	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Jan 12 2011	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondents.
Jan 20 2011	Joint appendix filed. (Jt appendix in 3 volumes) (Statement of costs filed)
Jan 20 2011	Brief of petitioner Wal-Mart Stores, Incorporated filed.
Jan 25 2011	CIRCULATED.
Jan 25 2011	Brief amicus curiae of California Employment Law Council filed. (Distributed)
Jan 26 2011	Brief amicus curiae of Pacific Legal Foundation filed. (Distributed)
Jan 27 2011	Brief amicus curiae of Intel Corporation filed. (Distributed)
Jan 27 2011	Brief amicus curiae of Association of Global Automakers, Inc. filed. (Distributed)
Jan 27 2011	Brief amicus curiae of Chamber of Commerce of the United States filed. (Distributed)
Jan 27 2011	Brief amici curiae of Society for Human Resource Management and HR Policy Association filed. (Distributed)
Jan 27 2011	Brief amicus curiae of International Association of Defense Counsel filed. (Distributed)
Jan 27 2011	Brief amici curiae of Altria Group, Inc., et al. filed. (Distributed)
Jan 27 2011	Brief amicus curiae of Costco Wholesale Corporation filed. (Distributed)
Jan 27 2011	Brief amicus curiae of Equal Employment Advisory Council filed. (Distributed)
Jan 27 2011	Brief amicus curiae of Securities Industry and Financial Markets Association filed. (Distributed)
Jan 27 2011	Brief amicus curiae of Retail Litigation Center, Inc. filed. (Distributed)
Jan 27 2011	Brief amicus curiae of Washington Legal Foundation filed. (Distributed)
Jan 27 2011	Brief amicus curiae of DRI - The Voice of the Defense Bar filed. (Distributed)
Jan 27 2011	Brief amici curiae of Atlantic Legal Foundation and New England Legal Foundation filed. (Distributed)
Feb 4 2011	Record received from U.S.C.A. for 9th Circuit. (1 box)
Feb 20 2011	Record received from U.S.D.C. for Northern District of San Francisco. (12 boxes)
Feb 22 2011	Brief of respondents Betty Dukes, et al. filed. (Distributed)
Feb 25 2011	Brief amici curiae of Labor Economists and Statisticians filed. (Distributed)
Feb 28 2011	Brief amicus curiae of American Association for Justice filed. (Distributed)
Mar 1 2011	Brief amici curiae of U.S. Women's Chamber of Commerce, et al. filed. (Distributed)
Mar 1 2011	Brief amicus curiae of Law and Economics Professors filed. (Distributed)
Mar 1 2011	Brief amici curiae of Public Justice, P.C., et al. filed. (Distributed)
Mar 1 2011	Brief amici curiae of Consumers Union of United States, Inc., et al. filed. (Distributed)
Mar 1 2011	Brief amici curiae of National Employment Lawyers Association, et al. filed. (Distributed)

Mar 1 2011	Brief amici curiae of American Sociological Association, et al. filed. (Distributed)
Mar 1 2011	Brief amicus curiae of Institute for Women's Policy Research filed. (Distributed)
Mar 1 2011	Brief amicus curiae of Public Citizen, Inc. filed. (Distributed)
Mar 1 2011	Brief amici curiae of United Food and Commercial Workers International Union, et al. filed. (Distributed)
Mar 1 2011	Brief amici curiae of NAACP Legal Defense and Educational Fund, Inc., et al. filed. (Distributed)
Mar 1 2011	Brief amicus curiae of Civil Procedure Professors filed. (Distributed)
Mar 1 2011	Brief amici curiae of American Civil Liberties Union and National Women's Law Center, et al. filed. (Distributed)
Mar 17 2011	Reply of petitioner Wal-Mart Stores, Incorporated filed.
Mar 29 2011	Argued. For petitioner: Theodore J. Boutrous, Jr., Los Angeles, Cal. For respondents: Joseph M. Sellers, Washington, D. C.

PETITION
FOR
WRIT OF
CERTIORARI

169 ①

Supreme Court, U.S.
FILED

10-277 AUG 25 2010

No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

WAL-MART STORES, INC.,

Petitioner,

v.

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, KAREN WILLIAMSON, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, on behalf of themselves and all others similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In a sharply divided 6-5 decision that conflicts with many decisions of this Court and other circuits, the en banc Ninth Circuit affirmed the certification of the largest employment class action in history. This nationwide class includes every woman employed for any period of time over the past decade, in any of Wal-Mart's approximately 3,400 separately managed stores, 41 regions, and 400 districts, and who held positions in any of approximately 53 departments and 170 different job classifications. The millions of class members collectively seek billions of dollars in monetary relief under Title VII of the Civil Rights Act of 1964, claiming that tens of thousands of Wal-Mart managers inflicted monetary injury on each and every individual class member in the same manner by intentionally discriminating against them because of their sex, in violation of the company's express anti-discrimination policy.

The questions presented are:

I. Whether claims for monetary relief can be certified under Federal Rule of Civil Procedure 23(b)(2)—which by its terms is limited to injunctive or corresponding declaratory relief—and, if so, under what circumstances.

II. Whether the certification order conforms to the requirements of Title VII, the Due Process Clause, the Seventh Amendment, the Rules Enabling Act, and Federal Rule of Civil Procedure 23.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Wal-Mart Stores, Inc. has no parent corporation and that no other publicly held corporation owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the en banc court of appeals (App. 1a–161a) is published at 603 F.3d 571. Superseded panel opinions are reported at 509 F.3d 1168 and 474 F.3d 1214. The district court's certification order (App. 162a–283a) is published at 222 F.R.D. 137. A related evidentiary order is published at 222 F.R.D. 189.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 2010. On July 7, 2010, Justice Kennedy extended the time for filing this petition to August 25, 2010. No. 10A19. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of Title VII, the Rules Enabling Act, and Federal Rule of Civil Procedure 23 are reproduced in the Appendix (at 286a–302a).

STATEMENT

The district court certified a sprawling nationwide class consisting of all current and former female employees of Wal-Mart Stores, Inc., estimated at the time to comprise at least 1.5 million women. The Ninth Circuit's 6-5 en banc decision upholding the certification order adopts standards that violate the rights of both defendants and absent class members and contradicts decisions of this Court and other circuits.

The Ninth Circuit created an acknowledged three-way circuit split on the standard for determining when claims for monetary relief can be certified as a class action under Federal Rule of Civil Procedure 23(b)(2), which on its face applies only to claims for injunctive or corresponding declaratory relief. The majority expressly rejected both of the standards previously articulated in the circuits (one of which had been applied by the district court) and announced a new standard, thus exacerbating the longstanding conflict and confusion on this issue in the lower courts. This Court has previously granted review to address variants of this issue, but has never decided it. It is now time to do so.

The Ninth Circuit also departed from this Court's precedents, and created conflicts with virtually every other circuit, on several other important and recurring issues in class action and employment law. The majority absolved plaintiffs from adducing "significant proof" of an unlawfully discriminatory practice or policy that affected all class members in the same manner, as required by this Court and other circuits. The court then swept aside the need to determine millions of individual issues by relieving plaintiffs of their burden of proving intent and injury and by stripping Wal-Mart of its right to assert crucial defenses explicitly established by Title VII. This approach, which violates the Rules Enabling Act, the Due Process Clause, and the Seventh Amendment, contradicts numerous decisions of this Court and other circuits and warrants review.

1. Wal-Mart is the Nation's largest private employer. At the time of certification (in 2004), it operated approximately 3,400 stores in the United States and employed more than a million people. App. 163a.

At the time of certification, Wal-Mart's complex retail operation functioned as follows: It was divided into seven divisions, which were split into 41 separate regions and then further divided into approximately 400 individual districts. App. 114a (Ikuta, J., dissenting). Each of Wal-Mart's regions consisted of 80 to 85 stores, employing 80 to 500 people per store. *Ibid.* Store managers who ran individual stores were responsible for hiring and promoting hourly employees in their respective stores. *Ibid.* Within each store, assistant managers (who were salaried) reported to store managers. *Ibid.* The company's hourly retail employees worked in 53 different departments and 170 different job classifications, including cashiers, team leads, and department managers. *Ibid.*

Wal-Mart's company-wide policy bars discrimination based on gender. As the district court recognized, "Wal-Mart has earned national diversity awards and its executives discuss diversity and include it in company handbooks and trainings. The company has diversity goals, performance assessments, and penalties for EEO violations." App. 195a (citations omitted).

The six class representatives are current or former Wal-Mart employees. They allege that, by delegating substantial discretion to individual managers, Wal-Mart "fosters or facilitates gender stereotyping and discrimination, . . . and that this discrimination is common to all women who work or have worked in Wal-Mart stores." App. 5a. On behalf of all women employed at any Wal-Mart retail store since 1998, they seek "injunctive and declaratory relief, back pay, and punitive damages, but not traditional 'compensatory' damages." *Ibid.*

Over Wal-Mart's objections, the district court determined that plaintiffs' evidence satisfied the requirements of Rule 23(a) and (b)(2) and certified a class of "[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal-Mart's challenged pay and management track promotions policies and practices." App. 283a.

2. On Rule 23(f) review, the Ninth Circuit issued three sharply divided decisions—a 2-1 panel decision, a 2-1 amended panel decision, and a 6-5 en banc decision—in which the majority voted to affirm, in substantial part, the certification order. App. 111a; *see also* 509 F.3d 1168; 474 F.3d 1214. The dissenters maintained that this unprecedented certification "departs from the language and intent of Rule 23 of the Federal Rules of Civil Procedure, ignores Supreme Court mandates, and neglects the rights of defendants." App. 113a (Ikuta, J., dissenting). And "[i]t sacrifices the rights of women injured by sex discrimination." 509 F.3d at 1200 (Kleinfeld, J., dissenting).

a. With respect to Rule 23(a)'s "commonality" requirement, the en banc majority concluded that "[e]vidence of Wal-Mart's subjective decision-making policies suggests a common legal or factual question regarding whether Wal-Mart's policies or practices are discriminatory." App. 78a. While acknowledging "the absence of a specific discriminatory policy," the majority held that plaintiffs were not required to establish such a policy at the certification stage, and that Wal-Mart's objections went to the "merits" of plaintiffs' claims. *Id.* at 59a.

As to the "typicality" requirement of Rule 23(a), the majority simply declared: "Even though individual employees in different stores with different managers may have received different levels of pay or may have been denied promotion or promoted at different rates, because the discrimination they claim to have suffered occurred through alleged common practices—e.g., excessively subjective decision making in a corporate culture of uniformity and gender stereotyping— . . . their claims are sufficiently typical . . . ." App. 80a.

Regarding Rule 23(b)(2)'s applicability to monetary relief claims, the majority recognized that the Ninth Circuit had "previously joined the Second Circuit in adopting a test that focuses on the plaintiffs' subjective intent in bringing a lawsuit," while "several other circuits use the 'incidental damages standard' that was first enunciated by the Fifth Circuit." App. 85a. Rather than reconciling this conflict, however, the majority rejected the Ninth Circuit's previous standard and "instead" adopted a third standard under which monetary claims may be certified under Rule 23(b)(2) if they are not "superior in strength" (as determined using a new multi-factor test) to the requested injunction. *Id.* at 86a. Although most of the class members are former employees who lack standing even to secure injunctive or declaratory relief and collectively seek to recover *billions* of dollars in backpay, the Ninth Circuit affirmed the certification order, announcing a categorical rule that Title VII backpay claims are "fully consistent with the certification of a Rule 23(b)(2) class action." *Id.* at 92a.

While the majority vacated the certification of plaintiffs' claims for punitive damages, it suggested that those claims might be certifiable on remand under Rule 23(b)(2) or (b)(3) (App. 99a), rejecting the need for any "individualized punitive damages determinations." *Id.* at 98a.

The court also rejected Wal-Mart's argument that, by eliminating traditional individual hearings regarding entitlement to monetary relief, the district court's trial plan violated its "due process rights, as well as section 706(g)(2) of Title VII, the Rules Enabling Act, and the Supreme Court's decision in [*International Brotherhood of*] *Teamsters* [v. *United States*], 431 U.S. [324], 359–60 [(1977)]." App. 104a & nn.51–53. The court "express[ed] no opinion regarding Wal-Mart's objections to the district court's tentative trial plan (or that trial plan itself)," but instead noted that "there are a range of possibilities." *Id.* at 105. The court suggested that a statistical sampling method or the district court's formula plan might be invoked. It nevertheless declined to endorse either approach. *Id.* at 105a–110a & n.57 (citing *Hilao* v. *Estate of Marcos*, 103 F.3d 767, 782–87 (9th Cir. 1996)).

b. Judge Graber concurred on the ground that it makes no difference for class certification purposes whether the employer had 500 or 500,000 female employees. App. 111a–112a.

c. Judge Ikuta, dissenting, demonstrated that each of the majority's principal holdings is inconsistent with this Court's precedents or in conflict with the decisions of other circuits. *See, e.g.*, App. 121a–122a, 138a–139a, 154a–157a. She showed that the decision is irreconcilable with *General Telephone Co. of the Southwest* v. *Falcon*, 457 U.S. 147 (1982), which is both "the sole Supreme Court case addressing Rule 23(a) in the Title VII discrimination context" and "directly on point in this case." App. 122a. She explained that "[a]ny reasonable scrutiny of the evidence in this case compels the conclusion that although the six plaintiffs here may have individualized claims of discrimination, they cannot represent a class of 1.5 million past and present employees." *Id.* at 138a.

Judge Ikuta also challenged the majority's invocation of Rule 23(b)(2), not only because it "br[oke] with the Second Circuit . . . as well as the Fifth, Sixth, Seventh, and Eleventh Circuits" and "creat[ed a] three-way circuit split" (App. 154a n.25), but also because it conflicts with the Rule's language and history and with this Court's precedents and the Rules Enabling Act. *Id.* at 154a–160a. And she established that this case cannot be tried in a manner that protects the statutory and constitutional rights of Wal-Mart and the absent class members. *Id.* at 145a–147a.

d. Chief Judge Kozinski also wrote a separate dissent, directly responding to Judge Graber's concurrence:

> Maybe there'd be no difference between 500 employees and 500,000 employees if they all had similar jobs, worked at the same half-billion square foot store and were supervised by the same managers. But the half-million members of the majority's approved class held a multitude of jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed depending on each class member's job, location and period of employment.

App. 161a. "They have little in common," he concluded, "but their sex and this lawsuit." *Ibid.*

REASONS FOR GRANTING THE PETITION

The class certified by the district court was estimated to include over 1.5 million former and current female Wal-Mart employees who held different jobs in different stores in different States under the supervision of different managers. The class is larger than the active-duty personnel in the Army, Navy, Air Force, Marines, and Coast Guard *combined*—making it the largest employment class action in history by several orders of magnitude. *See* App. 244a. The majority decision conflicts with every pertinent decision of this Court and many decisions of other circuits on numerous important, recurring issues in class-action litigation, both in discrimination cases and generally.

This Court has cautioned against "judicial inventiveness" in class-action procedure, warning that "the rulemakers' prescriptions for class actions may be endangered by those who embrace Rule 23 too enthusiastically just as they are by those who approach the Rule with distaste." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 620, 629 (1997) (internal quotation marks and alterations omitted). The Court has therefore "call[ed] for caution" where, as here, "individual stakes are high and disparities among class members great." *Id.* at 625. The majority's decision demonstrates that "the certification in this case does not follow the counsel of caution." *Ibid.*

As attested by the widespread attention this case has received in the national and academic press, it is one of the most important class-action decisions since the modern Rule 23 was adopted in 1966 and warrants this Court's review.

I. THIS COURT SHOULD GRANT REVIEW TO DECIDE WHETHER AND HOW RULE 23(B)(2) APPLIES TO MONETARY CLAIMS AND RESOLVE THE THREE-WAY CONFLICT ON THIS QUESTION

The majority decision expressly created a three-way circuit split on the standard for determining whether claims for monetary relief can be certified under Rule 23(b)(2). App. 85a–88a. The Ninth Circuit rejected the minority standard (applied now only in the Second Circuit) as well as the majority standard (applied in every other circuit to have considered the issue) in favor of a new multi-factor inquiry. This conflict warrants review, and all the more so because the Ninth Circuit's decision is so problematic. The issue frequently arises in class-action litigation and should be resolved consistently regardless of the forum in which suit is brought.

Rule 23(b)(2) allows class certification if the defendant "has acted or refused to act on grounds that apply generally to the class, so that final *injunctive* relief or corresponding *declaratory* relief is appropriate *respecting the class as a whole*." Fed. R. Civ. P. 23(b)(2) (emphases added). Certification under Rule 23(b)(2) is "mandatory"—it does not require notice to absent class members, and it does not permit them to opt out of the class. *See Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 842–47 (1999).

This Court has recognized the constitutional problems inherent in an overbroad application of mandatory certifications, *id.* at 842, and it has suggested that "actions seeking monetary damages . . . can be certified only under Rule 23(b)(3), which permits opt-out," requires notice to absent class members, and imposes strict requirements of predominance, superiority, and manageability, "and not under [Rule 23(b)(2)], which do[es] not," *Ticor Title Ins. Co.* v. *Brown*, 511 U.S. 117, 121 (1994) (per curiam); *see also Amchem*, 521 U.S. at 614–17. The Court has explained that Rule 23(b)(3)'s "predominance" requirement—which provides that common issues must "predominate" over individual issues—is a "vital prescription" governing monetary claims that is "far more demanding" than Rule 23(a)'s commonality requirement. *Amchem*, 521 U.S. at 622–24. Plaintiffs here cannot meet the Rule 23(b)(3) requirements, which is why they are invoking Rule 23(b)(2).

This Court has twice granted certiorari to consider variants of this issue. *Adams* v. *Robertson*, 520 U.S. 83 (1997) (per curiam); *Ticor*, 511 U.S. 117. In neither case, however, did the Court ultimately decide whether, or in what circumstances, Rule 23(b)(2) can be used to certify monetary claims.

This case is an ideal vehicle for providing much-needed clarity to the lower courts on this important and recurring question of class-action procedure.

A. The Circuits Have Split Three Ways

Although Rule 23(b)(2) authorizes certification only of claims for "injunctive relief or corresponding declaratory relief," some courts have relied on an Advisory Committee Note—which says that this provision does not apply where the relief sought "relates . . . predominantly to money damages"—to conclude that Rule 23(b)(2) allows certification of *some* monetary claims. Even before the Ninth Circuit's decision in this case, there was an acknowledged "split among circuits on how a court determines whether monetary relief predominates in a Rule 23(b)(2) class suit." *Richards* v. *Delta Air Lines, Inc.*, 453 F.3d 525, 531 n.8 (D.C. Cir. 2006). The Ninth Circuit's decision "aggravate[d] the already-existing inconsistency between the circuits" by creating a "three-way circuit split." App. 154a n.25 (Ikuta, J., dissenting).

The Fifth, Sixth, Seventh, and Eleventh Circuits have adopted the so-called "incidental damages" test, which prohibits certification under Rule 23(b)(2) where plaintiffs seek monetary relief unless the relief sought will "flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief." *Allison* v. *Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998); *see also Reeb* v. *Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 649–50 (6th Cir. 2006); *Cooper* v. *Southern Co.*, 390 F.3d 695, 720 (11th Cir. 2004); *Lemon* v. *Int'l Union of Operating Eng'rs*, 216 F.3d 577, 580–81 (7th Cir. 2000); *cf. Thorn* v. *Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 330 n.25 (4th Cir. 2006).

The Second Circuit, in contrast, has expressly rejected *Allison*'s "incidental damages" standard, adopting instead a standard that turns on plaintiffs' subjective intent in bringing suit. *Robinson* v. *Metro-North Commuter R.R. Co.*, 267 F.3d 147, 164 (2d Cir. 2001). Until the decision below, the Ninth Circuit agreed, *Molski* v. *Gleich*, 318 F.3d 937, 949–50 (9th Cir. 2003), and both the district court and the three-judge panel followed *Molski*. *See* App. 237a; 509 F.3d at 1186; 474 F.3d at 1234.

The Ninth Circuit criticized and expressly rejected both of these conflicting lines of authority—deriding its own *Robinson-Molski* standard as "fatally flawed," "troubling," "nebulous," "incomplete," and "imprecise" (App. 86a)—but nonetheless affirmed the certification order. *Id.* at 86a–87a; *id.* at 154a n.25 (Ikuta, J., dissenting). For a new test, the court looked not to the language of Rule 23(b)(2) itself, but instead to what it described as the "advisory committee *requirement*" that "the appropriate final relief" not relate "exclusively or predominantly to money damages." *Id.* at 85a (emphasis added).

The majority announced that, to satisfy Rule 23(b)(2), "a class must seek only monetary damages that are not 'superior in strength, influence, or authority' to injunctive and declaratory relief" (App. 86a (quoting *Merriam-Webster's Collegiate Dictionary* 978 (11th ed. 2004))), as determined using "[f]actors such as whether the monetary relief sought determines the key procedures that will be used, whether it introduces new and significant legal and factual issues, whether it requires individualized hearings, and whether its size and nature—as measured by recovery per class member—raise particular due process and manageability concerns." *Id.* at 88a. Under this amorphous new test, "no single factor would be determinative" (*ibid.*), and the court "should also consider *any other factors* relevant to whether monetary relief predominates." *Id.* at 97a (emphasis added).

The majority, however, deemed one factor irrelevant: the total *amount* of monetary relief sought. *See* App. 89a. In other words, in deciding whether the "strength, influence, or authority" of the monetary relief request outweighs that of injunctive relief, it is irrelevant that the class members are seeking billions of dollars for their alleged individual injuries.

B. The Ninth Circuit's Standard Is Clearly Wrong

None of the three existing standards is wholly consistent with Rule 23(b)(2)'s language and structure. Limited by its terms to injunctive or corresponding declaratory relief, this provision does not authorize certification of *any* claims for monetary relief. *Cf. Ticor*, 511 U.S. at 121. But the Ninth Circuit's new standard marks the most dramatic departure from the Rule's text and history and cannot be squared with this Court's decision in *Ortiz*.

Ortiz, which defined the bounds and characteristics of a permissible Rule 23(b)(1) "limited fund" class action, teaches that the mandatory provisions of Rule 23(b) must be applied carefully to ensure that the procedural class-action device does not impair the rights of either the defendant or absent class members. App. 138a–140a (Ikuta, J., dissenting). The mandatory provisions can be used to certify *only* classes that rest comfortably within the historical antecedents of Rule 23(b). *Ortiz*, 527 U.S. at 842–45. The cases cited by the Advisory Committee to illustrate the mandatory Rule 23(b)(2) category are vintage, *Brown*-era desegregation actions. App. 149a n.22 (Ikuta, J., dissenting) (citing cases). They bear no relation to a modern intentional discrimination case, which is essentially a tort claim for unliquidated damages. *See ibid.*; *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 264 (1989) (O'Connor, J., concurring in judgment).

Rule 23(b)(2) expressly permits certification only of claims brought on "grounds that apply generally to the class" such that prospective relief "is appropriate respecting the class as a whole"; appellate courts have construed these requirements under the rubric of "cohesion." *Barnes* v. *Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998) (collecting cases). Especially where, as here, monetary relief depends on the unique circumstances of each individual class member's case and does not automatically flow from a class-wide finding of liability, no such natural cohesiveness exists and certification under Rule 23(b)(2) is inappropriate. *Allison*, 151 F.3d at 413; *see also Thorn*, 445 F.3d at 330; *Lemon*, 216 F.3d at 580.

Moreover, due process requires both notice and the opportunity to opt out of the class in actions seeking monetary relief. *See Ortiz*, 527 U.S. at 848; *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985). No provision of Rule 23 authorizes opt-outs in (b)(2) actions—in sharp contrast to (b)(3), which *requires* opt-outs. *See Ticor*, 511 U.S. at 121. Although some courts, including the district court here (App. 243a), have purported to confer opt-out rights on (b)(2) class members, Rule 23 does not authorize this procedure and this Court has repeatedly warned the lower courts against re-writing the Rule. *Amchem*, 521 U.S. at 620; *see also Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168–69 (1993); *Harris v. Nelson*, 394 U.S. 286, 298 (1969).

Indeed, the very fact that the district court saw the need to create opt-out rights (App. 243a) signals that this case is not appropriate for (b)(2) certification. *See Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 976 (5th Cir. 2000); *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 897–99 (7th Cir. 1999). The Ninth Circuit's ruling that the district court could dispense with such notice and opt-out rights as to billions of dollars of backpay claims (*see* App. 99a–100a) does not cure the problem; rather, it violates due process.

In any event, even if some monetary claims could be certified under Rule 23(b)(2), the claims for monetary relief "predominate" in this case under *any* standard because at least two-thirds of the class members are former employees who lack standing to secure injunctive or declaratory relief. *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 103 (1983); *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 241 (1937). As other circuits hold, "certification under Rule 23(b)(2) is appropriate only if members of the proposed class would benefit from the injunctive relief they request." *In re Monumental Life Ins. Co.*, 365 F.3d 408, 416 (5th Cir. 2004); *see also, e.g.*, *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 15–16 (1st Cir. 2008). Although the majority of the class is constitutionally precluded from seeking the injunctive or corresponding declaratory relief that is actually authorized by Rule 23(b)(2), the Ninth Circuit purported to "solve" this problem by limiting the class to those persons who were employed on or after the date the operative complaint was filed. App. 100a–102a. But a plaintiff who left the company the day after the complaint was filed has no more standing to obtain injunctive or declaratory relief than a person who quit the day before; each plaintiff must have standing to secure the requested relief throughout the lawsuit. *See, e.g.*, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

The fact that plaintiffs are seeking monetary relief in the form of backpay, as opposed to compensatory damages, does not alter the predominance inquiry. While backpay is a form of monetary relief that has been characterized by some courts as equitable, it is simply monetary compensation for lost pay. "Congress treated backpay as equitable in Title VII only in the narrow sense that [Title VII] allowed backpay to be awarded *together with* equitable relief." *Great West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 218 n.4 (2002) (internal quotation marks, alteration and citation omitted). Although the majority held that backpay is always available in a 23(b)(2) class (App. 92a), it recognized that other courts hold that backpay "weighs on the monetary side of the scale." *Id.* at 91a n.40. *See Thorn*, 445 F.3d at 331; *Eubanks* v. *Billington*, 110 F.3d 87, 95 (D.C. Cir. 1997). Even the panel in this very case held that "Plaintiffs' request for back pay weighs *against* certification under Rule 23(b)(2)." 509 F.3d at 1187. As the Fourth Circuit explained, "certification under Rule 23(b)(2) is improper when the predominant relief sought is not injunctive or declaratory, even if [it] is equitable in nature." *Thorn*, 445 F.3d at 331.

This Court has strongly suggested that claims for monetary relief can proceed *only* under Rule 23(b)(3), with its attendant procedural protections and stricter certification standards. *Ortiz*, 527 U.S. at 861–62; *Amchem*, 521 U.S. at 623–24. The Court has recognized that the constitutional dimensions of this question require absolute fidelity to the text of Rule 23. *Ticor*, 511 U.S. at 121. And the Court has held that courts may not alter the Rule to fit a particular case. *Amchem*, 521 U.S. at 620. The Ninth Circuit's approval of the mandatory certification of claims collectively seeking *billions* of dollars in monetary relief cannot be reconciled with these precedents.

C. The Question Is Important And Recurring

The three-way circuit conflict on the applicability of Rule 23(b)(2) to claims for monetary relief warrants review. Rule 23 is a uniform federal standard that should apply equally regardless of where a lawsuit is filed. Now, however, class claims for monetary relief are subject to one standard in New York, another in California, and yet another virtually everywhere in between. This case could not have been certified under the "incidental damages" standard. The district court certified the case under a different standard (*Robinson-Molski*) (App. 237a–240a) that the majority held was fatally flawed. *Id.* at 86a–87a. Although the district court plainly abused its discretion in applying the wrong standard, *Koon* v. *United States*, 518 U.S. 81, 100 (1996), the majority nonetheless affirmed certification under a third, newly announced, multi-factor approach that had never been applied before.

The question whether and when monetary claims can be certified under Rule 23(b)(2) recurs repeatedly in class-action litigation. The mature and acknowledged circuit conflict will encourage forum shopping. Plaintiffs who cannot satisfy the stringent requirements of Rule 23(b)(3) (like plaintiffs here) have an incentive to bring suit under Rule 23(b)(2), in the hopes of securing a mandatory certification under the Ninth Circuit's malleable multi-factor test. Nationwide class actions will therefore gravitate to the Ninth Circuit. This Court has expressed an interest in resolving this conflict in some case. *Cf. Ticor*, 511 U.S. at 121. The Court should do so here, especially because the Ninth Circuit's test is incorrect and raises grave constitutional concerns.

II. THE DECISION BELOW CREATES OR EXACERBATES NUMEROUS ADDITIONAL CONFLICTS CONCERNING RULE 23, TITLE VII, THE DUE PROCESS CLAUSE, THE SEVENTH AMENDMENT, AND THE RULES ENABLING ACT

The overarching question posed by this certification is whether (as the majority thought) the procedural class device can trump the demands of the substantive law, or whether (as Congress has required, and this Court has repeatedly held) a class can be certified only if such certification protects the substantive rights of plaintiffs, defendants, and absent class members. *See Amchem*, 521 U.S. at 629 (Rule 23 "must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view"). The Ninth Circuit's subordination of the substantive law to the procedural class device runs counter to this Court's decisions construing Rule 23 and Title VII.

The Rules Enabling Act provides that procedural rules may not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). In holding that the widely diverging intentional discrimination claims that might be held by more than a million individual employees meet Rule 23(a)'s requirements of commonality, typicality, and adequacy, the majority impermissibly relieved plaintiffs of their burden of proving an unlawfully discriminatory practice or policy that affected all class members in the same manner. And to avoid what otherwise would be intractable manageability problems, the majority approved stripping Wal-Mart of its statutory and constitutional rights to defend itself against plaintiffs' accusations of intentional misconduct. In both respects the majority's decision remakes the substantive law in violation of the Rules Enabling Act. *Ortiz*, 527 U.S. at 845 ("no reading of [Rule 23] can ignore the Act's mandate"); *Amchem*, 521 U.S. at 612-13.

A. The Ninth Circuit Improperly Relieved Plaintiffs Of Their Burden Of Proof

According to the Ninth Circuit majority, "the district court found that Plaintiffs here have provided evidence sufficient to support their contention that company-wide corporate practices and policies—including [1] excessive subjectivity in personnel decisions, [2] gender stereotyping, and [3] maintenance of a strong corporate culture—affected both compensation and promotion of all Plaintiffs in a common manner." App. 83a. The court's rulings on these three aspects of plaintiffs' theory produced a bevy of additional conflicts.

1. *Evidence of Excess Subjectivity.* The district court certified plaintiffs' disparate treatment claim, which "comprises two elements: [a] an employment practice, and [b] discriminatory intent." *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U.S. 618, 631 (2007), *superseded on other grounds by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5, 5–6.

a. *The Employment Practice Element.* Although "plaintiff[s] must begin by identifying the specific employment practice that is challenged," *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988) (plurality), the Ninth Circuit majority acknowledged "the absence of a specific discriminatory policy promulgated by Wal-Mart." App. 59a. In fact, Wal-Mart's company-wide policy expressly bars discrimination based on gender and affirmatively promotes diversity. *Id.* at 195a. The majority nonetheless accepted plaintiffs' theory that the millions of pay and promotion decisions made by tens of thousands of Wal-Mart managers in thousands of stores over the course of a decade or more were all made pursuant to a company-wide "policy" of discretionary decision-making, which plaintiffs call "excessive subjectivity." *Id.* at 163a–164a, 173a. But this Court has held that "an employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct." *Watson*, 487 U.S. at 990; *see also id.* at 991 (plurality) ("standardized testing techniques" cannot measure "common sense, good judgment, originality, ambition, loyalty, and tact").

Accordingly, plaintiffs who premise a Title VII disparate treatment claim on a policy of "excess subjectivity" must come forward with "[s]ignificant proof that an employer operated under a general policy of discrimination" *before* a class can be certified; simply pointing to excess subjectivity is not enough. *Falcon*, 457 U.S. at 159 n.15 (rejecting class certification and establishing certification requirements for Title VII claims); *see Watson*, 487 U.S. at 990. As Judge Ikuta explained, such proof is required because, "to maintain a company-wide class action based on discrimination, the plaintiff must bridge the 'wide gap' between: (1) the plaintiff's own discriminatory treatment; and (2) the existence of a class that has suffered the same injury as the plaintiff as a result of a company-wide discriminatory policy." App. 119a (quoting *Falcon*, 457 F.3d at 157).

The majority, however, dismissed *Falcon*'s "significant proof" standard as a "hypothetical in clear dicta" (App. 42a n.15), thereby creating a conflict with numerous decisions from other circuits, which faithfully apply *Falcon* in the context of "excess subjectivity" challenges. *Garcia* v. *Johanns*, 444 F.3d 625, 631–32 (D.C. Cir. 2006) ("Following *Falcon*, we have required a plaintiff seeking to certify a disparate treatment class under Title VII to make a significant showing to permit the court to infer that members of the class suffered from a common policy of discrimination that pervaded all of the employer's challenged employment decisions." (internal quotation marks omitted)); *Reeb*, 435 F.3d at 644 (plaintiffs must adduce "significant proof that [the employer] operated under a general policy of gender discrimination manifesting itself in the same general fashion" (internal quotation marks omitted)); *Griffin* v. *Dugger*, 823 F.2d 1476, 1490 (11th Cir. 1987) (same); *see also Love* v. *Johanns*, 439 F.3d 723, 729–30 (D.C. Cir. 2006); *Cooper*, 390 F.3d at 716; *Rossini* v. *Ogilvy & Mather, Inc.*, 798 F.2d 590, 598 (2d Cir. 1986); *Goodman* v. *Lukens Steel Co.*, 777 F.2d 113, 124 (3d Cir. 1985).

Although the majority asserted that its refusal to follow *Falcon* was consistent with the decisions of "nearly every Court of Appeals to consider the question" (App. 41a), it failed to cite any of the contrary decisions collected above and relied instead on outlier decisions from two circuits that themselves are internally conflicted. *Compare Brown* v. *Nucor Corp.*, 576 F.3d 149, 153 (4th Cir. 2009) (cited at App. 43a), *cert. denied*, 130 S. Ct. 1720 (2010), *with Holsey* v. *Armour & Co.*, 743 F.2d 199, 216 (4th Cir. 1984); *and Shipes* v. *Trinity Indus.*, 987 F.2d 311, 316 (5th Cir. 1993) (cited at App. 78a), *with Vuyanich* v. *Republic Nat'l Bank of Dallas*, 723 F.2d 1195, 1200 (5th Cir. 1984).

The Ninth Circuit thus exacerbated a split that has existed for over two decades. *See* Note, *Certifying Classes & Subclasses in Title VII Suits*, 99 Harv. L. Rev. 619, 630–31 (1986). The majority of the circuits correctly read *Falcon* as *requiring* class plaintiffs to adduce "significant proof" of an unlawful employment policy as an element of Rule 23(a)'s commonality and typicality requirements, which ensure that the class representatives are sufficiently aligned with the absent class members to bring the asserted claims on behalf of the entire class. 457 U.S. at 157 n.13; *E. Tex. Motor Freight Sys., Inc.* v. *Rodriguez*, 431 U.S. 395, 403 (1977).

The majority rejected *Falcon's* "significant proof" standard because it mistakenly concluded that the existence of a class-wide discriminatory policy is a "merits" issue that cannot be resolved on certification. App. 43a–44a & nn.16–17. The majority's decision therefore conflicts with those from numerous other circuits, which *require* district courts to definitively *resolve* factual and legal disputes relevant to certification notwithstanding any overlap with the merits. *See In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 317 & n.17 (3d Cir. 2009) (collecting cases including *In re IPO Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006)). The majority departed from these authorities on the ground that they were brought under the securities and antitrust laws (App. 32a–39a), but the Federal Rules of Civil Procedure do not vary depending on the substantive law. *See Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1953 (2009). In any event, the majority decision squarely conflicts with *Hohider* v. *United Parcel Service, Inc.*, 574 F.3d 169 (3d Cir. 2009), which required resolution of factual disputes going to each of the Rule 23 elements in the context of an employment discrimination claim certified under Rule 23(b)(2). *Id.* at 171, 196–98.

The district court *explicitly* said that it was "not called upon to make *any* determination on the merits of Plaintiffs' allegations of gender discrimination" at the certification stage. App. 166a (emphasis added) (citing *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974)); *see also id.* at 170a–171a & n.5. The majority admitted that this approach conflicted with the standard applied by every circuit to have addressed the issue (*id.* at 52a n.20), but it affirmed the certification on the ground that a "close reading" (*id.* at 49a) of the order somehow revealed that the district court in fact did something *other* than what it said it was doing. *E.g.*, *id.* at 192a–193a, 198a & n.21. The majority's refusal to apply the correct standard to the central issue in this case places the Ninth Circuit squarely at odds with appellate courts in the rest of the country.

b. *The Intent Element.* "[T]he central element of [a disparate treatment claim] is discriminatory intent." *Ledbetter*, 550 U.S. at 624; *see Teamsters*, 431 U.S. at 335 n.15.

The Ninth Circuit majority opinion and the district court's certification order comprise 283 pages in the printed appendix, yet *nowhere* is the intent element of a disparate treatment claim addressed. Numerous other courts, however, have recognized that determining whether "excess subjectivity" was exercised in an intentionally discriminatory fashion requires individualized proof. *See, e.g.*, *Garcia*, 444 F.3d at 632 ("[e]stablishing commonality . . . is particularly difficult where, as here, multiple decisionmakers with significant local autonomy exist").

The Ninth Circuit's decision therefore squarely conflicts with the decisions of other circuits that refuse to certify multi-facility discrimination class actions where the claim asserted requires proof of decisionmaking by managers in separate facilities. *See Garcia*, 444 F.3d at 632; *Cooper*, 390 F.3d at 715; *Bacon* v. *Honda of Am. Mfg., Inc.*, 370 F.3d 565, 571 (6th Cir. 2004); *Holsey*, 743 F.2d at 216; *Stastny* v. *S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 279 (4th Cir. 1980). Indeed, no other court has ever certified a class of employees who challenge the exercise of delegated discretion at thousands of facilities where the claim requires proof of decisionmaking by managers in separate facilities. This is because the essential elements of the claim, including discriminatory intent and actual injury, could never be proven on a classwide basis, as Chief Judge Kozinski succinctly explained. App. 161a; *see also id.* at 113a (Ikuta, J., dissenting).

The majority's failure to take into account the intent element before certifying the class conflicts with decisions of the Second and Third Circuits. *Hohider*, 574 F.3d at 184 ("it is necessary to . . . assess what elements must be demonstrated for the court to reach . . . a determination of unlawful discrimination and a finding of classwide liability and relief"); *see McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 223–25 (2d Cir. 2008). Just as it "does not follow . . . that the particular supervisors to whom this discretion is delegated always act without discriminatory intent," *Watson*, 487 U.S. at 990, it simply cannot be assumed that each of them acted *with* discriminatory intent regarding millions of pay and promotion decisions. Proof that an individual store manager *intended* to treat a woman or group of women differently because of their sex—a necessary element of plaintiffs' disparate treatment claim—therefore destroys commonality and typicality under Rule 23(a).

2. *Evidence of Gender Stereotyping.* Plaintiffs relied heavily on the notion, propounded by one of their experts, that Wal-Mart and other large organizations are "vulnerable to gender bias." App. 55a. In response to Wal-Mart's objection that this "opinion" is unreliable and inadmissible (*see* John Monahan et al., Essay, *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* 94 Va. L. Rev. 1715, 1747–48 (2008)), the majority held that *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), does not have "exactly the same application at the class certification stage as it does to expert testimony . . . at trial." App. 57a n.22. But

as the dissent pointed out, "the majority never . . . explain[ed] why the district court can rely on an expert's testimony that is not reliable, at the class certification stage or any other." *Id.* at 136a n.16. By "erroneously approv[ing] the district court's reliance on an arguably unreliable expert opinion" (*id.* at 137a), the majority created a conflict with the Second, Third, Fifth, and Seventh Circuits, which hold that *Daubert* applies with equal force at class certification. *See, e.g.*, *Am. Honda Motor Co.* v. *Allen*, 600 F.3d 813, 817–18 (7th Cir. 2010) (per curiam); *Hydrogen Peroxide*, 552 F.3d at 315 n.13; *McLaughlin*, 522 F.3d at 232; *IPO*, 471 F.3d at 42; *Unger* v. *Amedisys Inc.*, 401 F.3d 316, 323 n.6 (5th Cir. 2005); *see also* App. 135a (Ikuta, J., dissenting). This too warrants review by this Court.

3. *Evidence of "Corporate Culture."* According to the majority, "Plaintiffs produced substantial evidence of Wal-Mart's centralized firm-wide culture and policies, thus providing a nexus between the subjective decision making and the considerable statistical evidence demonstrating a pattern of lower pay and fewer promotions for female employees." App. 78a (citation omitted). This observation obscures a key dispute between the parties' statistical experts: Although plaintiffs' theory centers on decisions made by individual *store* managers, their expert aggregated the data at the *national* or *regional* level. Wal-Mart's expert, however, concluded that "when data is considered *at the store level*, over 90 percent of Wal-Mart's stores showed no statistical difference in the hourly pay rates between men and women associates with similar work-related characteristics." *Id.* at 130a–131a (Ikuta, J., dissenting) (emphasis added).

The district court refused to resolve the appropriate level of aggregation (calling it a "merits" issue, App. 197a–198a), and the Ninth Circuit majority approved this refusal on the ground that "[t]he disagreement [between the parties' experts] *is* the common question," and certified the class without resolving this critical dispute. *Id.* at 71a. As the dissent explained, "[t]he district court's superficial examination of [plaintiffs'] statistics constituted legal error." *Id.* at 129a. The Ninth Circuit's approval of the district court's approach "amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert." *West* v. *Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002). It conflicts with the decisions of numerous other circuits, which recognize that disputes among the experts relating to the Rule 23 factors *must* be resolved on certification. *See, e.g., Hydrogen Peroxide*, 552 F.3d at 323–24; *McLaughlin*, 522 F.3d at 232; *IPO*, 471 F.3d at 42; *In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 5–6, 19 (1st Cir. 2005); *West*, 282 F.3d at 938.

This is not simply an issue of the size of the company or the class. *Compare* App. 112a (Graber, J., concurring), *with id.* at 161a (Kozinski, C.J., dissenting). Rather, where (as here) a disparate treatment claim is premised on discretionary decisionmaking, the class at a minimum must bear some relation to the decisionmaking unit (region, store, department, etc.). *Cf.* 42 U.S.C. § 2000e-5(f)(3). The Ninth Circuit, however, certified a class that is not so limited; on the contrary, it is precisely the type of "across-the-board" class that this Court condemned in *Falcon*. 457 U.S. at 157.

B. The Ninth Circuit Improperly Stripped Wal-Mart Of Its Right Of Defense

1. Aggregated disparate treatment claims typically proceed in two stages. *Teamsters*, 431 U.S. at 336, 361–62; *Cooper* v. *Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876 n.9 (1984). First, the plaintiffs must prove that "discrimination was the company's standard operating procedure." *Teamsters*, 431 U.S. at 336. If they carry this burden, a rebuttable presumption arises that each class member is entitled to appropriate relief. *Id.* at 361. At the second stage, "a district court must usually conduct additional proceedings . . . to determine the scope of individual relief" and afford the employer the opportunity "to demonstrate that the individual . . . was denied an employment opportunity for lawful reasons." *Id.* at 362.

The district court acknowledged that "holding individual hearings for the number of women potentially entitled to backpay in this case *is impractical on its face*, and thus the traditional *Teamsters* mini-hearing approach *is not feasible here*." App. 251a (emphases added). But rather than refusing to certify the class, the court did away with individualized hearings altogether, concluding that Wal-Mart's insistence on individualized proceedings "is inconsistent with the fundamental character of the class action proceeding." *Id.* at 245a. "That this shortcut was necessary in order for this suit to proceed as a class action should have been a caution signal to the district court that class-wide proof of damages was impermissible." *Broussard* v. *Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998).

An employer has a statutory, as well as a constitutional, right to an individualized defense. Congress has expressly provided that, if the employer proves that it took an employment action "for any reason other than discrimination on account of . . . sex," a court shall not order the "hiring, reinstatement, or promotion of *an individual* as an employee, or *the payment to him of any back pay*." 42 U.S.C. § 2000e-5(g)(2)(A) (emphases added). And even if the adverse employment action was partially motivated by unlawful discrimination, a court may not award damages or backpay to that employee if the employer can prove that it "would have taken the same action in the absence of the impermissible motivating factor." *Id.* § 2000e-5(g)(2)(B). Thus, even where class plaintiffs can satisfy the first step of the *Teamsters* framework, the employer is entitled to an opportunity to rebut the claims of each individual class member under the substantive law. *See Reeb*, 435 F.3d at 651.

"An employer cannot be deprived of its statutory right to raise individualized defenses to claims for monetary relief merely because plaintiffs characterize their claim as a pattern or practice of discrimination and bring the suit on behalf of a class." App. 141a (Ikuta, J., dissenting). Similarly, the Rules Enabling Act prohibits the courts from eliminating statutory defenses to accommodate Rule 23 procedure. *See Amchem*, 521 U.S. at 612–13; *Hohider*, 574 F.3d at 185. Yet that is precisely what the district court did here, in so many words: Wal-Mart "is not . . . entitled to circumvent or defeat the class nature of the proceeding by litigating whether every individual store discriminated against individual class members." App. 247a. As the dissent noted, it is hard to imagine a clearer violation of the Rules Enabling Act, which "prohibits a district court from depriving an employer of this right simply to facilitate the certification of a class action." *Id.* at 145a.

Yet the Ninth Circuit majority *nowhere* grappled with the Rules Enabling Act—a statute that this Court has twice held *must* be applied by reviewing courts in considering challenges to class certification. *Ortiz*, 527 U.S. at 845; *Amchem*, 521 U.S. at 612–13. Indeed, as the dissent explained, "the majority fail[ed] to address the specific legal and factual framework of Title VII or consider how it impacts the certification of plaintiffs' proposed class." App. 139a–140a. In fact, the majority expressly recognized that, as to some class members, "unequal pay or non-promotion was due to something *other* than gender discrimination," but nonetheless endorsed procedures that barred Wal-Mart from presenting its ordinarily available defenses to those claims. *Id.* at 110a n.56.

The majority's approach directly conflicts with the decisions of other circuits, which refuse to certify a class if the substantive law would preclude class-wide treatment. *See, e.g., Sullivan* v. *DB Invs., Inc.*, __ F.3d __, 2010 WL 2736947, at *11 (3d Cir. July 13, 2010) (vacating certification "extend[ing] antitrust remedies that . . . have no root in state substantive law"); *McLaughlin*, 522 F.3d at 225; *Thorn*, 445 F.3d at 323–24. It also conflicts with decisions recognizing that certification is inappropriate where numerous individualized hearings would be necessary. *In re Allstate Ins. Co.*, 400 F.3d 505, 508 (7th Cir. 2005) (reversing (b)(2) certification where "more than a thousand individual hearings" would be required regarding damages); *Lemon*, 216 F.3d at 581; *Allison*, 151 F.3d at 419–20. As the dissent points out, the answer is not to dispense with the element that is incompatible with class certification, but rather to deny certification. App. 146a.

2. The majority's decision also violates Wal-Mart's "right to litigate the issues raised," which is "guaranteed . . . by the Due Process Clause." *United States* v. *Armour & Co.*, 402 U.S. 673, 682 (1971), and includes the right "to present every available defense," *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) (internal quotation marks omitted). The consequences are dire. Wal-Mart will be precluded from proving that its managers did not discriminate against individual class members, and uninjured class members will be allowed to collect backpay at the expense of the actually injured. The district court recognized as much, labeling this "rough justice." App. 254a.

a. The district court's suggested approach of trying the case through use of formulas to estimate the amount of monetary relief (App. 251a–258a), and the Ninth Circuit's invocation of the statistical sampling method used in *Hilao*, 103 F.3d at 782–87 (App. 105a–110a), to estimate the number of people injured squarely conflict with the Second Circuit's decision in *McLaughlin*, which held that "[r]oughly estimating the gross damages to the class as a whole and only subsequently allowing for the processing of individual claims would inevitably alter defendants' substantive right to pay damages reflective of their actual liability" in violation of the Rules Enabling Act and due process. 522 F.3d at 231–32.

b. In addition, while the Ninth Circuit vacated and remanded the portion of the certification order related to punitive damages, it suggested that the district court nonetheless might be able to certify the punitive damages claims under Rule 23(b)(2) or (b)(3) and resolve such claims without regard to individual issues. App. 98a–99a. This ruling conflicts with numerous decisions that have rejected adjudication of punitive damages on a class-wide basis because it requires individualized and fact-specific inquiries. *See, e.g., Reeb*, 435 F.3d at 651; *Cooper*, 390 F.3d at 721; *Lemon*, 216 F.3d at 581; *Allison*, 151 F.3d at 418. And in *Philip Morris USA* v. *Williams*, 549 U.S. 346 (2007), this Court squarely held that "the Due Process Clause prohibits a State from punishing an individual without first providing that individual with an opportunity to present *every* available defense." *Id.* at 353 (emphasis added) (internal quotation marks omitted).

It would also violate Wal-Mart's Seventh Amendment rights if a jury did not resolve all factual issues related to punitive damages. *See Tull* v. *United States*, 481 U.S. 412, 422–23 (1987); *see also Feltner* v. *Columbia Pictures Television, Inc.*, 523 U.S. 340, 355 (1998). Other circuits have held that adjudicating claims for compensatory and punitive damages in a Rule 23(b)(2) class raises Seventh Amendment problems. *See Hohider*, 574 F.3d at 202 n.26; *Allison*, 151 F.3d at 419–22.

c. Absent class members fare no better. Without individualized hearings, non-victims would be overcompensated at the expense of anyone who was actually injured, as the district court recognized. App. 254a; 474 F.3d at 1244, 1249 (Kleinfeld, J., dissenting). The majority's acknowledgement that "a few nonvictims might also benefit from the relief" (App. 110a n.57 (quoting *Segar* v. *Smith*, 738 F.2d 1249, 1291 (D.C. Cir. 1984))) hardly commends the approach. *See Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561, 579 (1984) (Title VII relief limited to "actual victims" of illegal discrimination).

3. Finally, the majority's failure to require a trial plan conflicts with decisions of other circuits. *Hohider*, 574 F.3d at 202; *Hydrogen Peroxide*, 552 F.3d at 311–12; *Wachtel* v. *Guardian Life Ins. Co.*, 453 F.3d 179, 189 (3d Cir. 2006). Rule 23(c)(1)(B) *requires* the certification order to set forth the "class claims, issues, [and] defenses." Yet the Ninth Circuit found no error in the district court's failure to adhere to this mandatory provision.

The Ninth Circuit wrongly held that Rule 23(a) does not require the district court to determine "how the facts at issue would play out . . . in the merits of the litigation." App. 38a. Contrary to the Ninth Circuit's conclusion (*id.* at 31a), it is not enough for the case to present mere common "questions"; the *answers* to those questions must be found in a lawful and fair trial proceeding. The impracticability of allowing Wal-Mart to present statutory and constitutional defenses does not mean that the defenses can be eliminated; rather, it means that the class is not manageable and should not be certified. *See McLaughlin*, 522 F.3d at 223–25.

The district court's trial plan was hopelessly deficient, yet the majority (after refusing to address Wal-Mart's objections) said that "the option proposed by the district court may also remain viable." App. 110a n.57. The majority also encouraged the district court, on remand, to consider the statistical sampling approach adopted in *Hilao*, 103 F.3d at 782–87 (App. 105a–110a)—an approach that violates basic due process principles and has never been adopted by *any* other court. *See* App. 124a–128a (Ikuta, J., dissenting). For the majority even to suggest that *Hilao*, an "extraordinarily unusual" case involving claims against a foreign dictator who pillaged his country and terrorized its population, 103 F.3d at

786, has any applicability whatsoever in a Title VII case against America's largest private employer underscores the need for this Court's review.

C. The Issues Are Important and Recurring

The unprecedented certification order here stands at the intersection of Title VII and Rule 23, in the shadow of the Rules Enabling Act and constitutional constraints. It implicates numerous circuit splits on important and recurring issues.

The plaintiffs secured mandatory certification of this unprecedented class on the ground that Wal-Mart's delegation of decentralized decisionmaking authority to local managers opened a "conduit" for gender bias, a charge that can be levied against every organization of any size (including the federal government). *See* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 159 (2009) ("[T]he disparities in pay or promotion at Wal-Mart roughly track those across the economy more broadly"). If the Ninth Circuit decision in this case stands, virtually every employer in the land could be subject to a similar suit. App. 160a (Ikuta, J., dissenting) ("the door is now open to Title VII lawsuits targeting national and international companies, regardless of size and diversity, based on nothing more than general and conclusory allegations"). And although Title VII does not require employers to adopt "quotas and preferential treatment" to "avoid[] expensive litigation and potentially catastrophic liability," the Ninth Circuit's decision will have precisely the "chilling effect on legitimate business practices" that the Court has sought to avoid. *Watson*, 487 U.S. at 993 (plurality). This Court's guidance is needed in this case to chart the future course of class litigation in the employment context and beyond.

As the sharp division in the court below establishes, this case exposes widespread conflict and uncertainty regarding the appropriate standards for certifying class actions. This uncertainty is unfair and unjust for all involved, including class representatives, absent class members, and defendants. This Court's review is necessary to provide much-needed clarity and to ensure that the ends of justice are served.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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August 25, 2010

APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BETTY DUKES; PATRICIA SURGESON; EDITH ARANA; KAREN WILLIAMSON; DEBORAH GUNTER; CHRISTINE KWAPNOSKI; CLEO PAGE; on behalf of themselves and all others similarly situated, *Plaintiffs-Appellees / Cross-Appellants* v. WAL-MART STORES, INC., *Defendant-Appellant / Cross-Appellee.*	Nos. 04-16688 04-16720 D.C. No. CV-01-02252-MJJ OPINION

Appeals from the United States District Court
for the Northern District of California
Martin J. Jenkins, District Judge, Presiding

Argued and Submitted
March 24, 2009—San Francisco, California

Filed April 26, 2010

Before: Alex Kozinski, Chief Judge,
Stephen Reinhardt, Pamela Ann Rymer,
Michael Daly Hawkins, Barry G. Silverman,
Susan P. Graber, Raymond C. Fisher,
Richard A. Paez, Marsha S. Berzon, Carlos T. Bea
and Sandra S. Ikuta, Circuit Judges.

Opinion by Judge Hawkins;
Concurrence by Judge Graber;
Dissent by Judge Ikuta;
Dissent by Chief Judge Kozinski

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Rae T. Vann, Norris, Tysse, Lampley & Lakis, LLP, Washington, D.C., on behalf of amicus curiae Equal Employment Advisory Council.

John H. Beisner, O'Melveny & Myers, LLP, Washington, D.C., on behalf of amicus curiae Chamber of Commerce of the United States.

Daniel J. Popeo, Washington Legal Foundation, Washington, D.C., on behalf of amicus curiae Washington Legal Foundation.

Laura C. Fentonmiller, Constantine Cannon LLP, Washington, D.C., on behalf of amicus curiae The Retail Industry Leaders Association.

Pamela Coukos, Mehri & Skalet, Washington, D.C., on behalf of amici curiae The National Employment Lawyers Association, The National Partnership for Women & Families, and The National Women's Law Center.

Daniel B. Kohrman, AARP Foundation Litigation, Washington, D.C., on behalf of amicus curiae AARP.

Bill Lann Lee, Lewis, Feinberg, Lee, Renaker & Jackson, P.C., Oakland, California, on behalf of amici curiae Consumers Union, National Consumer Law Center, Center for Constitutional Rights, and Communities for a Better Environment.

Audrey J. Wiggins, Lawyers' Committee for Civil Rights Under Law, Washington, D.C., on behalf of amici curiae Lawyers' Committee for Civil Rights Under Law, Asian American Justice Center, Asian Pacific American Legal Center of Southern California, Legal Aid Society-Employment Law Center, Mexican American Legal Defense & Educational Fund, NAACP Legal Defense & Educational Fund, Inc., National Association for the Advancement of Colored People, Public Advocates, Inc. & Women Employed.

David R. Bruce, Santa Rose, California, on behalf of amicus curiae California Employment Law Council.

James M. Beck, Dechert LLP, Philadelphia, Pennsylvania, on behalf of amicus curiae Product Liability Advisory Council, Inc.

Mark Etheredge Burton, Hersh & Hersh, San Francisco, California, on behalf of amicus curiae U.S. Women's Chamber of Commerce.

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Barbara L. Sloan, Equal Employment Opportunity Commission, Office of the General Counsel, Washington, D.C., on behalf of amicus curiae Equal Employment Opportunity Commission.

OPINION

HAWKINS, Circuit Judge:

Plaintiffs allege that Wal-Mart, Inc., discriminates against women in violation of Title VII of the Civil Rights Act of 1964. After detailed briefing and hearing, the district court certified a class encompassing all women employed by Wal-Mart at any time after December 26, 1998, and encompassing all Plaintiffs' claims for injunctive relief, declaratory relief, and back pay, while creating a separate opt-out class encompassing the same employees for punitive damages. We affirm[1] the district court's certification of a Federal Rule of Civil Procedure 23(b)(2) class of current employees with respect to their claims for injunctive relief, declaratory relief, and back pay. With respect to the claims for punitive damages, we remand so that the district court may consider whether to certify the class under Rule 23(b)(2) or (b)(3). We also remand with respect to the claims of putative class members who no longer worked for Wal-Mart when the complaint was filed so that the district court may consider whether to certify an additional class or classes under Rule 23(b)(3).

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[1] We have jurisdiction under 28 U.S.C. § 1292(e).

BACKGROUND

Plaintiffs' Third Amended Complaint,[2] brought on behalf of certain named plaintiffs and those similarly situated, asserts claims against Wal-Mart for sex discrimination under Title VII of the 1964 Civil Rights Act. Plaintiffs allege that women employed in Wal-Mart stores: (1) are paid less than men in comparable positions, despite having higher performance ratings and greater seniority; and (2) receive fewer—and wait longer for—promotions to in-store management positions than men. Plaintiffs contend that Wal-Mart's strong, centralized structure fosters or facilitates gender stereotyping and discrimination, that the policies and practices underlying this discriminatory treatment are consistent throughout Wal-Mart stores, and that this discrimination is common to all women who work or have worked in Wal-Mart stores.

Plaintiffs sought to certify a nationwide class of women who have been subjected to these allegedly discriminatory pay and promotion policies. The proposed class consists of women employed in a range of Wal-Mart positions, from part-time entry-level hourly employees to salaried managers. The class seeks injunctive and declaratory relief, back pay, and punitive damages, but not traditional "compensatory" damages. Plaintiffs proposed that the district court certify the following class pursuant to Rule 23:

> All women employed at any Wal-Mart domestic retail store at any time since Decem-

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[2] The action was originally filed on June, 21, 2004.

> ber 26, 1998 who have been or may be subjected to Wal-Mart's challenged pay and management track promotions policies and practices.

Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 141-42 (N.D. Cal. 2004).

After the parties had conducted extensive discovery and filed copious briefs, the district court heard oral argument. At the hearing, Wal-Mart emphasized the "historic" nature of Plaintiffs' motion, including the size of the putative class, involving women employees at Wal-Mart's 3,400 stores in 41 regions. The court acknowledged Wal-Mart's concerns but noted that, while the class size was large, the issues were not unusual.[3]

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[3] Ten times the dissent points out the large class size, referring to the "1.5 million" women alleging discrimination as a reason to reject certification. However, at oral argument, counsel for Wal-Mart conceded that if past employees are excluded the class to be certified would be less than 1.5 million, perhaps two-thirds less than the figure the dissent cites. Further, the dissent emphasizes that this is the largest class that we have ever certified "based on a small number of incidents." Dissent at 6249 n.11 (all references in this Opinion to the dissent refer to Judge Ikuta's dissent). As an initial matter, we do not find 120 claims of illegal sex discrimination a small number. Nevertheless, given that the class is suing by far the largest employer in the United States, we are unsurprised that Plaintiffs are seeking to represent such a large class. Of course, this should not change the analysis the Supreme Court required in *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 157-59 (1982), nor should it necessitate that we take an even harder look at the merits, essentially conducting a trial, as the dissent proposes.

DISTRICT COURT PROCEEDINGS

The district court issued an eighty-four-page order granting in part and denying in part Plaintiffs' motion for class certification. *See id.* at 187-88. With respect to Plaintiffs' claims for equal pay, the district court granted Plaintiffs' certification motion as to issues of alleged discrimination and all forms of requested relief. With respect to Plaintiffs' promotion claim, the court's holding was mixed. The court certified the proposed class with respect to issues of alleged discrimination (including liability for punitive damages, as well as injunctive and declaratory relief); however, the court rejected the proposed class with respect to the request for back pay, determining that data relating to the challenged promotions were not available for all class members. The court also exercised its discretion to provide for notice and an opportunity for employees to opt-out of the punitive damages portion of the class.

THE APPEAL

Pursuant to Rule 23(f), Wal-Mart appealed, contending that the district court erred by: (1) concluding that the class met Rule 23(a)'s commonality and typicality requirements; (2) eliminating Wal-Mart's ability to respond to individual Plaintiff's claims; and (3) failing to recognize that Plaintiffs' claims for monetary relief predominated over their claims for injunctive or declaratory relief. Plaintiffs cross-appealed from the district court's limitation of back pay relief for many of Plaintiffs' promotion claims.

DISCUSSION

I. STANDARD AND SCOPE OF REVIEW

A district court's decision regarding class certification is not only reviewed for abuse of discretion, *Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir.

2003), but also subject to "very limited" review, to be reversed "only upon a strong showing that the district court's decision was a clear abuse of discretion," *Armstrong v. Davis*, 275 F.3d 849, 867 (9th Cir. 2001) (internal quotation marks omitted). *See also Millowitz v. Citigroup Global Mkts., Inc. (In re Salomon Analyst Metromedia Litig.)*, 544 F.3d 474, 480 (2d Cir. 2008) ("When reviewing a grant of class certification, we accord the district court noticeably more deference than when we review a denial of class certification."); *Gonzales v. Free Speech Coal.*, 408 F.3d 613, 618 (9th Cir. 2005) ("Abuse of discretion is a highly deferential standard, under which the appellate court cannot substitute its view of what constitutes substantial justification for that of the district court; rather, the review is limited to assuring that the district court's determination has a basis in reason." (internal quotation marks omitted)); *Blyden v. Mancusi*, 186 F.3d 252, 269 (2d Cir. 1999) ("A district court's decision to certify a class is reviewed for abuse of discretion, and '[a] reviewing court must exercise even greater deference when the district court has certified a class than when it has declined to do so.'" (quoting *Marisol A. v. Giuliani*, 126 F.3d 372, 375 (2d Cir. 1997) (per curiam))); *Doninger v. Pac. Nw. Bell, Inc.*, 564 F.2d 1304, 1309 (9th Cir. 1977) (stating that "the judgment of the trial court should be given the greatest respect and the broadest discretion" (internal quotation marks omitted)).

A court abuses its discretion if its decision is premised on legal error. *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1237 (9th Cir. 2001). Moreover, the district court's factual findings as to the applicability of Rule 23 criteria are entitled to the traditional deference given such determinations. *See Local Joint Executive Bd. of Culinary/Bartender*

Trust Fund v. Las Vegas Sands, Inc., 244 F.3d 1152, 1161 (9th Cir. 2001).

Rule 23 "provides district courts with broad discretion to determine whether a class should be certified, and to revisit that certification throughout the legal proceedings before the court." *Armstrong*, 275 F.3d at 871 n.28. If evidence not available at the time of certification disproves Plaintiffs' contentions that common issues predominate, the district court has the authority to modify or even decertify the class, *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982) ("Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation."), or use a variety of management devices to address the individualized issues that have arisen, *see* 2 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 4.26 (4th ed. 2002).[4]

Our review is limited to whether the district court correctly selected and applied Rule 23 criteria. *Bogus v. Am. Speech & Hearing Ass'n*, 582 F.2d 277, 289 (3d Cir. 1978); *see also Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 295 (1st Cir. 2000) ("An abuse occurs when a court, in making a discretionary ruling, relies upon an improper factor, omits consideration of a factor entitled to substantial weight, or mulls the correct mix of factors but makes a clear error of judgment in assaying them."). Thus, if Plaintiffs demonstrate that they meet Rule 23's requirements, they should be allowed to pursue their action as a class.

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[4] As the district court acknowledged, *Dukes*, 222 F.R.D. at 143, although federal courts are no longer permitted to engage in "conditional certification," *see* Fed. R. Civ. P. 23 advisory committee's note to 2003 amends., district courts retain the authority to amend or decertify a class if, based on information not available or circumstances not anticipated when the class was certified, the court finds that either is warranted.

II. STANDARDS FOR CLASS CERTIFICATION UNDER RULE 23

[1] A district court may certify a class only if:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

[2] The district court must also find that at least one of the following three conditions is satisfied: (1) the prosecution of separate actions would create a risk of: (a) inconsistent or varying adjudications, or (b) individual adjudications dispositive of the interests of other members not a party to those adjudications; (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class; or (3) questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *See id.* 23(b).

The party seeking certification bears the burden of showing that each of the four requirements of Rule 23(a) and at least one requirement of Rule 23(b) have been met. *Zinser v. Accufix Research Inst., Inc.*, 253

F.3d 1180, 1186 (9th Cir.), *amended by* 273 F.3d 1266 (9th Cir. 2001).

[3] The parties vigorously contest the standards governing the district court in finding the Rule 23 requirements satisfied. For a number of reasons, we must clarify this standard. First, the parties' briefs demonstrate the degree of debate over the standard in this circuit. Second, a number of recent cases in other circuits have endeavored to clarify the standard, and we find it prudent to follow suit given evidence of confusion. Third, it is only very recently that any case in this circuit has interpreted language under the standard that drifts away from our clear case law, and we write to clarify our precedent. Fourth, we are not aware of a circuit that has detailed the issue in the Title VII context, and the typical situation presented in such a case implicates significant differences in the doctrine that require explanation to reach a resolution here and in future Title VII class action certification decisions.

A. *Supreme Court Authority*

The Supreme Court has provided clear, if sometimes misunderstood, guidance on the issue of what standards a district court applies when deciding whether to certify a class.

The leading case describing these standards is *Falcon*, where the plaintiff successfully certified a class of Mexican-Americans claiming racial discrimination. After a full trial on the merits, however, the district court's findings distinguishing the named representative's claims from those of the class called the propriety of continued class certification into question.[5] On appeal, the Supreme Court held that because of the district court's findings at trial, Falcon's "complaint provided an insufficient basis for concluding that the adjudication of his claim of discrimination in promotion would require the decision of any common question concerning the failure of [General Telephone] to hire more Mexican-Americans." *Id.* at 158.

[4] The Court described the implications of its holding, noting that "[s]ometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Id.* at 160. In either case, the Court held, "a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Id.* at 161. In conducting this rigorous analysis, the Court explained that "the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* at 160 (internal quotation marks omitted).

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[5] After a trial, the district court in *Falcon* made converse findings regarding Falcon, who was the named plaintiff, and the class he sought to represent. The district court found that the defendant, General Telephone Company of the Southwest, had not discriminated against Falcon when it hired him, but had discriminated against him when it failed to promote him. *Falcon*, 457 U.S. at 152. But the district court also found the defendant had not discriminated against Mexican Americans generally in promotion decisions, but had discriminated against them in hiring. *Id.* This disconnect created a potential typicality problem under Rule 23(a)(3).

Illustrating further, the Court approvingly cited Judge Godbold's concurring opinion in the Fifth Circuit case that had announced the "across-the-board" rule the Court was reviewing in *Falcon*. Judge Godbold's concurrence addressed the role of the district court in understanding the likely course of the litigation, and the Supreme Court praised his focus on "the need for more precise pleadings." *Id.* at 160 (internal quotation marks omitted). The Court approved of his statement that " 'without reasonable specificity the court cannot define the class, cannot determine whether the representation is adequate, and the employer does not know how to defend.' " *Id.* at 161 (quoting *Johnson v. Ga. Highway Express, Inc.*, 417 F.2d 1122, 1126 (5th Cir. 1969) (Godbold, J., specially concurring)).

[5] *Falcon* thus provides relatively straightforward guidance. When considering class certification under Rule 23, district courts are not only at liberty to, but must, perform a rigorous analysis to ensure that the prerequisites of Rule 23(a) have been satisfied. *See id.* at 160-61. It does not mean that a district court must conduct a full-blown trial on the merits prior to certification. A district court's analysis will often, though not always, require looking behind the pleadings, even to issues overlapping with the merits of the underlying claims. *See id.* As we describe in more detail below, every circuit to have considered this issue, including our own previous decisions, has reached essentially the same conclusion: *Falcon*'s central command requires district courts to ensure that Rule 23 requirements are actually met, not simply presumed from the pleadings.

We also agree with the Second Circuit's recent decision in *Miles v. Merrill Lynch & Co. (In re Initial Pub. Offerings Securities Litigation)* ("*IPO*"), which explained that, to the extent lower courts have evidenced confusion regarding the Rule 23 standard after *Falcon*, this confusion has existed because those courts have misread a Supreme Court statement made eight years before the Court handed down *Falcon*. *See* 471 F.3d 24, 33-34 (2d Cir. 2006). Specifically, courts have misunderstood *Eisen v. Carlisle & Jacquelin*, in which the Supreme Court stated, "We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." 417 U.S. 156, 177 (1974). "This statement has led some courts to think that in determining whether any Rule 23 requirement is met, a judge may not consider any aspect of the merits . . . ." *IPO*, 471 F.3d at 33. It has "led other courts to think that a judge may not do so at least with respect to a prerequisite of Rule 23 that overlaps with an aspect of the merits of the case." *Id.*

As the *IPO* court recognized, the distinguishing features of *Falcon* and *Eisen* are the purposes for which the certifying court is using the underlying facts — whether to address a merits issue unnecessarily or to determine whether, for example, the plaintiffs have demonstrated questions of law or fact common to their proposed class. *See IPO*, 471 F.3d at 32-35. An easy way to understand this distinction is to analogize to a familiar dispute over the admissibility of alleged hearsay evidence. Offered for the truth of the matter asserted, an out-of-court statement by someone not testifying is, of course, inadmissible hearsay. However, that same evidence used to impeach a witness may be properly admitted. So, too, with inquiries into facts overlapping with merits issues in the Rule 23 context. It is whether courts are using the facts to probe the plaintiffs' claims of compliance with Rule 23, or to hear either parties' claims directed to stand-alone merits issues, that renders a court's use of the facts proper or improper. Courts have thus strayed from *Falcon* when they have myopically invoked *Eisen* to avoid considering facts properly relevant to the Rule 23 determination because the facts happen to be relevant to the later merits inquiry as well.

B. Case Law in Other Circuits

Like our decision today, and in part because of courts' misunderstanding of *Eisen*, many of our sister circuits have recently been called upon to clarify the standard that a district court applies when deciding whether to certify a class under Rule 23.

Though *IPO* is the most notable of these decisions, other courts often trace the explanatory effort back to the Seventh Circuit's decision in *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672 (7th Cir. 2001). In *Szabo*, the court rejected a nationwide products liability class because the class was generally unsuitable for class-wide resolution because of choice of law problems on the state breach-of-warranty and fraud claims. *Id.* at 674. The Seventh Circuit also found that the district court below had "certified the class without resolving factual and legal disputes that strongly influence the wisdom of class treatment" because the district court had stated that the plaintiffs' "allegations in the complaint are accepted as true for purposes of the class motion." *Id.* at 675. Analogizing to the preliminary jurisdictional inquiries that district courts routinely make under

Federal Rules of Civil Procedure 12(b)(1) and 12(b)(2), the court explained that, "[b]efore deciding whether to allow a case to proceed as a class action, therefore, a judge should make whatever factual and legal inquiries are necessary under Rule 23." *Id.* at 676.

The Second Circuit's decision in *IPO* agreed with *Szabo*, providing what is now the leading case on the extent to which a district court must resolve Rule 23 issues that overlap with the merits of the case. *IPO* held that factual disputes concerning each of the Rule 23 factors must be analyzed and resolved. 471 F.3d at 41. This is a similar holding to our previous explanation—discussed in more detail below—that a district court must make "determinations" that the prerequisites of Rule 23(a) have been satisfied before it certifies a class, "which may require review of the same facts and the same law presented by review of the merits." *Falcon*, 457 U.S. at 161; *Blackie v. Barrack*, 524 F.2d 891, 897 (9th Cir. 1975). *IPO* explained that "the obligation to make such determinations is not lessened by overlap between a Rule 23 requirement and a merits issue." 471 F.3d at 41. *IPO* expressly rejected the Second Circuit's approach in *Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283, 291-93 (2d Cir. 1999), and *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc. (In re Visa Check/MasterMoney Antitrust Litigation)* ("*Visa Check*"), 280 F.3d 124, 135 (2d Cir. 2001), which had permitted class certification based on "some showing" that the Rule 23 factors were met, obviating the need to assess conflicting expert testimony pertinent to the Rule 23 inquiries. *IPO*, 471 F.3d at 40.

Since *IPO*, a number of other circuits have detailed the issue. The First Circuit has reviewed these appellate cases, noting that "[o]ur sister circuits agree that when class criteria and merits overlap, the district court must conduct a searching inquiry regarding the Rule 23 criteria, but how they articulate the necessary degree of inquiry ranges along a spectrum which suggests substantial differences." *Brown v. Am. Honda (In re New Motor Vehicles Canadian Export Antitrust Litig.)*, 522 F.3d 6, 24 (1st Cir. 2008) ("*New Motor Vehicles*").

Though, of course, different circuits have used different words in articulating the review necessary, we think *New Motor Vehicles* overstates the degree of difference among the circuits. The core holding across circuits that have considered the issue is essentially unanimous: district courts must satisfy themselves that the Rule 23 requirements have been met before certifying a class, which will sometimes, though not always, require an inquiry into and preliminary resolution of disputed factual issues, even if those same factual issues are also, independently, relevant to the ultimate merits of the case. *See, e.g.*, 1 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 3:12 (6th ed. 2009) ("Consensus is rapidly emerging among the United States Courts of Appeal. The First, Second, Third, Fourth, Fifth, Seventh, Eighth, Tenth and Eleventh Circuits have expressly adopted certification standards that require rigorous factual review and preliminary factual and legal determinations with respect to the requirements of Rule 23 even if those determinations overlap with the merits.").

A closer discussion of the cases the First Circuit has cited demonstrates the truly narrow range in which this "spectrum" actually exists. Requiring the district court to "make specific findings that each Rule 23 criterion is met" represents, the First Circuit has claimed, "around the more rigorous end of [the] spectrum," and has been embraced by the Second, Fourth, Fifth, Seventh—and we would add Ninth—Circuits. *New Motor Vehicles*, 522 F.3d at 24 (citing *IPO*, 471 F.3d at 33, 41; *Unger v. Amedisys Inc.*, 401 F.3d 316, 321-22 (5th Cir. 2005) (requiring courts to find facts favoring class certification through the use of "rigorous, though preliminary, standards of proof"); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004) (requiring that "the factors spelled out in Rule 23 . . . be addressed through findings"); *Szabo*, 249 F.3d at 675-76)); *see Blackie*, 524 F.2d at 897.

On the other end of this "spectrum," according to the *New Motor Vehicles* court, are cases in "the Third and Eighth Circuits [which] sometimes require an inquiry into and preliminary resolution of disputes, but they do not require findings and do not hold that such inquiry will always be necessary." *New Motor Vehicles*, 522 F.3d at 24 (citing *Blades v. Monsanto Co.*, 400 F.3d 562, 566-67 (8th Cir. 2005)); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 166 (3d Cir. 2001)).

In our review of these cases, we find this "spectrum" of certification standards narrower and more internally consistent than does the First Circuit. To begin with, we respectfully disagree with *New Motor Vehicles*'s characterization of the Third Circuit's approach. The case *New Motor Vehicles* cited, *Newton*, 259 F.3d at 174-77, only discussed a "presumption" of conformity with Rule 23 in the context of the fraud-on-the-market presumption in a securities class action.

The Third Circuit has since provided clarification. It has noted that *Newton* does not hold that a district court can presume Rule 23 requirements met from contested pleadings outside the fraud-on-the-market context. *Vallies v. Sky Bank*, No. 08-4160, 2009 WL 5154473, at *7 (3d Cir. Dec. 31, 2009). It has also demonstrated its conformity with the other circuits' standard more broadly. In *In re Constar International Inc. Securities Litigation*, the court explained that "we require that each Rule 23 component be *satisfied*." 585 F.3d 774, 780 (3d Cir. 2009) (emphasis added) (citing *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310 (3d Cir. 2009) ("*Hydrogen Peroxide*")). Recognizing the importance of the class certification decision, the court emphasized that "district courts, where appropriate, [are] to 'delve beyond the pleadings to determine whether the requirements for class certification are satisfied.'" *Id.* (quoting *Hydrogen Peroxide*, 552 F.3d at 316; *Newton*, 259 F.3d at 167). It further elucidated, "[a]n overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met." *Id.* (internal quotation marks omitted). The Third Circuit thus requires a district court "determination" that the "requirements" of Rule 23 have been "satisfied." *Id.* While we readily recognize the benefit of the additional cases available to us in conducting our review, we respectfully disagree with the First Circuit's conclusion that the Third Circuit allows a more lax standard of review than do other circuits.

New Motor Vehicles is on firmer ground describing the Eighth Circuit's decision in *Blades*, though we find the language in that case more nuanced than *New Motor Vehicles* describes, and we disagree that *Blades* "suggests substantial differences" from other circuits. *New Motor Vehicles*, 522 F.3d at 24. The

Blades court cited *Falcon* in describing the standard as follows:

> To determine whether common questions predominate, a court must conduct a limited preliminary inquiry, looking behind the pleadings. In conducting this preliminary inquiry, however, the court must look only so far as to determine whether, given the factual setting of the case, if the plaintiffs [sic] general allegations are true, common evidence could suffice to make out a prima facie showing for the class. . . .
>
> The preliminary inquiry at the class certification stage may require the court to *resolve* disputes going to the factual setting of the case, and such disputes may overlap with the merits of the case. *See Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676-77 (7th Cir. 2001). Nonetheless, such disputes may be resolved only insofar as resolution is necessary to determine the nature of the evidence that would be sufficient, if the plaintiff's general allegations were true, to make out a prima facie case for the class.

Blades, 400 F.3d at 566-67 (some citations omitted) (emphasis added).

While this language is not as definitive as that used by the Second Circuit in *IPO*, for example, it sets up essentially the same standard. Under *Blades*, district courts in the Eighth Circuit must "resolve" factual disputes going to the "setting of the case," which we understand to mean the factual circumstances dictating whether the plaintiffs have met the Rule 23 requirements. *Id.* at 567. Supporting this understanding is *Blades*'s later statement explaining that "[t]o certify a class action under Rule 23(b)(3), the Court must *find* that: 1) common questions predominate . . . and 2) class resolution is superior to other available methods for the fair and efficient adjudication of the controversy." *Id.* at 569 (emphasis added). Finally, like *IPO*, *Blades* understands *Eisen* as prohibiting the district court from making preliminary findings on merits issues not related to the Rule 23 resolution. *See id.* at 566-67; *see also* Richard A. Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, 75 U.Chi. L. Rev. 603, 616 (2008) ("Nagareda, *Class Actions*"). Not surprisingly, then, IPO cited *Blades* as a key case supporting its conclusion to require district court determinations that each of the Rule 23 requirements is met. *IPO*, 471 F.3d at 38.

We thus view whether an appellate court requires district courts to "resolve," *id.*; "find," *Unger*, 401 F.3d at 319-20; or "determine," *IPO*, 471 F.3d at 40-41, that Rule 23 requirements have been met, as essentially, even if not precisely, the same standard.[6] To characterize such usage as embodying "substantial differences" seems to create a distinction where none exists. *See New Motor Vehicles*, 522 F.3d at 24; *see also* Richard A. Nagareda, *Class Certification in*

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[6] We recognize that these words imply slightly different approaches, and we agree with the *IPO* court's thoughtful discussion of resisting use of the word " 'findings' because the word usually implies that a district judge is resolving a disputed issue of fact," and the Rule 23 inquiry, though it may require findings in some cases, "is really a mixed question of fact and law." 471 F.3d at 40. We cannot, however, agree that the difference in usage is significant enough that circuit courts using these various words employ substantially different standards. *Cf. New Motor Vehicles*, 522 F.3d at 24.

the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 113-14 (2009) (Nagareda, *Aggregate Proof*) (describing federal courts as moving toward an "essentially uniform" standard that is "now-settled law"). Under any of these articulations, the charge to the district court follows the analysis the *IPO* court explained, and we agree, that *Falcon* and *Eisen* require. *IPO*, 471 F.3d at 41. The district court must analyze underlying facts and legal issues going to the certification questions regardless of any overlap with the merits. However, this does not mean a district court should put the actual resolution of the merits cart before the motion to dismiss, summary judgment, and trial horses by reaching out to decide issues unnecessary to the Rule 23 requirements.

Having discussed our sister circuits' treatment of this issue, we now turn to the standard in our circuit as established by our previous cases.

C. Ninth Circuit Precedent

[6] Since we first addressed the issue in the wake of the *Eisen* and *Falcon* decisions, our cases have made clear that a district court inquiry overlapping with the merits is permissible, and often required, under Rule 23. *See Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 480 (9th Cir. 1983) ("Although some inquiry into the substance of a case may be necessary to ascertain satisfaction of the commonality and typicality requirements of Rule 23(a), it is improper to advance a decision on the merits to the certification stage." (citation omitted)). Later, we said that a district court is "at liberty to consider evidence which goes to the requirements of Rule 23 even though the evidence may also relate to the underlying merits of the case." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir.

1992) (internal quotation marks omitted); *see also Staton v. Boeing Co.*, 327 F.3d 938, 954 (9th Cir. 2003) ("The court may not go so far, of course, as to judge the validity of [the merits] claims. . . . But the breadth and consistency of class counsel's initial evidence places the district court's finding of commonality well within that court's discretion." (citation omitted)). We have also specifically cited *Eisen* in rejecting a party's argument that *Eisen* prohibits any inquiry overlapping with the merits and explaining that such an overlapping inquiry is sometimes necessary under Rule 23. *See Blackie*, 524 F.2d at 897 ("Nor is the class issue separable from the merits in all cases (including this one). The common questions, typicality, conflicts and adequacy of representation, and predominance tests, are determinations . . . which may require review of the same facts and the same law presented by review of the merits." (citations omitted)).[7]

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[7] Many other decisions have similarly shown this circuit's proper, narrow reading of the "no merits inquiry" passage from *Eisen* to prohibit only merits inquiries unnecessary for the class certification decision. *See, e.g.*, *McElmurry v. U.S. Bank Nat'l Ass'n*, 495 F.3d 1136, 1141-42 (9th Cir. 2007) (rejecting the appellants' broad claim relying on misunderstood language from *Eisen*); *Staton*, 327 F.3d at 954 (citing *Eisen* in explaining that a merits inquiry is improper at the class certification stage though the district court was "well within" its discretion in considering overlapping issues); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1232 (9th Cir. 1996) (discussing *Eisen* as prohibiting "a separate hearing to consider the merits of the plaintiffs' claims when determining class certification"); *Hanon*, 976 F.2d at 509 (describing *Eisen* as holding "a motion for class certification is not the appropriate point at which to resolve the merits of a plaintiff's claim"); *Wright v. Schock*, 742 F.2d 541, 544-45 (9th Cir. 1984) (understanding *Eisen* narrowly to allow a sum-

[7] We have adhered to the Supreme Court's guidance in holding that "[a] class may only be certified if we are 'satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.'" *Hanon*, 976 F.2d at 509 (quoting *Falcon*, 457 U.S. at 161). We have also, however, recognized that *Falcon* contemplated cases in which "the issues are plain enough from the pleadings" and do not require analysis beyond those papers. 457 U.S. at 160; *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 961 (9th Cir. 2005) (per curiam) ("The Supreme Court thus recognized over twenty years ago that a rigorous analysis does not always result in a lengthy explanation or in-depth review of the record."); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1023 (9th Cir. 1998). Thus, in some cases, the pleadings will be sufficient to render the certification decision, and in others, the district court must make determinations on facts overlapping with the merits.

In addition, our cases have understood that *Falcon*, like Rule 23 itself, requires "*questions* of law or fact that were common to the claims." 457 U.S. at 158 (emphasis added). Therefore, we have found class certification proper where a "plaintiff is attack-

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mary judgment motion before the class certification decision); *Moore*, 708 F.2d at 480 ("Although some inquiry into the substance of a case may be necessary to ascertain satisfaction of the commonality and typicality requirements of Rule 23(a), it is improper to advance a decision on the merits to the class certification stage."); *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1321-22 (9th Cir.), (characterizing *Eisen* as confirming the narrow rule that "the class representative need not demonstrate a likelihood of success on the merits in order to maintain a class action"), *vacated on other grounds*, 459 U.S. 810 (1982).

ing defendants' discriminatory practices against females, and this is not just as it applied to plaintiff only," because such a claim "identifies a common legal issue, discrimination against women, and a common factual problem, discrimination as applied" by the defendant. *Bouman v. Block*, 940 F.2d 1211, 1232 (9th Cir. 1991) (internal quotation marks omitted); *see also Rodriguez v. Hayes*, No. 08-56156, 2010 WL 6394, at *12 (9th Cir. Jan. 4, 2010) ("[T]he commonality requirements ask[s] us to look only for some shared legal issue or a common core of facts."). We have also, of course, rejected the "across-the-board" claims that *Falcon* prohibited, and we have denied class certification when a rigorous analysis did not show the class would implicate common questions. *See, e.g., Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 730 (9th Cir. 2007) (citing *Falcon* in rejecting certification of a class action based on the unconscionability of a class action waiver because the district court did not perform the requisite analysis). As one example, we have explained that "commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members," because such a system implicates common factual questions. *Armstrong*, 275 F.3d at 868.

[8] Our most recent statement considering *Falcon* and *Eisen* comports with this understanding as well. Writing for the court in *United Steel Workers v. ConocoPhillips Co.*, Judge Bybee explained that it is the plaintiff's *theory* that matters at the class certification stage, not whether the theory will ultimately succeed on the merits. *See* No. 09-56578, 2010 WL 22701, at *5 (9th Cir. Jan. 6, 2010). We thus found reversible error because the district court did not consider whether the plaintiff's legal theory "was one in which common *issues* of law and or fact did not predominate," and instead found the class did not meet Rule 23's requirements because " 'there can be no *assurances* that [plaintiffs] w[ould] prevail on this theory.' " *Id.* (citing the district court) (first emphasis added). In short, we have consistently held that when considering how the facts and legal issues apply to a class under Rule 23(a), the district court must focus on common questions and common issues, not common proof or likely success on the questions commonly raised. *See id.*

For the most part, the dozens of district court cases in this circuit parsing *Eisen*, *Falcon*, and our precedent, have considered *Eisen*'s language in context, concluding that they must make determinations that the requirements of Rule 23 have been met, and acknowledging that these determinations will sometimes require examining issues that overlap with the merits. *See, e.g., Endres v. Wells Fargo Bank*, No. C 06-7019, 2008 WL 344204, at *2 (N.D. Cal. Feb. 6, 2008) ("[T]he court is not permitted to make a preliminary inquiry into the merits of the plaintiffs' claims at that stage of the litigation. Nevertheless, the court must consider evidence relating to the merits if such evidence also goes to the requirements of Rule 23." (internal quotation marks and citation omitted)); *West-ways World Travel, Inc. v. AMR Corp.*, 218 F.R.D. 223, 230 (C.D. Cal. 2003) ("Although the Supreme Court once stated that courts have no authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action, [citing *Eisen*] later cases make clear that a preliminary inquiry into the merits is sometimes necessary to make a meaningful determination of class certification issues. At the same time, the court is required to take the allegations of the plaintiff's complaint as true. Plaintiff bears the burden of showing that the elements of Rule 23 are met." (citations omitted)).[8]

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[8] That district courts must consider questions overlapping with the merits, if doing so is necessary to find the Rule 23 requirements met, is the understanding of the majority of district court orders considering the issue in this circuit. *See Colvin v. Citigroup Global Mkts., Inc.*, No. C 09-00238, 2009 WL 1657331, at *1-2 (N.D. Cal. June 11, 2009) (hearing issues overlapping with merits before class certification motion); *In re First Am. Corp. ERISA Litig.*, 258 F.R.D. 610, 616 (C.D. Cal. 2009) (citing *Eisen* but also noting *Falcon*'s statement that class determinations are often "enmeshed" with merits issues); *In re Cooper Cos. Sec. Litig.*, 254 F.R.D. 628, 641 n.7 (C.D. Cal. 2009) (noting the obligation to consider evidence relating to the Rule 23 determination, but stating that "[a]t the same time, the inclusion of evidence that may speak to the merits of a case does not mean that a district court should mistake class action certification for summary judgment"); *Ballew v. Matrixx Initiatives, Inc.*, No. CV-07-267, 2008 WL 4831481, at *2 (E.D. Wash. Oct. 31, 2008) ("It is true that at this stage of the proceedings the Court is not resolving whether Plaintiff can establish that she can prove her case. Rather, the narrow question before the Court is whether, under Fed. R. Civ. P. 23, a class action is a proper vehicle for litigating the products liability claims brought by Plaintiff."); *Bishop v. Petro-Chem. Transp., LLC*, 582 F. Supp. 2d 1290, 1305 (E.D. Cal. 2008) ("[T]he Court has evaluated the evidence of the Motor Carrier exemption, not to determine whether plaintiff will ultimately prevail at trial, but to determine, again, whether the proposed class members are similarly situated."); *Lindquist v. Farmers Ins. Co. of Ariz.*, No. CV 06-597, 2008 WL 343299, at *6 (Feb. 6, 2008 D. Ariz. 2008) ("While preliminary inquiry into the merits is sometimes appropriate to the extent necessary to evaluate class certification issues that happen to be intertwined with facts relating to the underlying merits . . . the general rule followed by federal courts [is] that trial courts may not decide the merits of the case or consider the likelihood of success on the merits in determining whether the requirements of Rule 23 class certification are

These cases have correctly threaded the needle between *Eisen*, *Falcon*, and our precedent.

In the less typical instances in which district courts in this circuit have been led astray, a common reason seems to have been a misreading of our

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met."); *Alexander v. JBC Legal Group, P.C.*, 237 F.R.D. 628, 630 (D. Mont. 2006) ("It is improper for this Court to consider the merits of the complaint beyond what is necessary to decide whether the requirements of Rule 23 have been met."); *In re Seagate Tech. II Sec. Litig.*, 843 F. Supp. 1341, 1367 (N.D. Cal. 1994) (noting that "district courts *must* examine some of the merits" because "the adequacy of the representation cannot be ascertained without examining the composition of the class"); *Hernandez v. Alexander*, 152 F.R.D. 192, 194 (D. Nev. 1993) ("The determination of whether to certify a class does not permit or require a preliminary inquiry into the merits. Only the class certification requirements of Rule 23 need be considered at the class certification stage. However, before certifying a class action the trial court must be satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been met." (citations to *Eisen* and *Falcon* omitted)); *Lim v. Citizens Sav. & Loan Ass'n*, 430 F. Supp. 802, 805-06 (N.D. Cal. 1976) ("Although the *Eisen* rule has evolved into a wedge for broad class certification by *plaintiffs*, a close reading of the *Eisen* case indicates the Supreme Court's contrary intention . . . ."); *El Concilio v. Modesto Elementary Sch. Dist.*, No. C-76-2479, 1978 WL 56, at *1 (N.D. Cal. May 11, 1978) ("While the Court is foreclosed from a preliminary inquiry into the merits in order to determine whether it may be maintained as a class action, it must determine whether plaintiffs have met their burden of establishing the existence of a claim of unlawful employment practices affecting an ascertainable class of persons of which they are members." (internal quotation marks and citation omitted)); *Nguyen Da Yen v. Kissinger*, 70 F.R.D. 656, 661 (N.D. Cal. 1976) ("In determining whether a matter should proceed as a class action the court is required to make findings concerning each essential element of the class action rule.").

statement in footnote 17 of *Blackie v. Barrack*, in which we explained that district courts are "bound to take the substantive allegations of the complaint as true, thus necessarily making the class order speculative in the sense that the plaintiff may be altogether unable to prove his allegations." 524 F.2d at 901 n.17; *see also Edwards v. City of Long Beach*, 467 F. Supp. 2d 986, 991 (C.D. Cal. 2006) ("The court is bound to take the substantive allegations in the complaint as true."). But, that statement is taken out of context when relied on in this manner.[9] The subsequent sentences in *Blackie*, which the erring district courts almost universally neglect to include, explained that, although "the court may not put the plaintiff to preliminary proof of his claim, it does require sufficient information to form a reasonable judgment. Lacking that, the court may request the parties to supplement the pleadings with sufficient material to allow an informed judgment *on each of the Rule's requirements*." 524 F.2d at 901 n.17 (emphasis added). Discussing when a certification inquiry overlaps with the merits, we further explained in *Blackie*:

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[9] District courts in this circuit have quoted this passage somewhat out of context on a number of occasions. *See Mateo v. V.F. Corp.*, No. C 08-05313, 2009 WL 3561539, at *4 (N.D. Cal. Oct. 27, 2009) (citing *Blackie* though noting that the defense's arguments addressed only the merits and not the Rule 23 inquiry); *Perez v. Safety-Kleen Sys., Inc.*, 253 F.R.D. 508, 511 (N.D. Cal. 2008) (noting that "the court must accept the substantive allegations contained in plaintiffs' complaints as true"); *Nw. Fruit Co. v. A. Levy & J. Zentner Co.*, 116 F.R.D. 384, 388 (E.D. Cal. 1986) (same); *see also* Steig D. Olson, *"Chipping Away": The Misguided Trend Toward Resolving Merits Disputes as Part of the Class Certification Calculus*, 43 U.S.F. L. Rev. 935, 949 n.89 (2009) (understanding *Blackie* as requiring acceptance of a plaintiff's claims as to not only merits questions, but Rule 23 requirements as well).

> Nor is the class issue separable from the merits in all cases (including this one). The common questions, typicality, conflicts and adequacy of representation, Fed. R. Civ. P. 23(a), and predominance tests, Fed. R. Civ. P. 23(b)(3), are determinations . . . which may require review of the same facts and the same law presented by review of the merits.

524 F.2d at 897.

[9] A better reading of *Blackie*, then, is to understand it as having the meaning that our cases, and the majority of district court opinions, have ascribed to it: *Blackie* is entirely consistent with the Supreme Court's guidance, explicitly requiring a district court to probe behind the pleadings if doing so is necessary to make findings on the Rule 23 certification decision. Thus, *Blackie* does not, and could not, require the district court to unquestioningly accept a plaintiff's arguments as to the necessary Rule 23 determinations. The sense in which *Blackie* referred to class certification as speculative is the same way in which we most recently, and more artfully, described the inquiry:

> [A] court can never be *assured* that a plaintiff will prevail on a given legal theory prior to a dispositive ruling on the merits, and a full inquiry into the merits of a putative class's legal claims is precisely what both the Supreme Court and we have cautioned is not appropriate for a Rule 23 certification inquiry.

United Steel Workers, 2010 WL 22701, at *5.

In short, the explanation we provide today is not a new standard at all. Though a small number of district courts in this circuit have misunderstood *Blackie* and relied on *Eisen* in the way that the Second Circuit has cautioned against, and that we now reject, the precedent from this court is consistent. We are unable to find a single case in our court that incorrectly relied on the "no merits inquiry" language from *Eisen* in certifying a class without examining necessary issues because they overlapped with the merits. *Cf. Caridad*, 191 F.3d at 291-92 (applying the "no merits inquiry" language from *Eisen* out of context to prohibit the proper Rule 23 analysis). Our explanation confirms what our decisions have held for more than twenty-five years: A district court must sometimes resolve factual issues related to the merits to properly satisfy itself that Rule 23's requirements are met, but the purpose of the district court's inquiry at this stage remains focused on, for example, common *questions* of law or fact under Rule 23(a)(2), or predominance under Rule 23(b)(3), not the proof of answers to those questions or the likelihood of success on the merits. *Falcon*, 457 U.S. at 158 (requiring a "specific presentation identifying the *questions* of law or fact that were common to the claims of respondent and of the members of the class he sought to represent" (emphasis added)); *United Steel Workers*, 2010 WL 22701, at *5 (district court erred in basing its decision on whether the plaintiffs could prove merits rather than whether their claims implicated common questions of law or fact). Of course, for class certification to be proper, the common questions cannot simply arise from artful pleading. Plaintiffs must raise questions that the district court concludes, after a rigorous analysis, are susceptible to common resolution at a later stage.

D. Clarifying the Standard

1. The Proper Standard of Rule 23 Adjudication

This review of Supreme Court dictates, as well as our own and other circuits' treatment of the issue, leads us to recognize a number of constant holdings across circuits that we must incorporate into our clarification of the proper standard governing a district court in considering a Rule 23 motion for class certification.

To begin with, at the class certification stage, while *Eisen* prohibits a court from making determinations on the merits that do not overlap with the Rule 23 inquiry, district courts must make determinations that each requirement of Rule 23 is actually met. This bedrock rule is consistent with the Supreme Court's statements, other circuits' decisions, and our long-standing precedent. While plaintiffs need not make more than allegations as to their substantive claims, whether the suit is appropriate for class resolution must be actually demonstrated, not just alleged, to the district court's satisfaction.

In addition, in the cases such as *IPO* in which courts have recognized how *Eisen* is sometimes misunderstood, those circuits have uniformly reserved discretion with the district court to avoid a trial-level inquiry at the certification stage despite the need to find the Rule 23 requirements met.[10] *See, e.g.*,

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[10] *IPO*'s "release valve" reads as follows:

> [W]e reach the following conclusions: . . . (5) a district judge has ample discretion to circumscribe both the extent of discovery concerning Rule 23 requirements and the extent of a hearing to determine whether such re-

Blades, 400 F.3d at 567 ("The closer any dispute at the class certification stage comes to the heart of the claim, the more cautious the court should be in ensuring that it must be resolved in order to determine the nature of the evidence the plaintiff would require."). District courts must maintain the ability to cut off discovery to avoid either party bootstrapping a trial or summary judgment motion into the certification stage. Nearly every circuit to consider the issue, including our own, has recognized the practical importance of the certification decision as leverage for settlement, yet Rule 23 gives neither party the right to turn the certification decision into a trial.

When reading recent class certification cases, one also notices the prevalence of securities fraud cases, and particularly the fraud-on-the-market presumption, in the evolution of the Rule 23 standard. *See, e.g.*, *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 264 (5th Cir. 2007); *IPO*, 471 F.3d at 30-31; *Bowe v. PolyMedica Corp.* (*In re PolyMedica Corp. Secs. Litig.*), 432 F.3d 1, 6-7 (1st Cir. 2005); *Unger*, 401 F.3d at 323-24; *Gariety*, 368 F.3d at 364-66; *West v. Prudential Sec., Inc.*, 282 F.3d 935, 937-38 (7th Cir. 2002).

It is an interesting feature of the case law's development that it has occurred largely in these fraud-on-the-market cases, in which a plaintiff typically must show the six "basic elements" of a securi-

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[Footnote continued from previous page]

> quirements are met in order to assure that a class certification motion does not become a pretext for a partial trial of the merits.

471 F.3d at 41.

ties fraud action, *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005), and the efficient market component of the causation element overlaps with the merits. We must, then, be aware that applying the same procedural rules, such as Rule 23, can lead to different outcomes when the underlying legal and factual framework is different. *See, e.g., Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169, 182-85 (3d Cir. 2009) (describing how the pattern and practice evidentiary framework from Title VII cases is not perfectly applicable in the context of the Americans with Disabilities Act).

Thus, in contrast to a securities class action based on a fraud-on-the-market theory, in a pattern and practice discrimination case, a plaintiff will typically not come to court in the first place without anecdotal evidence. For practical purposes, assuming a plaintiff possesses anecdotal evidence, the plaintiff's statistical evidence does not *overlap* with the merits, it largely *is* the merits. *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986-87 (1988); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 337-39 (1977). This means that disputes over whose statistics are more persuasive are often not disputes about whether the plaintiffs raise common issues or questions, but are really arguments going to proof of the merits. *See* Nagareda, *Class Actions, supra*, at 619-20 ("Nowhere is this [disputed statistics] problem more acute than in employment discrimination class actions centered on statistical analysis of an aggregate nature."). Of course, if one party argued that the other party's statistics were unreliable or based on an unaccepted method, this may be an issue the district court would have to resolve to determine whether the potentially problematic statistics were even capable of raising a common question.

In fact, after *IPO*, but before his recent elevation to the Second Circuit, Judge Gerard Lynch recognized this problem in a Title VII gender discrimination case in which the plaintiffs were seeking to certify on the same grounds as those here. Predictably faced with a dispute regarding whether the plaintiffs' statistics demonstrated commonality, Judge Lynch addressed *IPO's* application in a Title VII, gender discrimination context.[11]

The problem, the district court explained, was that "[i]n deciding that the class certification order complied with *In re IPO*, it is important to note that disparate impact cases present unique difficulties in analyzing the commonality requirement of Rule 23(a). Plaintiffs in disparate impact cases often rely on statistical evidence to prove the merits of their claim." *Hnot v. Willis Group Holdings Ltd.*, 241 F.R.D. 204, 210-11 (S.D.N.Y. 2007). The court continued, "[i]n such a case, however, the same evidence must be considered to determine whether a plaintiff has satisfied the commonality requirement." *Id.* at 211.

In resolving this problem and certifying the class, the district court noted, "[c]ontrary to defendants' assertions, *In re IPO* does not stand for the proposition that the Court should, or is even authorized to, determine which of the parties' expert reports is more persuasive. Defendants ignore the fact that *In re IPO specifically rejected* this interpretation of Rule 23." *Id.* at 210. Instead, Judge Lynch explained, "*In re IPO* reiterated that 'experts' disagreement *on the merits*—whether a discriminatory impact [can] be shown—[is] *not a valid basis* for denying class certification.'" *Id.* (alterations in original) (quoting *IPO*, 471 F.3d at 35). Thus, the court could only "examine the expert reports as far as they bear on the Rule 23 determination." *Id.*

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[11] The plaintiffs in *Hnot* pled both disparate impact and disparate treatment theories of discrimination under Title VII. *See Hnot v. Willis Group Holdings Ltd.*, 228 F.R.D. 476, 486 (S.D.N.Y. 2005).

Judge Lynch similarly clarified, with regard to the disparate treatment issue in the case before him, that "plaintiffs and defendants disagree on whose statistical findings and observations are more credible, but this disagreement is relevant only to the merits of plaintiffs' claim—whether plaintiffs actually suffered disparate treatment—and not to whether plaintiffs have asserted common *questions* of fact or law; plaintiffs' ultimate success at trial on the merits requires an *answer* to that question, specifically that defendants actually did discriminate against plaintiffs." *Id.* at 210-11. "By asking the Court to decide which expert report is more credible, defendants are requesting that the Court look beyond the Rule 23 requirements and decide the issue on the merits, a practice *In re IPO* specifically cautions against." *Id.* at 210.

Thus, in addition to demonstrating Rule 23's proper implementation in various legal contexts (securities class actions versus Title VII claims), *Hnot* also illustrates a second feature of the certification cases that we must address. Because the fraud-on-the-market cases are typically decided under Rule 23(b)(3)'s predominance requirement, a related feature of the circuit court cases considering the proper standard a district court applies, when deciding whether to certify a class, is the difference between cases describing review of evidence under Rule 23(a) and those under Rule 23(b).[12] We are unaware of any argument claiming that a different standard should apply in the two inquiries, and the cases generally treat the precedent as applying equally to both contexts. We do, however, note that the inquiry cannot be divorced from the text of Rule 23, which, of course, requires plaintiffs to make different showings under different parts of the rule. This distinction helps order the doctrine, keeping in mind the different requirements under Rule 23(a) and (b) and how those requirements may play out in a district court's certification decision.

This insight derives from the Supreme Court's explanation of the predominance test under Rule 23(b)(3). Predominance, the Court explained, "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997), a standard "far more demanding" than the commonality requirement of Rule 23(a), *id.* at 623-24. Thus, we would expect that cases in which the parties are contesting facts underlying the Rule 23(b)(3) determination may often require more determinations by the district court than those in which Rule 23(a)(2) is the primarily contested issue. Rule 23(a)(2) is about invoking common *questions*, *see Falcon*, 457 U.S. at 158, whereas Rule 23(b)(3) requires a district court to formulate "some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case." *New Motor Vehicles*, 522 F.3d at 20 (internal quotation marks omitted). We thus should not be surprised that a district court will have to make more precise factual determinations under Rule 23(b)(3) than under Rule 23(a)(2). This insight does not apply a procedural rule differently in two like contexts; it applies the text of Rule 23 itself to the district court's task.

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[12] More specifically, as the cases demonstrate, is the standard for evidence under Rule 23(a)(2), commonality, versus Rule 23(b)(3), predominance.

While we find the case law across circuits more uniform than some courts have implied, *see id.* at 24, to the extent it is not, this result may be because of courts' failure to recognize this key difference between a district court's job under Rule 23(a)(2) and its job under Rule 23(b)(3).[13] This conclusion is further supported when one notices that *Falcon's* primary inquiry was under Rule 23(a), 457 U.S. at 156-58, whereas many of the circuit courts discussed above were concerned with Rule 23(b)'s predominance test and, thus, required the district court to make more detailed determinations as to how the facts at issue would play out—whether they would predominate—in the merits of the litigation. *See, e.g.*, *Hydrogen Peroxide*, 552 F.3d at 310 (Rule 23(b)(3) predominance); *New Motor Vehicles*, 522 F.3d at 26 (same); *IPO*, 471 F.3d at 45 (same); *In re PolyMedica Corp. Secs. Litig.*, 432 F.3d at 3 & n.4

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[13] Even commentators who clearly recognize this difference often lapse into speaking about Rule 23 as requiring a single showing, minimizing the differences between Rule 23(a)(2) and Rule 23(b)(3). *See, e.g.*, Nagareda, *Class Actions*, *supra*, at 622 ("To task the court at the class certification stage here with the making of a 'definitive assessment' of compliance with Rule 23 would be to call, as a practical matter, for an assessment of which side is right on the merits with regard to the existence of a company-wide policy.").

(same); *Unger*, 401 F.3d at 320, 324-25 (same); *Blades*, 400 F.3d at 566 (same); *Gariety*, 368 F.3d at 364-65 (same); *Szabo*, 249 F.3d at 676-77 (same).

Though some courts have noted the difference between Rule 23(a) and 23(b) in passing, *see Hydrogen Peroxide*, 552 F.3d at 310-11,[14] we are not aware of any decisions detailing the difference, and some courts have failed to note the distinction at all. *See, e.g., IPO*, 471 F.3d at 33 n.3 ("We see no reason to doubt that what the Supreme Court said about Rule 23(a) requirements applies with equal force to all Rule 23 requirements, including those set forth in Rule 23(b)(3)."). We think a great deal of any disparity in different courts' explication of the Rule 23 standard can be explained by this difference. The lesson for future district courts is that, in a given case, the text of Rule 23(a), as compared to Rule 23(b), may require them to determine more or different facts (typically more under Rule 23(b)(3)) to determine whether the plaintiffs have met their Rule 23 burden.

[10] In short, these observations, which include the Supreme Court's direction, long-standing precedent in this court, and treatment from other circuits, lead us to the following explanation of the proper standards governing a district court's adjudication of a Rule 23 motion for class certification. First, when considering class certification under Rule 23, district courts are not only at liberty to, but must, perform a rigorous analysis to ensure that the prerequisites of Rule 23 have been satisfied, and this analysis will often, though not always, require looking behind the pleadings to issues overlapping with the merits of the underlying claims. It is important to note that the district court is not bound by these determinations as the litigation progresses. Second, district courts may not analyze any portion of the merits of a claim that do not overlap with the Rule 23 requirements. Relatedly, a district court performs this analysis for the purpose of determining that each of the Rule 23 requirements has been satisfied. Third, courts must keep in mind that different parts of Rule 23 require different inquiries. For example, what must be satisfied for the commonality inquiry under Rule 23(a)(2) is that plaintiffs establish common *questions* of law and fact, and answering those questions is the purpose of the merits inquiry, which can be addressed at trial and at summary judgment. Fourth, district courts retain wide discretion in class certification decisions, including the ability to cut off discovery to avoid a mini-trial on the merits at the certification stage. Fifth, different types of cases will result in diverging frequencies with which the district court will properly invoke its discretion to abrogate discovery. As just one example, we would expect a district court to circumscribe discovery more often in a Title VII case than in a securities class action resting on a fraud-on-the-market theory, because the statistical disputes typical to Title VII cases often encompass the basic merits inquiry and need not be proved to raise common questions and demonstrate the appropriateness of class resolution. Plaintiffs pleading fraud-on-the-market, on the other hand, may have to establish an efficient market to even raise common questions or show predominance.

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[14] *See also* Olson, *supra*, at 947 (noting that class certification must be particularly predictive under Rule 23(b)(3)).

2. The Dissent's "Significant Proof" Standard

In addition to setting out our own review, we feel compelled to discuss the dissent's consideration of this issue. The Supreme Court's decisions in *Falcon* and *Eisen* are the primary guides to our ruling in this case. The dissent, in suggesting that we are unfaithful to *Falcon*, seeks to create a new class action requirement based on a hypothetical in one sentence of Supreme Court dicta; conflates, or at least fails to distinguish, the posture of *Falcon* and the present case; ignores the weight of the many cases in other circuits arriving at the same standard we have described above; and renders itself unpersuasive by critiquing the district court's eighty-four-page analysis as insufficiently rigorous. In doing so, the dissent is unfaithful to the actual distinctions the Supreme Court relied upon in *Falcon*, and variously depicts *Falcon* as instituting a "significant proof" "burden" or " 'significant proof' requirement" that *Falcon* did not create. Dissent at 6247, 6454.

We read *Falcon*, as has nearly every Court of Appeals to consider the question, as creating the standard we describe above. But in discussing what *it* views as the analysis required by *Falcon*, the dissent quotes a portion of a sentence of *Falcon* dicta in footnote 15 as standing for the requirement that plaintiffs cannot prevail at the certification stage without showing "[s]ignificant proof that an employer operated under a general policy of discrimination." *Id.* at 6244. However, the entire footnote sentence reads as follows: "Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class *of both applicants and employees* if the discrimination manifested itself in hiring and promotion practices in the same general fashion, *such as through entirely subjective decisionmaking processes.*" *Falcon*, 457 U.S. at 159 n.15 (emphasis added).[15]

Falcon's discussion of two distinct processes—hiring and promotion—for which "significant proof" could prove sufficient to certify a single class, is an unusually high standard that Plaintiffs here need not meet because they did not present the distinct legal theories of recovery that the *Falcon* plaintiffs, both employees and applicants, had pursued together in one class. "The question before the district court was not whether [Plaintiffs] have definitively proven disparate treatment and a disparate impact; rather, the question was whether the basis of [Plaintiffs'] discrimination claims was sufficient to support class certification." *Brown v. Nucor Corp.*, 576 F.3d 149, 156 (4th Cir. 2009), *cert. denied*, No. 09-981, 2010 WL 285702 (Mar. 1, 2010).

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[15] The dissent chides us for ignoring the " 'significant proof' requirement" from *Falcon*, an approach the dissent finds troubling, particularly because *Falcon* is "directly on point." Dissent at 6245-46. Putting aside the fact that, unlike here, the problem in *Falcon* was a proposed class consisting of members of the general public who had sought employment, represented by an employee who had sought promotion, alleging different theories of discrimination, *see Falcon*, 457 U.S. at 157-58, ignoring relevant Supreme Court guidance would indeed be troubling if that was in fact what we were doing. But the dissent mischaracterizes the role that "significant proof" played in the *Falcon* analysis. The statement was a hypothetical in clear dicta. *Id.* at 159 n.15. It is important not to apply Supreme Court dicta "to create a new rule—one [the Court] never envisioned." *Lopez-Rodriguez v. Holder*, 560 F.3d 1098, 1099 (9th Cir. 2009) (order) (Bea, J., dissenting from denial of reh'g en banc). Further, here, we are not taking Supreme Court statements and "blandly shrug[ging] them off because they were not a holding." *Newdow v. U.S. Congress*, 328 F.3d 466, 480 (9th Cir. 2003) (order) (O'Scannlain, J., dissenting from denial of reh'g en banc). Instead, we are considering the statements and avoiding creating a new rule of law, noting that we should be particularly wary of conceiving such a rule from dicta when the facts underlying the dicta are easily distinguished from the present case and when the dicta relied upon was in the form of a hypothetical.

Contrary to the dissent,[16] *Falcon* does not say that Plaintiffs must show a common policy of proven *discrimination* at the class action stage, rather than just a common policy *alleged* to be discriminatory. 457 U.S. at 158-59. Of course, as we have already explained, named plaintiffs must do more than merely allege discriminatory practices against themselves. *Id.* As we demonstrate below, Plaintiffs here do so, making showings through their expert testimony and statistical evidence, which further distinguishes the certification decision here from that decision in *Falcon*. In maintaining otherwise in its discussion, the dissent confuses merits decisions such as *Teamsters*, 431 U.S. at 336, and class action certification decisions.[17] It also ignores our previous statement examining *Falcon* footnote 15 in which we explained that "[w]e understand footnote fifteen of *Falcon* to present a demonstrative example rather than a limited exception to the overall skepticism toward broad discrimination class actions." *Staton*, 327 F.3d at 955. In other words, as we have previously described *Falcon*, the Supreme Court "does not generally ban all broad classes but rather precludes a class action that, on the basis of one form of discrimination against one or a handful of plaintiffs, seeks to adjudicate all forms of discrimination against all members of a group protected by Title VII, § 1981, or a similar statute." *Id.*

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[16] The dissent reads *Falcon* to require a showing of evidence "sufficient to carry plaintiffs' burden of adducing significant proof." Dissent at 6259. However, the dissent's encapsulating all of *Falcon* into this one phrase in dicta ignores other key distinctions on which the Court was actually relying. *Falcon* does not hold that a plaintiff must *prove* a widespread policy of discrimination to obtain class certification nor, of course, does it allow a district court to certify a class based on a plaintiff's mere allegations of discriminatory practices. 457 U.S. at 157-58. Rather, *Falcon* only says that an individual who, on his own behalf, does not *allege* any overall policy cannot, by proving his own case, establish *on the merits* an inference relevant to the group, thus remedying his failure to otherwise make a showing of commonality. *Id.* Such a statement is a far cry from suggesting, as does the dissent, *see* Dissent at 6247, 6249-50, that a class cannot be certified unless the plaintiffs *prove* a discriminatory overall policy — in which case there would be no reason to have a trial at all.

The dissent also largely ignores Supreme Court guidance by failing to recognize that *Falcon* addressed the claim that the allegations of an employee subject to discrimination in promotion decisions "fairly encompassed" the claims of non-employees allegedly subject to discrimination in a discrete hiring process. *Falcon*, 457 U.S. at 158. Such a determination under Rule 23 is clearly distinct from an inquiry where, as here, a class consists entirely of individuals actually employed under the same corporate policies.[18] Critically, in *Falcon*, the individual plaintiff's claim was based on promotion practices for his allegations and hiring practices for the putative class members, yet *Falcon*'s "complaint contained no factual allegations concerning petitioner's hiring practices," *id.* at 150, despite the fact that the class members' claims depended on pattern or practice in hiring, *id.* at 159. In contrast, where the individual plaintiffs seek to prove their own cases through pattern or practice methods, they are *necessarily* dependent on proving facts relevant to others of the same protected group subject to the same policy, class action or no class action. *See Watson*, 487 U.S. at 994-95; *see also* Nagareda, *Aggregate Proof*, *supra*, at 150 ("The terms 'pattern' and 'practice' themselves imply an aggregate perspective.").

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[17] The dissent's claim that Plaintiffs must prove discrimination at this stage, Dissent at 6247, conflates the class certification and merits phases of the litigation. *See Brown*, 576 F.3d at 153 ("*[A]llegations* of a practice of disparate treatment in the exercise of unbridled discretion raises questions of law and fact common to all subject black employees." (emphasis added) (internal quotation marks omitted))); *Shipes v. Trinity Indus.*, 987 F.2d 311, 316 (5th Cir. 1993) ("The threshold requirements of commonality and typicality are not high . . . . *Allegations* of similar discriminatory employment practices, such as the use of entirely subjective personnel processes that operate to discriminate, satisfy the commonality and typicality requirements of Rule 23(a)." (emphasis added)).

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[18] Indeed, the record provides significant evidence of central control. The district court found that, "[h]aving reviewed the extensive evidence submitted by the parties, . . . Wal-Mart's systems for compensating and promoting in-store employees are sufficiently similar across regions and stores to support a finding that the manner in which these systems affect the class raises issues that are common to all class members." *Dukes*, 222 F.R.D. at 149. Yet the dissent seems to assume that central control was not a pervasive feature of Wal-Mart's baseline promotion policies, or that if it was, such control undercuts Plaintiffs' case. Dissent at 6253 (rejecting Plaintiffs' claim that " 'the subjective decision-making in compensation and promotions takes place within parameters and guidelines that are highly uniform, and within a strong corporate culture,' " because "this argument is contrary to the thrust of plaintiffs' legal theory") (citing *Dukes*, 222 F.R.D. at 157). Such a view ignores the precise contours of Plaintiffs' claims. Questioning the degree of central control over the framework policies is particularly surprising given the district court's findings, *see Dukes*, 222 F.R.D. at 145-54, and additional evidence in the record that, for example, Wal-Mart posted employees in the "Rising Star Program" who were eligible for promotion on a wall in the Bentonville Home Office.

Finally, Plaintiffs here are unlike the plaintiff in *Falcon*, who failed to "otherwise [ ]support[his] allegation that the company ha[d] a policy of discrimination" except by claiming that he himself had been denied a promotion on discriminatory grounds. *Falcon*, 457 U.S. at 157-58. As we detail below, Plaintiffs here have introduced "significant proof" of Wal-Mart's policies, and their effects on the certified class, and have introduced evidence of far more than "the validity of [their] own claim[s]." *Id.* Even if the dissent were correct in creating a "significant proof" standard (or burden, or requirement), which it is not, it would not apply to Plaintiffs in this case. "Subjective decisionmaking processes" are exactly what the Plaintiffs allege here and what the Supreme Court's hypothetical expressed concern with in *Falcon*. *Id.* at 159 n.15. In addition, it is not clear that such a standard, if it existed, need apply to Plaintiffs—everyone of whom was or is an employee—at all because they are not situated as the *Falcon* plaintiffs, who were both employees seeking promotion and job applicants pursuing a position and thus needed to show different facts and allege diverging legal theories.

Again unlike in *Falcon*, and as discussed in detail below, the district court here did not presume or fail "to evaluate carefully the legitimacy [of Plaintiffs' claims to be] proper class representative[s]," *id.* at 160, but rather found Rule 23 satisfied only after undertaking the "rigorous analysis" the Supreme Court requires, *see Dukes*, 222 F.R.D. at 143-69. The specific recognition of *Falcon*'s "rigorous analysis" requirement guided the district court's analysis throughout its lengthy order, and the court made determinations that each of Rule 23's requirements were satisfied. *Id.* at 143-44, 166-68 (applying *Falcon*). The dissent's attenuated claim that the district court abused its discretion by failing to require a "specific presentation identifying the questions of law or fact that were common to the claims of respondent and of the members of the class he sought to represent," *see Falcon*, 457 U.S. at 158, is vitiated by the twenty-four pages in which the district court exhaustively performed exactly that analysis, explicitly considering questions of law and fact that were common to the members of the class and the named representatives,[19] *see Dukes*, 222 F.R.D. at 145-69. In short, and as we will now explain, at the certification stage, it is difficult for us to envision a more rigorous analysis than the one the district court conducted.

III. CERTIFICATION OF THIS CLASS

Unsurprisingly, the class in this case is broad and diverse, encompassing both salaried and hourly employees in a range of positions, who are or were employed at one or more of Wal-Mart's 3,400 stores across the country. The district court found that the large class is united by a complex array of company-wide practices, which Plaintiffs contend discriminate against women.

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[19] These common issues of law and fact, necessary to bridge the gap from the class representatives to the entire class, are discussed in Part III.A. For now, it is sufficient to note that they include an analysis of similar promotion and compensation policies Wal-Mart applied to all employees, a dominant corporate culture Wal-Mart maintained throughout its stores, and statistical evidence showing class-wide gender disparities in compensation. *Dukes*, 222 F.R.D. at 145-69.

A. *Rule 23(a)*

At the outset of considering the district court's certification order in light of the above-clarified standard, we note two facets of the district court's review.

First, this case reached us after a significantly more searching review than cases in other circuit courts explaining the Rule 23 standard. In *Szabo*, for example, the district court "assumed that whatever [the plaintiff] allege[d] must be true," and it "[p]roceed[ed] as if class certification under Rule 23 were governed by the same principles as evaluating the sufficiency of the complaint under Rule 12(b)(6)." 249 F.3d at 674-75. In *Gariety*, the case came to the Fourth Circuit after the district court had concluded that "the fact that the plaintiffs have *asserted* that the Keystone market was efficient is enough at the certification stage to find the market efficient." 368 F.3d at 361 (emphasis added); *see also Vallario v. Vandehey*, 554 F.3d 1259, 1265-66 (10th Cir. 2009) (district court abused its discretion in thinking it was barred from any consideration of action's merits); *IPO*, 471 F.3d at 30 (district court finding that only "plaintiffs—who have the burden of proof at class certification—must make '*some showing*' ").

In other words, previous circuit courts addressing similar issues have been faced with district courts making the same mistake that we described a small number of district courts in this circuit have made in citing *Blackie* out of context: refusing to consider any issue overlapping with the merits, and assuming the plaintiffs' substantive allegations as true for the Rule 23 inquiry. As we demonstrate below, such review is entirely dissimilar from the district court's review in this case.

Second, we also note that resolving this case requires a close reading of the district court's lengthy opinion to determine the standard the district court applied in deciding to certify the class. Contrary to the claims of Wal-Mart and the dissent, such a reading of the district court's individual determinations on Rule 23(a) shows that the district court actually weighed evidence and made findings sufficient under the standard we have described above.

[11] In broadly discussing the standard of review, the district court stated the following:

> A party seeking to certify a class must demonstrate that it has *met* all four requirements of Federal Rule of Civil Procedure 23(a), and at least one of the requirements of Rule 23(b). Rule 23(a) *requires* that all of the following four factors be *met* . . . . In short, the class must *satisfy* the *requirements* of numerosity, commonality, typicality, and adequacy. . . .
>
> The party seeking certification must provide facts sufficient to *satisfy* Rule 23(a) and (b) *requirements*. In turn, the district court must conduct a *rigorous analysis* to determine that the prerequisites of Rule 23 have been *met*. *Gen. Tel. Co. v. Falcon*., 457 U.S. 147, 161 (1982). If a court is not fully satisfied, certification should be refused. . . . *See* Fed. R. Civ. P. 23 advisory committee's note to 2003 amends.

. . . .

> . . . "[A]lthough some inquiry into the substance of a case may be necessary to ascertain satisfaction of the commonality and typicality requirements of Rule 23(a), it is improper to advance a decision on the merits to the certification stage." *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 480 (9th Cir. 1983) (citation omitted); *see also Nelson v. United States Steel Corp.*, 709 F.2d 675, 679-80 (11th Cir. 1983) (plaintiffs' burden at class certification "entails more than the simple assertion of [commonality and typicality] but less than a prima facie showing of liability") (citation omitted).

Dukes, 222 F.R.D. at 143-44 (some citations omitted) (last alteration in original) (emphasis added). Unlike some other district courts, which have assumed facts in a complaint, the district court here spent significant effort explaining a nuanced standard that clearly comprehended the need to look well beyond the pleadings in the case.

[12] Most importantly, as we will now explain, the district court's standard led to a review that complies with *Falcon* and with our herein-described standards that a district court must follow when deciding whether to certify a class.

1. Numerosity

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Wal-Mart does not contest this point.

2. Commonality

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." Commonality focuses on the relationship of common facts and legal issues among class members. *See, e.g.*, Conte & Newberg, *supra*, § 3:10, at 271. We noted in *Hanlon*, 150 F.3d at 1019:

> Rule 23(a)(2) has been construed permissively. All questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class.

The commonality test is "qualitative rather than quantitative"—one significant issue common to the class may be sufficient to warrant certification, *see, e.g.*, *Savino v. Computer Credit, Inc.*, 173 F.R.D. 346, 352 (E.D.N.Y. 1997), *aff'd*, 164 F.3d 81 (2d Cir. 1998); *see also* Conte & Newberg, *supra*, § 3:10, at 272-74, a standard that dovetails with our discussion above, requiring plaintiffs to show common questions or issues.

The district court found that Plaintiffs had provided evidence sufficient to support their contention that significant factual and legal questions are common to all class members. After analyzing Plaintiffs' evidence, the district court stated:

> Plaintiffs have exceeded the permissive and minimal burden of establishing commonality by providing: (1) significant evidence of company-wide corporate practices and policies, which include (a) excessive subjectivity in personnel decisions, (b) gender stereotyping, and (c) maintenance of a strong corporate culture; (2) statistical evidence of gender disparities caused by discrimination; and (3) anecdotal evidence of gender bias. Together,

> this evidence raises an inference that Wal-Mart engages in discriminatory practices in compensation and promotion that affect all plaintiffs in a common manner.

Dukes, 222 F.R.D. at 166. Discussing commonality, the district court alluded to the determinations Rule 23 requires in certifying a class. The court stated, "Rule 23(a)(2) requires that common questions of law or fact exist among class members." *Id.* at 144. Recognizing this *requirement* of Rule 23, the district court went on to make reasoned determinations that commonality was met, concluding that "th[e] evidence more than satisfies plaintiffs' burden to demonstrate commonality under Rule 23(a)(2)." *Id.* at 145. The district court then detailed the four categories of commonality evidence to which we now turn. *Id.* We conclude, as explained in more detail below, that it was within the district court's discretion, and in line with *Falcon* and the standard we have clarified today, to determine that the commonality prerequisite to class certification was satisfied. *See* Fed. R. Civ. P. 23(a)(2).[20]

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[20] Of course, returning to the standard discussed above, if the district court had rejected Wal-Mart's arguments regarding commonality solely because they overlapped with "merits issues," that would have been error. However, as we explain in the following sections, the district court did not do this but, instead, conducted a "rigorous analysis" of the conflicting evidence presented on the commonality question and ultimately concluded that Plaintiffs raised "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2); *see Falcon*, 457 U.S. at 161; *Hanon*, 976 F.2d at 509.

a. *Evidence of a Common Policy of Discrimination*

[13] Pursuant to *Falcon*, 457 U.S. at 161, Plaintiffs presented four categories of commonality evidence that the district court subjected to a "rigorous analysis": (1) facts supporting the existence of company-wide policies and practices that, in part through their subjectivity, provide a potential conduit for discrimination; (2) expert opinions supporting the existence of company-wide policies and practices that likely include a culture of gender stereotyping; (3) expert statistical evidence of class-wide gender disparities attributable to discrimination; and (4) anecdotal evidence from class members throughout the country of discriminatory attitudes held or tolerated by management. *See Dukes*, 222 F.R.D. at 145-66. Wal-Mart contends this evidence is insufficient to suggest a common factual or legal question related to the existence of discrimination.

(1) Factual Evidence

As factual evidence, Plaintiffs presented evidence of the following: (1) uniform personnel and management structure across stores; (2) Wal-Mart headquarters's extensive oversight of store operations, company-wide policies governing pay and promotion decisions, and a strong, centralized corporate culture; and (3) consistent gender-related disparities in every domestic region of the company. Such evidence supports Plaintiffs' contention that Wal-Mart operates a highly centralized company that promotes policies common to all stores and maintains a single system of oversight. Wal-Mart does not challenge this evidence.

(2) Expert Opinion

Plaintiffs presented evidence from Dr. William Bielby, a sociologist, to interpret and explain the facts that suggest that Wal-Mart has and promotes a strong corporate culture — a culture that may include gender stereotyping. Dr. Bielby based his opinion on, among other things, Wal-Mart managers' deposition testimony; organizational charts; correspondence, memos, reports, and presentations relating to personnel policy and practice, diversity, and equal employment opportunity issues; documents describing the culture and history of the company; and a large body of social science research on the impact of organizational policy and practice on workplace bias.

Dr. Bielby testified that he employed a social framework analysis to examine the distinctive features of Wal-Mart's policies and practices and evaluated them "against what social science shows to be factors that create and sustain bias and those that minimize bias."[21] In Dr. Bielby's opinion, "social science research demonstrates that gender stereotypes are especially likely to influence personnel decisions when they are based on subjective factors, because substantial decision-maker discretion tends to allow people to seek out and retain stereotyping-confirming information and ignore or minimize information that defies stereotypes." *Id.* at 153 (internal quotation marks omitted). Dr. Bielby concluded that: (1) Wal-Mart's centralized coordination, reinforced by a strong organizational culture, sustains uniformity in personnel policy and practice; (2) there are significant deficiencies in Wal-Mart's equal employment policies and practices; and (3) Wal-Mart's personnel policies and practices make pay and promotion decisions vulnerable to gender bias. *See id.* at 153-54.

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[21] For a description of the "social framework analysis," see Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 Fordham L. Rev. 37, 41-55 (2009).

The district court reviewed Plaintiffs' and Wal-Mart's competing claims as to Wal-Mart's uniform culture and determined that "the evidence indicates that in-store pay and promotion decisions are largely subjective and made within a substantial range of discretion by store or district level managers, and that this is a common feature which provides a wide enough conduit for gender bias to potentially seep into the system." *Id.* at 152. Having evaluated this evidence in detail, the court determined "that given the evidence regarding strong uniform culture and policies, the degree and impact of this practice is a significant question of fact common to the class as a whole." *Id.* at 153. Such a reasoned determination is what our standard for Rule 23 requires.

Wal-Mart vigorously challenges Dr. Bielby's third conclusion as vague and imprecise because he concluded that Wal-Mart is "vulnerable" to bias or gender stereotyping but failed to identify a specific discriminatory policy at Wal-Mart. Specifically, Wal-Mart contends that Dr. Bielby's testimony does not meet the standards for expert testimony set forth in Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993), which held that a trial court must act as a "gatekeeper" in determining whether to admit or exclude expert evidence.

Wal-Mart made an identical argument to the district court and the district court properly rejected it. A close reading of the district court's order demonstrates its correct understanding of its role at the Rule 23(a)(2) certification stage — to make factual determinations regarding evidence as it relates to common questions of fact or law but not to decide which parties' evidence is ultimately more persuasive as to liability. The court stated, "Dr. Bielby presents enough of a basis, both in his review of the scientific literature and on the facts of the case, to provide a foundation for his opinions." *Dukes*, 222 F.R.D. at 154. The court correctly explained that whether the jury was ultimately persuaded by those opinions was a question on the merits. For the class certification, however, Dr. Bielby's opinions, for which Wal-Mart did not challenge the methodology, raised a question "of corporate uniformity and gender stereotyping that is common to all class members." *Id.* We cannot say that considering Dr. Bielby's opinions in this method was an abuse of discretion.

This conclusion is furthered by the fact that Wal-Mart did not (and does not) challenge Dr. Bielby's methodology or contend that his findings lack relevance because they "do[ ] not relate to any issue in the case," *Daubert*, 509 U.S. at 591 (internal quotation marks omitted). Wal-Mart challenges *only* whether certain inferences can be persuasively drawn from his data. But because *Daubert* does not require a court to admit or exclude evidence based on its persuasiveness, but rather requires a court to admit or exclude evidence based on its scientific reliability and relevance, *id.* at 587-92 (relevance standard "is a liberal one," under which evidence is relevant if it has " 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence' " (quoting Fed. R. Evid. 401)), testing Dr. Bielby's testimony for "*Daubert* reliability" would not have addressed Wal-Mart's objections. It would have simply revealed what Wal-Mart itself has admitted and courts have long accepted: that properly analyzed social science data, like that offered by Dr. Bielby, may support a plaintiff's assertions that a claim is proper for class resolution. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 235-36, 255 (1989) (considering similar evidence offered by expert social psychologist).

[14] Accordingly, Wal-Mart's contention that the district court was required to strike Dr. Bielby's testimony under the *Daubert* test at the class certification stage, simply because the conclusion he reached seemed unpersuasive absent certain corroborating evidence, is misplaced.[22] *See Daubert*, 509 U.S. at

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[22] We are not convinced by the dissent's argument that *Daubert* has exactly the same application at the class certification stage as it does to expert testimony relevant at trial. Dissent at 6255. However, even assuming it did, the district court here was not in error. Thus we need not resolve this issue here.

In accepting Dr. Bielby's social framework analysis, the district court stated:

> The Court is further guided by *Daubert v. Merrell Dow Pharm., Inc.* (*Daubert II*), 43 F.3d 1311, 1316 (9th Cir. 1995), in which the Ninth Circuit stated that scientific knowledge "does not mean absolute certainty," and that expert testimony should be admitted when "the proffered testimony is 'based on scientifically valid principles.' " *Id.*, quoting *Daubert I*, 509 U.S. 579, 113 S. Ct. 2786. The Ninth Circuit contin-

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> ued: "Our task, then, is to analyze not what the experts say, but what basis they have for saying it." *Daubert II*, 43 F.3d at 1316. The Court is satisfied that Dr. Bi[e]lby's opinion—while subject to critique—is based on valid principles. Thus, it is sufficiently probative to assist the Court in evaluating the class certification requirements at issue in this case. Accordingly, Defendant's motion to strike Dr. Bilby's declaration is denied.

Dukes v. Wal-Mart, Inc., 222 F.R.D. 189, 192 (N.D. Cal. 2004) ("*Dukes II*").

On this review, regardless of whether full *Daubert* review is required at the class certification stage, we cannot say that admitting Dr. Bielby's social framework analysis was an abuse of discretion. The district court specifically considered *Daubert*'s applicability to Dr. Bielby and was within its discretion to limit its inquiry. As the district court observed, Dr. Bielby's testimony could be admissible even without reaching "definitive[ ]" conclusions, because tentative rather than "conclusive determination[s]" are in "the nature of this particular field of science." *Dukes*, 222 F.R.D. at 154.

Other cases support this conclusion. The Third Circuit, citing *IPO*, has noted that when the plaintiffs' ability to prove their case "is genuinely disputed, the district court must resolve it after considering all relevant evidence. Here [in *Hydrogen Peroxide*], the District Court apparently believed it was barred from resolving" these expert disputes. *Hydrogen Peroxide*, 552 F.3d at 325. Unlike *Hydrogen Peroxide* and other cases Wal-Mart cites, in the present case the district court *heard*, rather than excluded, the bulk of the relevant evidence. As a general rule, " '[d]istrict courts are not required to hold a *Daubert* hearing before ruling on the admissibility of scientific evidence.' " *Millenkamp v. Davisco Foods Int'l, Inc.*, 562 F.3d 971, 979 (9th Cir. 2009) (quoting *Jaros v. E.I. DuPont (In re Hanford Nuclear Reservation Litig.)*, 292 F.3d 1124, 1138 (9th Cir. 2002)). Plaintiffs clearly established foundation for Dr. Bielby's testimony

595 ("The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate."). While a *jury* may ultimately agree with Wal-Mart that, in the absence of a specific discriminatory policy promulgated by Wal-Mart, it is not more likely than not, based solely on Dr. Bielby's analysis, that Wal-Mart engaged in actual gender discrimination, that question must be left to the merits stage of the litigation (and presumably will not have to be decided as there will be other evidence). At the class certification stage, it is enough that Dr. Bielby presented scientifically reliable evidence tending to show that a common question of fact—i.e., "Does Wal-Mart's policy of decentralized, subjective employment decision making operate to discriminate against female employees?"—exists with respect to all members of the class.[23] This he did and, thus, we

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and statistics. It was not an abuse of discretion for the district court not to exclude them, under *Daubert* or otherwise.

[23] As discussed below in Part II.A.2.b, this court and many others have held that "delegation to supervisors, pursuant to company-wide policies, of discretionary authority without sufficient oversight . . . gives rise to common questions of fact warranting certification of the proposed class." *Caridad*, 191 F.3d at 291, *overruled on other grounds by IPO*, 471 F.3d at 39-42; *see Hnot*, 241 F.R.D. at 210 (explaining that *IPO* did not overrule this aspect of *Caridad*); *see also Staton*, 327 F.3d at 955-56 (rejecting argument that "decisionmaking at Boeing is too decentralized to permit a class that combines plaintiffs from disparate locales"); *Shipes v. Trinity Indus.*, 987 F.2d 311, 316 (5th Cir. 1993) (upholding commonality finding where all of company's plants "utilized the same subjective criteria in making personnel decisions"); *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1557 (11th Cir. 1986) (holding that " '[a]llegations of similar discriminatory employment practices, such as . . . [the] use

find no error in the district court's acceptance of Dr. Bielby's evidence to support a finding of commonality.

(3) Statistical Evidence

It is well established that plaintiffs may demonstrate commonality by presenting statistical evidence, which survives a "rigorous analysis," sufficient to fairly raise a common question concerning whether there is class-wide discrimination. *See Falcon*, 457 U.S. at 159 n.15, 161; *Caridad*, 191 F.3d at 292;[24] *see also Stastny v. S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 278 (4th Cir. 1980) (recognizing that statistical data showing comparable disparities experienced by protected employees may indicate a policy or practice that commonly affects the class members and raises a common question concerning whether the pattern or practice is discriminatory).

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of entirely subjective personnel processes that operated to discriminate, would satisfy the commonality and typicality requirements of Rule 23(a)'" (alterations in original) (quoting *Carpenter v. Stephen F. Austin State Univ.*, 706 F.2d 608, 617 (5th Cir. 1983))); *Segar v. Smith*, 738 F.2d 1249, 1276 (D.C. Cir. 1984) (explaining that "subjective criteria may well serve as a veil of seeming legitimacy behind which illegal discrimination is operating").

[24] *See Hnot*, 241 F.R.D. at 210 ("*Caridad* held, in part, that class challenges to subjective employment practices, like other disparate treatment and disparate impact claims, may satisfy the commonality requirement. *In re IPO* did not even address this aspect of *Caridad*. . . . [I]t did not question *Caridad*'s holding that statistical evidence can demonstrate commonality in a challenge to subjective employment practices, which remains controlling authority." (citation omitted)).

[15] A careful reading of the district court's treatment of the competing statistical evidence demonstrates that, in conducting its analysis, the district court followed the correct standard as explained in *Falcon* and our earlier cases, and clarified today.

Dr. Richard Drogin, Plaintiffs' statistician, analyzed data at a regional level. He ran separate regression analyses for each of the forty-one regions[25] containing Wal-Mart stores.[26] He concluded that "there are statistically significant disparities between men and women at Wal-Mart in terms of compensation and promotions, that these disparities are wide-spread across regions, and that they can be explained only by gender discrimination." *Dukes*, 222 F.R.D. at 154. Dr. Marc Bendick, Plaintiffs' labor economics expert, conducted a "benchmarking" study comparing Wal-Mart with twenty of its competitors, concluding Wal-Mart promotes a lower percentage of women than its competitors.[27] *See id.*

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[25] Each region contains approximately 80 to 85 stores.

[26] Regression analyses, in general terms, provide estimates of the effect of independent variables on a single dependent variable. *See Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1183-84 & n.9 (9th Cir. 2002). The purpose of this methodology is to estimate the extent to which a particular independent variable (in this case, gender) has influenced the dependent variables of compensation and promotion. *See id.*; *see also Rudebusch v. Hughes*, 313 F.3d 506, 511-12 (9th Cir. 2002). As long as the analyses include enough relevant non-discriminatory independent variables (e.g., education, experience, performance, etc.), the results will indicate whether any salary disparities are attributable to gender (thereby raising an inference of discrimination) or whether the disparities are attributable to other factors (and thereby refuting such an inference). *See Hemmings*, 285 F.3d at 1183-84 & n.9; *see also EEOC v. Gen. Tel. Co. of Nw., Inc.*, 885 F.2d 575, 577 n.3 (9th Cir. 1989) ("A regression analysis is a common statistical tool . . . designed to isolate the influence of one particular factor — [e.g.,] sex—on a dependent variable—[e.g.,] salary." (internal quotation marks omitted)).

Wal-Mart challenges Dr. Drogin's findings and faults his decision to conduct his research on the regional level, rather than analyze the data store-by-store.[28] However, the proper test of whether workforce statistics should be viewed at the macro (regional) or micro (store or sub-store) level depends largely on the similarity of the employment practices and the interchange of employees at the various facilities. *See Kirkland v. N.Y. State Dep't of Corr. Servs.*, 520 F.2d 420, 425 (2d Cir. 1975) (recognizing that the focus of analysis depends on the nature of a defendant's employment practices); 2 Barbara Lindemann & Paul Grossman, *Employment Discrimination Law* 1598, 1723 (3d ed. 1996).

Here, Dr. Drogin explained that a store-by-store analysis would not capture: (1) the effect of district, regional, and company-wide control over Wal-Mart's uniform compensation policies and procedures; (2) the dissemination of Wal-Mart's uniform compensation policies and procedures resulting from the frequent movement of store managers; or (3) Wal-Mart's strong corporate culture. *Dukes*, 222 F.R.D. at 157.

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[27] "Specifically, Dr. Bendick compared, or 'benchmarked,' Wal-Mart against twenty other [similar] general merchandise retailers by comparing workforce data provided by the companies to the Equal Employment Opportunity Commission." *Dukes*, 222 F.R.D. at 164. Dr. Bendick analyzed the data "to determine the extent to which women in the relevant market sought promotion, so that an inference could be made that roughly the same percentage of women would have [sought promotion] at Wal-Mart if given the opportunity." *See id.* As Dr. Bendick explained, "The logic in benchmarking is that, if retail chains comparable to Wal-Mart are successfully employing women at some rate, then women are presumably available, interested, and qualified to hold comparable positions at Wal-Mart at a similar rate." *Id.*

[28] This argument is unsurprising, and is the statistical argument similarly situated defendants make as a matter of course.

In conducting its rigorous analysis of these claims, the district court first re-stated its standard of review. Its decision makes clear that the district court made determinations that Plaintiffs' statistics raised common questions of fact or law only after it rigorously analyzed them, probing significantly behind the pleadings and resolving facts necessary to make determinations on Rule 23(a)(2).

Discussing the proper standard for evaluating the statistics, the district court said it rejected a full-blown merits evaluation of the evidence but had to "view[ ] the statistical evidence and testimony through the proper lens of the standards applicable to a class certification motion." *Dukes*, 222 F.R.D. at 155. Though noting it would not decide the actual merits of the claims, the court did "delve[ ] into the substance of the expert testimony . . . to the extent necessary to determine if it [wa]s sufficiently probative of an inference of discrimination to create a common question as to the existence of a pattern and practice of gender discrimination at Wal-Mart." *Id.* This is the precise inquiry that cases such as *IPO* have required, and it clearly meets the standard we outline above, particularly given the depth of the district court's review, the evidentiary posture of the case as a Title VII pattern and practice case, and the underlying procedural standard where the district court here was reviewing evidence under Rule 23(a)(2), to raise a common question, rather than, like the cases Wal-Mart cites, Rule 23(b)(3), to determine predominance. *See Hnot*, 241 F.R.D. at 210.

In addition to formulating a review that complied with *Falcon* and our precedent, the district court, contrary to Wal-Mart's claims, did not improperly rely on out-of-circuit cases the Second Circuit overruled in *IPO*. Specifically, Wal-Mart cites *Visa Check* and *Caridad* as decisions *IPO* rejected, noting the district court's supposed reliance on this reasoning renders its decision error. As an initial matter, the district court did not cite *Visa Check* at all. *See Dukes*, 222 F.R.D. 137 *passim*. While it did cite to *Caridad*, nothing about its citation to *Caridad* was erroneous.

The district court cited *Caridad* five times. Two instances of this reliance can be immediately set aside as unproblematic because they relied on *Caridad*'s holding that excessive subjectivity in corporate policies can contribute to a finding of commonality. *Dukes*, 222 F.R.D. at 149-50, 154. *IPO* neither addressed nor overruled this holding in *Caridad*, and it still remains "controlling authority" in the Second Circuit. *Hnot*, 241 F.R.D. at 210. A third citation to *Caridad* supported the district court's statement that, "although some inquiry into the substance of a case may be necessary to ascertain satisfaction of the commonality and typicality requirements of Rule 23(a), it is improper to advance a decision on the merits to the class certification stage." *Dukes*, 222 F.R.D. at 144 (internal quotation marks omitted) (citing *Caridad*, 191 F. 3d at 292). This statement is entirely consistent with *Falcon*, our precedent, and our ruling today. The two other citations to *Caridad* equally show that the district court did not adopt the "some showing" standard that the Second Circuit properly rejected. Instead, the district court refused to consider the merits—it would not conclusively find whether Wal-Mart had discriminated—but it analyzed the evidence to the extent, under Rule 23(a)(2), that it had to determine whether "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2); *Dukes*, 222 F.R.D. at 143.[29]

[16] Critically, the district court did not shy away from issues overlapping with the merits; rather it devoted fifteen pages of its opinion to probing the parties' statistics. The district court merely refused to decide the underlying merits themselves and examined evidence only to the extent necessary to satisfy itself under Rule 23(a)(2) that Plaintiffs raised common questions. In doing so, it joined dozens of other district courts in this circuit that have engaged the proper analysis, all using different wording, but all probing behind the pleadings to make determinations on the Rule 23 requirements. *See, e.g., In re Cooper Cos. Sec. Litig.*, 254 F.R.D. 628, 641 n.7 (C.D. Cal. 2009); *Bishop v. Petro-Chem. Transp., LLC*, 582 F. Supp. 2d 1290, 1305 (E.D. Cal. 2008); *Alexander v. JBC Legal Group, P.C.*, 237 F.R.D. 628, 629 (D. Mont. 2006); *Westways World Travel, Inc.*, 218 F.R.D. at 230.

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[29] The district court's other two citations to *Caridad* supported its statements that, first, "[d]efendant's arguments seek to engage the Court in a merits evaluation of the expert opinions. The Court rejects this approach, and views the statistical evidence and testimony through the proper lens of the standards applicable to a class certification motion." *Dukes*, 222 F.R.D. at 155 & n. 21 (citing *Caridad*, 191 F.3d at 292). Second, "[t]he ultimate question of whether subjective decision-making and a uniform culture contribute to a nation-wide pattern of gender discrimination will, of course, be for a jury to decide. At this stage, however, these factors are apparent enough to support Dr. Drogin's regional approach as at least *a* reasonable means of conducting a statistical analysis." *Id.* at 159 & n.29 (citing *Caridad*, 191 F.3d at 292-93). These are determinations of the type we require for Rule 23(a)(2) certification. Though we have used different language in clarifying the standard today, the district court examined the evidence and made a determination, over Wal-Mart's evidence, that Plaintiffs' evidence raised questions of law or fact common to the class. That is what Rule 23(a)(2), the Supreme Court, and we require.

Turning to the factual assertions in Plaintiffs' evidence, the court made a preliminary determination, based on the following "largely uncontested" statistics:

> [W]omen working in Wal-Mart stores are paid less than men in every region, that pay disparities exist in most job categories, that the salary gap widens over time even for men and women hired into the same jobs at the same time, that women take longer to enter into management positions, and that the higher one looks in the organization the lower the percentage of women.

Dukes, 222 F.R.D. at 155. Importantly, and as instructed by *Falcon*, these factual determinations were arrived at after looking beyond the pleadings to Plaintiffs' expert's deposition. *Id.*

Correctly noting that descriptive statistics do not address causation, the district court then analyzed not the pleadings, but Plaintiffs' and Wal-Mart's statistics, finding, "In short, all of Dr. Drogin's regressions show that gender is a statistically significant variable in accounting for the salary differentials between female class members and male employees at Wal-Mart stores." *Id.* at 156.

The court specifically analyzed whether aggregation of statistics for regional units was proper or whether Wal-Mart was correct to insist upon a store-level evaluation. The district court first stated the relevant sub-standard: "The proper test of whether workforce statistics should be viewed at the macro (regional) or micro (store or sub-store) level depends largely on the similarity of the employment practices, and the interchange of employees, at the various facilities." *Id.* at 157 (citation omitted). It continued, "Dr. Drogin contends that it is proper to conduct the analysis on a regional level because the subjective decision-making in compensation and promotions takes place within parameters and guidelines that are highly uniform . . . . Plaintiffs also have shown, as discussed above, that the primary salary decision-makers, Store Managers, experience frequent relocation among the various stores." *Id.* at 157.

[17] On appeal, Wal-Mart contends that the district court erred by not finding Wal-Mart's statistical evidence more persuasive than Plaintiffs' evidence because, according to Wal-Mart, its analysis was conducted store-by-store. However, contrary to Wal-Mart's characterization of its analysis, and the dissent's concerns regarding statistical aggregation,[30]

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[30] Contrary to the dissent's characterization, the district court was cognizant of the possibility of aggregation problems in the data. *Dukes*, 222 F.R.D. at 155-59 & n.22. The dissent's invocation of "Simpson's Paradox" to discount Plaintiffs' statistical evidence is not compelling, particularly at the class certification stage. *See* Dissent at 6253 n.12. First, Simpson's Paradox is a problem of incorrect causation inferences as much as it is the result of an aggregation problem, *see* Judea Pearl, *Causality: Models, Reasoning, and Inference* 130 (2000) (noting that the study the dissent cites, while not "defective," highlights "that no adjustment is guaranteed to give an unbiased estimate of causal effects, direct or indirect, absent a careful examination of

Wal-Mart's own research was not conducted at the individual store level. Dr. Joan Haworth, Wal-Mart's expert, did not conduct a store-by-store analysis; instead she reviewed data at the *sub-store* level by comparing departments to analyze the pay differential between male and female hourly employees.[31] Moreover, our task here is to determine whether the district court *abused its discretion* in finding that, based on all the evidence presented, there existed common questions of fact sufficient to justify class certification. *See Gonzales v. Free Speech Coal.*, 408 F.3d 613, 618 (9th Cir. 2005); *Armstrong*, 275 F.3d at 867. We are *not* to re-examine the relative strength or persuasiveness of the commonality evidence ourselves. Thus, even if we were to find, based on an independent review of the record, that Wal-Mart's statistical evidence was more persuasive than Plain-

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the causal assumptions that ensure identification"), and the district court considered potential problems and causation inferences in its discussion of the competing regression analyses. *See Dukes*, 222 F.R.D. at 155-56 & n.22. Second, at trial, Wal-Mart is free to further argue the unpersuasiveness of Plaintiffs' statistics, but lacking evidence showing a likelihood of a Simpson's Paradox, and given the many causal factors the statistical analyses addressed, *see id.*; Marios G. Pavlides & Michael D. Perlman, *How Likely is a Simpson's Paradox*, 63 Am. Statistician 226, 229-30 (2009), we find the district court properly considered Plaintiffs' statistics probative after a rigorous analysis. *See Falcon*, 457 U.S. at 161; *Dukes*, 222 F.R.D. at 156-59.

[31] This means that Dr. Haworth ran separate regression analyses for: (1) each of the specialty departments in the store, (2) each grocery department in the store, and (3) the store's remaining departments. She did not run regression analyses to examine pay differential between male and female salaried employees.

tiffs'—which we do not, in any event—this alone would not allow us to find that the district court improperly relied on Dr. Drogin's testimony as a valid component of its commonality analysis or that the district court erred in its ultimate conclusion that the commonality prerequisite was satisfied. That the jury might later find Wal-Mart's statistical evidence more persuasive does not detract from the district court's determination, after extensive review, that Dr. Drogin's regional analysis raises common issues appropriate for class adjudication.

Here, again, the district court followed the Supreme Court's guidance to thoughtfully "probe behind the pleadings," *Falcon*, 457 U.S. at 160, and did not abuse its discretion when it relied on Dr. Drogin's use and interpretation of statistical data as a valid component of its determination that Plaintiffs raised common questions. It considered Wal-Mart's challenges to Dr. Drogin's statistics and made the specific determination that "the Court is not persuaded that Dr. Drogin's aggregated statistical analysis should be rejected because he did not choose to utilize the Chow test," as Wal-Mart had urged. *Dukes*, 222 F.R.D. at 158. In other words, for the purposes of class certification, the district court reasonably made the determination to credit Plaintiffs' statistics.

Wal-Mart also claims the district court erred in determining that Wal-Mart provided little or no proper legal or factual challenge to Dr. Drogin's analysis,[32] and that, contrary to Wal-Mart's contention, Dr. Haworth's Store Manager survey evidence—which was stricken for failing to satisfy the standards of Rules 702 and 703 of Evidence[33] —did not undermine or contradict Dr. Drogin's evidence.

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[32] For example, Wal-Mart maintains that the district court erred by not requiring Dr. Drogin to perform a "Chow test" to determine whether data could be properly aggregated. We have

In rejecting the inclusion of Wal-Mart's Store Manager surveys as a challenge to Dr. Drogin's statistics because they were not based on a scientifically valid reasoning or methodology, *Dukes II*, 222 F.R.D. at 197-98 (discussing Rules 702 and 703), *see Daubert*, 509 U.S. at 592-93, the court noted that even if the evidence were included, "[t]he survey would not provide sufficient additional *weight* to Defendant's challenge to Dr. Drogin's analysis to sway the Court from its *conclusion* that his testimony supports an inference of discrimination, and thus the existence of substantial questions common to the class." *Dukes II*, 222 F.R.D. at 198 n.9 (emphasis added). In so ruling, the district court went even fur-

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not found a single case suggesting or requiring use of such a test.

[33] In addition to her sub-store analysis, Dr. Haworth conducted a survey of store managers. After reviewing the survey and its methodology, the district court concluded that the Store Manager survey was biased both "on its face" and in the way that it was conducted. *Dukes II*, 222 F.R.D. at 196-97 (noting that the survey's results "are not the 'product of reliable principles and methods,' and therefore are not the type of evidence that would be 'reasonably relied upon by experts'" (quoting Fed. R. Evid. 702, 703)). Dr. Haworth's disaggregated analysis created pools too small to yield any meaningful results. Wal-Mart has not appealed this issue. Accordingly, this evidence is not properly before us. *See Kohler v. Inter-Tel Techs.*, 244 F.3d 1167, 1179 n.8 (9th Cir. 2001) (recognizing that the appellant waived a claim by failing to raise it in her briefs).

ther into the merits than necessary to make a reasoned, justifiable determination, after proper review under the correct standard, that Plaintiffs' claims were appropriate for class adjudication due to common questions.

Thus, because Dr. Drogin adequately explained, and the district court rigorously analyzed, why his statistical method best reflected the alleged discrimination, the court did not abuse its discretion when it credited Dr. Drogin's analysis of statistical evidence of common discrimination questions. Nor did the district court abuse its discretion when it concluded that Dr. Drogin's analysis supported Plaintiffs' contention that there is a common core of facts flowing from Wal-Mart's corporate structure and policies that affects class members generally with regard to their discrimination claims. While Plaintiffs and Wal-Mart disagree on whose findings are more persuasive, the disagreement is not one of whether Plaintiffs have asserted "common questions of law or fact." *Falcon*, 457 U.S. at 157, 159. The disagreement *is* the common question, and deciding which side has been more persuasive is an issue for the next phase of the litigation. Requiring even more findings and further analysis from the district court would be to force a trial on the merits at the certification stage.

Finally, and discussed further below, the district court's review of statistics showing discrimination regarding promotions was also not an abuse of discretion. Plaintiffs and Defendant disagree over whether Dr. Drogin's analysis of internal promotion data was proper. Specifically, both sides agreed that Wal-Mart's actual applicant flow data for promotions during the class period was limited and contained significant gaps. *Dukes*, 222 F.R.D. at 162. Dr.

Drogin's statistics estimated the applicant flow by "tabulating 'the incumbents in historical feeder jobs for each promotion.' " *Id.* Wal-Mart argued that the data, "while limited, is nonetheless sufficient to justify an extrapolation for all job openings during the entire class period." *Id.*

The district court, addressing this statistical dispute, found Plaintiffs' statistics "sufficient to create an inference of discrimination." *Id.* at 164. In doing so, the district court found Dr. Drogin's reasoning and methodology valid and applicable in the case. While the court noted in passing that Dr. Drogin's statistics were "reasonable," the court also, and more appropriately, stated that "it is well recognized that where actual applicant flow data is inadequate or unavailable, other measures of applicant flow—including but not limited to "feeder pools"—are deemed acceptable so long as they are used in a reliable manner." *Id.* at 162-63. In doing so the district court cited an evidence treatise, Ninth Circuit precedent, and a district court case that had accepted the same type of feeder pool methodology in a dispute of the very same experts—Dr. Drogin and Dr. Haworth. *Id.* at 163 & n.37 (citing *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1185-86 (9th Cir. 2002); R. Paetzold and S. Willborn, *The Statistics of Discrimination* §§ 4.02-4.04 (2002); *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259, 333-34 (N.D. Cal. 1992)).

Thus, properly considering Dr. Drogin's statistics, the court made a determination on the applicant pool data. It found that "Defendant's assertion that its approach is necessarily superior does not withstand scrutiny. Rather, Defendant's arguments, which go to the weight of the evidence [i.e., the persuasiveness on the merits], merely highlight the presence of a significant issue affecting all class members which supports, rather than defeats, granting class certification." *Id.* at 164. This determination was thus made after a rigorous analysis of the parties' statistical claims.

[18] In short, the district court stated the legal standard, analyzed Plaintiffs' and Wal-Mart's competing claims to the propriety of aggregating statistics on a regional level and addressing Wal-Mart's missing applicant flow data, noted Plaintiffs have "shown" reasons to accept their statistics, dismissed Wal-Mart's statistical challenges, demonstrated these finding were supported by relevant Ninth Circuit precedent (and an identical dispute involving the same two experts), rejected Wal-Mart's reliance on a district court case purportedly explaining why the sub-store statistical analysis was proper, and, finally, determined that at the class certification stage all of this analysis was sufficient to support Dr. Drogin's analysis and raise questions of law or fact common to the class. This searching analysis was solid, well founded and in no way an abuse of discretion.

(4) Anecdotal Evidence

Circumstantial and anecdotal evidence of discrimination is commonly used in Title VII "pattern and practice" cases to bolster statistical proof by bringing "the cold numbers convincingly to life." *Teamsters*, 431 U.S. at 339; *see also Rudebusch v. Hughes*, 313 F.3d 506, 517 (9th Cir. 2002). Wal-Mart contends that the district court erred by concluding that the anecdotal evidence, presented by Plaintiffs in the form of sworn declarations, supported a finding of commonality.[34] Wal-Mart maintains that the declarations depict a handful of "widely divergent" events that cannot be deemed probative or representative of discrimination in pay or management-track promotions.

In their declarations, the potential class members testified to being paid less than similarly situated men, being denied or delayed in receiving promotions in a disproportionate manner when compared with similarly situated men, working in an atmosphere with a strong corporate culture of discrimination, and being subjected to various individual sexist acts. The district court credited this evidence.

[19] Wal-Mart argues that 120 declarations cannot sufficiently represent a class of this size. However, we find no authority requiring or even suggesting that a plaintiff class submit a specific number of declarations for such evidence to have any value. Moreover, the district court did not state that this anecdotal evidence provided sufficient proof to *establish* commonality *by itself*, but merely noted such evidence provides *support* for Plaintiffs' contention that commonality is present. *See Dukes*, 222 F.R.D. at 166 ("This anecdotal evidence, in combination with the other evidence previously discussed, further supports an inference that [Wal-Mart's] policies and procedures have the effect of discriminating against Plaintiffs in a common manner.").[35] Because the combination of these declarations and Plaintiffs' other evidence, discussed below, raise an inference of common discriminatory experiences, the district court did not abuse its discretion when it considered Plaintiffs' anecdotal evidence.[36]

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[34] Plaintiffs submitted declarations from each of the class representatives, as well as 114 declarations from putative class members around the country. *See Dukes*, 222 F.R.D. at 165.

[35] Of course, the district court made no finding that Plaintiffs' anecdotal declarations *alone* would raise an inference of com-

Finally, in arguing against certification based on affidavits, Plaintiffs' personal allegations, statistics, and expert testimony, the dissent intersperses references of *Falcon* immediately with discussion of *Cooper v. Federal Reserve Bank*, 467 U.S. 867, 879 (1984), claiming "individual stories do not constitute significant proof that Wal-Mart has adopted a general policy of discrimination or that such a policy

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mon discriminatory experiences. Therefore, contrary to the dissent's mischaracterization of our holding, Dissent at 6244-45, this case does not present the opportunity for us to consider, let alone affirm, such a hypothetical finding.

[36] The dissent's accusation that both we and the district court are playing the "proverbial shell game," is unpersuasive given the weight of the evidence the district court considered. *See* Dissent at 6259. Not surprisingly, the dissent's implication that a single form of evidence must, by itself, be able to support a commonality finding to satisfy the standard of significance set forth in *Falcon*, cites no authority for its proposition. *Id.* Even under a preponderance of the evidence standard, *see, e.g.*, *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 202 (2d Cir. 2008), the district court's review here would have been sufficient, finding Plaintiffs' "evidence more than satisfies plaintiffs' burden to demonstrate commonality under Rule 23(a)(2)." *See Dukes*, 222 F.R.D. at 143, 145 ("The party seeking certification must provide facts sufficient to satisfy Rule 23(a) and (b) requirements. In turn, the district court must conduct a rigorous analysis to determine that the prerequisites of Rule 23 have been met. If a court is not fully satisfied, certification should be refused." (citations omitted)).

prevails" at Wal-Mart. Dissent at 6250. This criticism, and particularly its temporary suspension of consideration of the statistical evidence, is indicative of the dissent's repeated attempts to go beyond the Supreme Court's concern with the need for "more precise pleadings" in class actions, *Falcon*, 457 U.S. at 160-61 (citing *Johnson*, 417 F.2d at 1125), and the Court's command that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," *id.* at 160, in an effort to reframe the question as one on whether Plaintiffs can actually succeed on the merits. *Cf. Eisen*, 417 U.S. at 177-78 (explaining that the plaintiffs' likelihood of success on the merits is not part of deciding whether certification is proper).

Contrary to the dissent's proposed standard, Plaintiffs here need not "establish a prima facie case" on the merits. Dissent at 6263. Class certification in *Cooper* had already taken place and, in fact, the case had gone through a trial. 467 U.S. at 872. The decision for the Supreme Court was whether the class's loss at trial precluded a class member from maintaining his own, separate civil action subsequent to the loss. *Id.* at 869. This is an entirely different posture than the present case presents, and the standard for winning a claim under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), is, of course, different than that for certifying a class action. *See Cooper*, 467 U.S. at 875-76; *Falcon*, 457 U.S. at 160-61.

b. *Subjective Decision Making*

As discussed above, the district court found substantial evidence suggesting common pay and promotion policies among Wal-Mart's many stores. *See Dukes*, 222 F.R.D. at 148-51. The court also reasoned that Wal-Mart's decision to permit its managers to utilize subjectivity in interpreting those policies offers additional support for a commonality finding. *See id.* Relying on *Sperling v. Hoffman-LaRoche, Inc.*, 924 F. Supp. 1346 (D.N.J. 1996), Wal-Mart challenges the latter conclusion, contending that managers' discretionary authority does not support a finding of commonality because "[d]ecentralized, discretionary decisionmaking is not inherently discriminatory."

It is well established that subjective decision making is a "ready mechanism[ ] for discrimination" and that courts should scrutinize it carefully. *Sengupta v. Morrison-Knudsen Co.*, 804 F.2d 1072, 1075 (9th Cir. 1986) (internal quotation marks omitted). Wal-Mart is correct that discretionary decision making *by itself* is insufficient to meet Plaintiffs' burden. The district court recognized this, noting that managerial discretion is but one of *several* factors that supported a finding of commonality. *See Dukes*, 222 F.R.D. at 149-50 ("And while the presence of excessive subjectivity, alone, does not necessarily create a common question of fact, where, as here, such subjectivity is part of a consistent corporate policy and supported by other evidence giving rise to an inference of discrimination, courts have not hesitated to find that commonality is satisfied.").

Wal-Mart is incorrect, however, that decentralized, subjective decision making cannot *contribute* to a common question of fact regarding the existence of discrimination. *See Falcon*, 457 U.S. at 159 n.15. Indeed, courts from around the country have found "[a]llegations of similar discriminatory employment practices, such as the use of entirely subjective personnel processes that operate to discriminate, [sufficient to] satisfy the commonality and typicality requirements of Rule 23(a)." *Shipes v. Trinity Indus.*, 987 F.2d 311, 316 (5th Cir. 1993); *see also supra* note 7 and cases cited therein.

[20] Plaintiffs produced substantial evidence of Wal-Mart's centralized firm-wide culture and policies, *see Dukes*, 222 F.R.D. at 151-54, thus providing a nexus between the subjective decision making and the considerable statistical evidence demonstrating a pattern of lower pay and fewer promotions for female employees. *See id.* at 154-65; *see also Reid v. Lockheed Martin Aeronautics Co.*, 205 F.R.D. 655, 670-72 (N.D. Ga. 2001) (subjective decision making may give rise to an inference of discrimination where evidence shows a nexus between decision making and discrimination). Therefore, for the reasons stated above, there was no abuse of discretion in determining that Wal-Mart's subjective decision-making policy provides support for Plaintiffs' contention that commonality exists among potential class members.

c. *Commonality Conclusion*

[21] The district court's analysis of Rule 23(a)(2) complies with the standard the Supreme Court has set down and we have explained today for a district court adjudicating a motion for class certification. Plaintiffs' factual evidence, expert opinions, statistical evidence, and anecdotal evidence provide sufficient support *to raise the common question* whether Wal-Mart's female employees nationwide were subjected to a *single set of corporate policies* (not merely a number of independent discriminatory acts) that may have worked to unlawfully discriminate against them in violation of Title VII. Evidence of Wal-Mart's subjective decision-making policies suggests a common legal or factual question regarding whether Wal-Mart's policies or practices are discriminatory.

Many other courts have reached the same conclusion based on similar evidence. *See, e.g.*, *Staton*, 327 F.3d at 955; *Shipes*, 987 F.2d at 316; *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1557 (11th Cir. 1986); *Segar v. Smith*, 738 F.2d 1249, 1276 (D.C. Cir. 1984).

3. Typicality

As an initial matter, Plaintiffs contend that Wal-Mart has waived a challenge to the district court's typicality finding by failing to offer specific objections to the district court's typicality determination. However, because Wal-Mart refers, somewhat obliquely, to the typicality factor in its opening brief and because typicality and commonality are similar and tend to merge, *see Falcon*, 457 at 157 n.13,[37] we conclude that Wal-Mart did not waive its opportunity to challenge the district court's findings with regard to typicality.

Thus, although Wal-Mart did not raise a specific challenge, it nevertheless raised a general objection to the district court's conclusion that Plaintiffs' evidence satisfies the typicality requirement. As discussed below, to satisfy the typicality prerequisite, Plaintiffs must demonstrate that their claims and their class representatives are sufficiently typical of the class.

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[37] Although the "commonality and typicality requirements of Rule 23(a) tend to merge," *see Falcon*, 457 U.S. at 157 n.13, each factor serves a discrete purpose. Commonality examines the relationship of facts and legal issues common to class members, while typicality focuses on the relationship of facts and issues between the class and its representatives. *See Newberg on Class Actions* § 3.13, at 317.

a. *Plaintiffs' Claims Are Sufficiently Typical*

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). We stated in *Hanlon* that, "[u]nder the rule's permissive standards, representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." 150 F.3d at 1020; *see also Staton*, 327 F.3d at 957 (stating that "a class representative [from each job category] for each type of discrimination claim alleged . . . is not necessary").

Thus, we must consider whether the injury allegedly suffered by the named plaintiffs and the rest of the class resulted from the same allegedly discriminatory practice. *See Staton*, 327 F.3d at 957. Even though individual employees in different stores with different managers may have received different levels of pay or may have been denied promotion or promoted at different rates, because the discrimination they claim to have suffered occurred through alleged common practices—e.g., excessively subjective decision making in a corporate culture of uniformity and gender stereotyping—the district court did not abuse its discretion by finding that their claims are sufficiently typical to satisfy Rule 23(a)(3).

b. *Plaintiffs' Representatives Are Sufficiently Typical of the Class*

Typicality requires that the named plaintiffs be members of the class they represent. *See Falcon*, 457 U.S. at 156. There is no dispute that the class representatives are "typical" of the hourly class members, because almost all of the class representatives hold hourly positions. Instead, Wal-Mart contends that the class representatives are not typical of all female in-store managers because only one of the class representatives holds a salaried management position, and she holds a somewhat low-level position.

However, because all female employees faced the same alleged discrimination, the lack of a class representative for each management category does not undermine Plaintiffs' certification goal. *See Hartman v. Duffey*, 19 F.3d 1459, 1471 (D.C. Cir. 1994) (An employee can challenge discrimination in "different job categories where the primary practices used to discriminate in the different categories are themselves similar. While it may be prudent to have the class divided into sub-classes represented by a named plaintiff from each of the differing job categories, it would not be necessary to the validity of the class certification to do so."); *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 562 (8th Cir. 1982) ("Typicality is not defeated because of the varied promotional opportunities at issue, or the differing qualifications of the plaintiffs and class members.").

In addition, because the range of managers in the proposed class is limited to managers working in Wal-Mart's stores and excludes those at regional or national offices, it is not an excessively diverse class; a named plaintiff occupying a lower-level, salaried, in-store management position is sufficient to satisfy the "permissive" typicality requirement. *Staton*, 327 F.3d at 957 (recognizing that, " '[u]nder the rule's permissive standards,' " plaintiffs are not required to offer a class representative for each type of discrimination claim alleged (quoting *Hanlon*, 150 F.3d at 1020)).

[22] Because Plaintiffs' claims and Plaintiffs' representatives are sufficiently typical of the class, the district court acted within its discretion when it found that Plaintiffs satisfied the typicality prerequisite.

4. Adequate Representation

Rule 23(a)(4) permits certification of a class action only if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This factor requires: (1) that the proposed representative Plaintiffs do not have conflicts of interest with the proposed class, and (2) that Plaintiffs are represented by qualified and competent counsel. *See Hanlon*, 150 F.3d at 1020; *see also Molski v. Gleich*, 318 F.3d 937, 955 (9th Cir. 2003).

Before the district court, Wal-Mart argued that Plaintiffs cannot satisfy this factor because of a conflict of interest between female in-store managers who are both plaintiff class members and decision-making agents of Wal-Mart. Relying on *Staton*, the district court recognized that courts need not deny certification of an employment class simply because the class includes both supervisory and non-supervisory employees. *See Dukes*, 222 F.R.D. at 168; *see also Staton*, 327 F.3d at 958-59. This decision was not an abuse of discretion. Finally, because Wal-Mart does not challenge the district court's finding that Plaintiffs' class representatives and counsel are adequate, we need not analyze this factor.

5. Commonality, Typicality, and Manageability of Promotion Claims

The district court certified Plaintiffs' promotion claims for injunctive and declaratory relief and punitive damages, but concluded that "manageability concerns" required that "any lost pay remedy on Plaintiffs' promotion claim would be limited to that subset of the class for whom objective applicant data exists." *Dukes*, 222 F.R.D. at 183. Wal-Mart objects to the certification of Plaintiffs' promotion claims, even with this limitation, on commonality and manageability grounds. Plaintiffs, on the other hand, object to the district court's limitation of eligibility for back pay to positions for which objective applicant data exist.

[23] Title VII pattern and practice class actions frequently include both salary and promotion claims. *See, e.g., Bazemore v. Friday*, 478 U.S. 385, 406 (1986) (per curiam); *Cooper*, 467 U.S. at 870. As discussed above, the district court found that Plaintiffs here have provided evidence sufficient to support their contention that company-wide corporate practices and policies—including excessive subjectivity in personnel decisions, gender stereotyping, and maintenance of a strong corporate culture—affected both compensation and promotion of all Plaintiffs in a common manner. *Dukes*, 222 F.R.D. at 166. Although there may be some variation among individual promotion decisions, variation does not prevent class certification of common issues of fact. *See Hanlon*, 150 F.3d at 1019 ("Rule 23(a)(2) has been construed permissively. All questions of fact and law need not be common to satisfy the rule."). Given its findings regarding Wal-Mart's company-wide promotion policies and minimum guidelines, *see Dukes*, 222 F.R.D. at 148-49, the district court did not abuse its discretion by concluding that there was a sufficient common factual basis among putative class members' promotion claims to satisfy Rule 23(a)(2).

[24] We also affirm the district court's conclusion that a back pay remedy for promotion claims would be manageable only "with respect to those positions for which objective applicant data is available to document class member interest." *Dukes*, 222 F.R.D. at 183. Wal-Mart's extensive database containing information on each employee individually with respect to job history, seniority, job review ratings, and many other factors, *see id.* at 183-85, would enable a determination of each class member's qualifications for promotion without the need for potentially unmanageable individualized hearings. The district court did not abuse its discretion by limiting eligibility for back pay, however, because allowing class members to demonstrate post hoc their previous interest in promotions might indeed be unmanageable. *See id.* at 181-82.

6. Rule 23(a) Conclusion

[25] Based on the evidence before the district court, which it rigorously analyzed pursuant to *Falcon*, 457 U.S. at 161, and the standard herein described, the district court did not abuse its discretion when it found that the Rule 23(a) elements were satisfied.

B. Rule 23(b)

As mentioned earlier, Plaintiffs moved to certify the class under Rule 23(b)(2), which requires showing that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief . . . is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).[38] The district court agreed with Plaintiffs. *See Dukes*, 222 F.R.D. at 170-71. Wal-Mart argues the district court merely "paid lip service" to Rule 23(b)(2) and erred in certifying the class under Rule 23(b)(2) because claims for monetary relief predominate over claims for injunctive and declaratory relief.

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[38] The purported class need only satisfy one of Rule 23(b)'s prongs to be sustainable. *See Zinser*, 253 F.3d at 1186.

[26] Rule 23(b)(2) is not appropriate for all classes and "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." Fed. R. Civ. P. 23(b)(2) advisory committee's note to 1966 amends., 39 F.R.D. 69, 102; *see also Zinser*, 253 F.3d at 1195 ("Class certification under Rule 23(b)(2) is appropriate only where the primary relief sought is declaratory or injunctive."). An interpretation of Rule 23(b)(2) that prevented any claim for monetary relief would render this advisory committee requirement redundant or irrelevant.

We first turn to the appropriate standard for determining when monetary relief "predominates" over declaratory and injunctive relief and therefore precludes certification of a Rule 23(b)(2) class. We have previously joined the Second Circuit in adopting a test that focuses on the plaintiffs' subjective intent in bringing a lawsuit. *See Molski*, 318 F.3d at 950; *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 164 (2d Cir. 2001). In contrast, several other circuits use the "incidental damages standard" that was first enunciated by the Fifth Circuit in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415-16 (5th Cir. 1998). *See, e.g.*, *Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 646-51 (6th Cir. 2006); *Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001); *Lemon v. Int'l Union of Operating Eng'rs Local No. 139*, 216 F.3d 577, 580-81 (7th Cir. 2000). Under the *Allison* approach, monetary relief predominates over other forms of relief "unless it is incidental to requested injunctive or declaratory relief." *See Allison*, 151 F.3d at 415.

We see no need to employ either approach, which are both, essentially, glosses on the text of the Advisory Committee's Note's statement that Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." Merriam-Webster defines "predominant" as "having superior strength, influence, or authority: prevailing." *Merriam-Webster's Collegiate Dictionary* 978 (11th ed. 2004). To be certified under Rule 23(b)(2), therefore, a class must seek only monetary damages that are not "superior [in] strength, influence, or authority" to injunctive and declaratory relief.

An analysis of a plaintiff's subjective intent in bringing a suit, as required by the standard set forth in *Molski*, is, at best, an incomplete method for answering this question. By eschewing consideration of the practical impact of a request for monetary relief on the litigation itself, the sole emphasis on the plaintiff's intent ignores important indicators of the "strength, influence, [and] authority" of a request for specific monetary relief. In short, *Molski*'s focus on subjective intent and its concomitant failure to consider the pragmatic impact of a request for monetary relief render it fatally flawed.

The *Molski* approach is troubling for the additional reason that it requires courts to engage in a nebulous and imprecise inquiry into the plaintiffs' intent in bringing a particular suit. Only in those cases in which a request for injunctive relief is obviously a ruse will this inquiry provide a clear answer. More often than not, we suspect that the answer will be equivocal and, therefore, essentially an entirely discretionary one.

Although the standard set forth in *Allison* is an objective one that does consider the practical effect of a request for monetary damages, it suffers from a different deficiency. By requiring monetary relief to be no more than "incidental" to injunctive or declaratory relief, the *Allison* approach is in direct conflict with the text of the Advisory Committee's Note, which forbids certification under Rule 23(b)(2) if monetary relief is the "predominant" form of relief. *See* 151 F.3d at 412-16. "Predominant" is not synonymous with "more than incidental." As a result, the *Allison* approach would preclude the certification of some Rule 23(b)(2) classes that the drafters of the Rules intended to allow.

Allison's standard also "usurps the district courts' authority granted by Rule 23 . . . to rigorously analyze the case, probe behind the pleadings if necessary, and exercise its own discretion within the framework of the rules in determining whether the action is to be so maintained." *Id.* at 431 (Dennis, J., dissenting); *see also Robinson*, 267 F.3d at 165 (describing *Allison*'s incidental damages test as a "one-size-fits-all approach"). Such a limitation is in direct conflict with the Federal Rules' intention that district courts be afforded discretion. The predominance test suggested by the Advisory Committee's Note, by contrast, is consistent with the wide discretion given to district courts in making the class certification decision and accomplishing Title VII's remedial objectives.

[27] To the extent *Molski* required the district court to inquire only into the intent of the plaintiffs and focus primarily on determining whether reasonable plaintiffs would bring suit to obtain injunctive or declaratory relief even in the absence of a possible monetary recovery, *see Molski*, 318 F.3d at 950 & n.15, it is overruled. In light of the inadequacy of both the *Allison* and *Molski* approaches, we adopt instead the standard that Rule 23(b)(2)'s drafters straightforwardly indicated: Rule 23(b)(2) certification is not appropriate where monetary relief is "predominant" over injunctive relief or declaratory relief. To determine whether monetary relief predominates, a district court should consider, on a case-by-case basis, the objective "effect of the relief sought" on the litigation. *See Allison*, 416 F.3d at 416. Factors such as whether the monetary relief sought determines the key procedures that will be used, whether it introduces new and significant legal and factual issues, whether it requires individualized hearings, and whether its size and nature—as measured by recovery per class member—raise particular due process and manageability concerns would all be relevant, though no single factor would be determinative.

[28] Under this standard, as discussed more fully below, the district court's decision to include claims for back pay in a class certified under Rule 23(b)(2) was not an abuse of its discretion. On the other hand, the district court did abuse its discretion by failing to analyze whether certifying Plaintiffs' punitive damages claims under Rule 23(b)(2) caused monetary damages to predominate, notwithstanding its decision to require notice and an opportunity for Plaintiffs to opt-out of the punitive damages claims.

1. Wal-Mart's Evidence Does Not Undermine Plaintiffs' Claim That Injunctive and Declaratory Relief Predominate

Wal-Mart first asserts that the district court "failed to even evaluate" Rule 23(b)'s requirement that the challenged conduct be generally applicable to the class. Wal-Mart's contention that its "unrebutted" statistics demonstrate that there is no evidence of pervasive discrimination that would justify injunctive relief and that, therefore, the "challenged conduct" does not affect all members, is simply not persuasive. As explained above, Wal-Mart's evidence *was* rebutted by Plaintiffs to the extent that Plaintiffs' evidence and theories remain viable at this premerits analysis stage. Further, the issue before us is whether monetary relief predominates, not whether Plaintiffs will ultimately prevail.

2. The Large Size of the Class Does Not Undermine Plaintiffs' Claim That Injunctive and Declaratory Relief Predominate

Wal-Mart contends that monetary claims necessarily predominate because this case involves claims that may amount to billions of dollars. However, such a large amount is principally a function of Wal-Mart's size, and the predominance test turns on the primary goal and nature of the litigation—not the theoretical or possible size of the total damages award. A comparison between the amount of monetary damages available *for each plaintiff* and the importance of injunctive and declaratory relief for each is far more relevant to establishing predominance than the total size of a potential monetary award for the class as a whole. As the district court stated, "focusing on the potential size of a punitive damage award would have the perverse effect of making it more difficult to certify a class the more egregious the defendant's conduct or the larger the defendant. Such a result hardly squares with the remedial purposes of Title VII." *Dukes*, 222 F.R.D. at 171. Because Wal-Mart has not shown that the size of the monetary request undermines Plaintiffs' claim that injunctive and declaratory relief predominate, we find that Wal-Mart's argument fails.

3. Request for Back Pay Does Not Undermine Plaintiffs' Claim That Injunctive and Declaratory Relief Predominate

Wal-Mart asserts that Plaintiffs' request for back pay weighs against certification because it proves that claims for monetary relief predominate. The district court reasoned that back pay "is recoverable as an equitable, make-whole remedy in employment class actions notwithstanding its monetary nature." *Dukes*, 222 F.R.D. at 170. Wal-Mart contends that the district court erred by failing to recognize that back pay, whether "equitable" or not, is still a form of monetary relief.

Wal-Mart's argument is without merit. Although the circuits have adopted different tests for determining when monetary relief predominates, every circuit to have addressed the issue has acknowledged that Rule 23(b)(2) does allow for some claims for monetary relief.[39] More to the point, it is equally well accepted, even by circuits that are generally restrictive in certifying classes seeking monetary damages under Rule 23(b)(2), that a request for back pay in a Title VII case is fully compatible with the certification of a Rule 23(b)(2) class. *See, e.g.*, *Allison*, 151 F.3d at 415; *see also Thorn*, 445 F.3d at 331; *Cooper*, 390 F.3d at 720; *Coleman*, 296 F.3d at 449. As the Fifth Circuit stated in *Allison*, "final injunctive relief [was] appropriate and the defendant's liability for back pay [was] rooted in grounds applicable to all members of the defined class. Under these circumstances the award of back pay, *as one element of the equitable remedy*, conflicts in no way with the limitations of Rule 23(b)(2)." 151 F.3d at 415 (internal quotation marks omitted).[40]

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[39] *See, e.g.*, *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 331 (4th Cir. 2006) (awards of back pay do not predominate over the injunctive remedies because their calculation generally involves relatively uncomplicated factual determinations); *In re Monumental Life Ins. Co.*, 365 F.3d 408, 418 (5th Cir. 2004) (same); *Cooper v. S. Co.*, 390 F.3d 695, 720 (11th Cir. 2004), *overruled on other grounds by Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 457-58 (2006) (noting that back pay can be awarded in a case certified under Rule 23(b)(2)); *see also Reeb*, 435 F.3d at 650 (same); *Coleman v. GMAC*, 296 F.3d 443, 449 (6th Cir. 2002) (same); *Robinson*, 267 F.3d at 164 (holding compensatory or punitive damages sometimes permissible under Rule 23(b)(2)); *Thomas v. Albright*, 139 F.3d 227 (D.C. Cir. 1998) (upholding a settlement in which claims for compensatory damages were included in a class certified under Rule 23(b)(2)).

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[40] Athough some circuits have held that a request for back pay technically weighs on the monetary side of the scale, even though it is also an equitable form of relief, none has held that this prevents requests for back pay from being certified under Rule 23(b)(2). *See, e.g.*, *Thorn*, 445 F.3d at 3332 ("Rule 23(b)(2) class certification is proper in the Title VII context not *because* backpay is an equitable form of relief, but because injunctive or declaratory relief predominates *despite* the presence of a request for back pay."); *Eubanks v. Billington*, 110 F.3d 87, 95 (D.C. Cir. 1997); *see also In re Monumental Life Ins. Co.*, 365 F.3d at 418 ("[E]quitable monetary remedies are less likely to predominate over a class's claim for injunctive relief, but this has more to do with the uniform character of the relief rather than with its label.").

We need not decide whether to adopt the view that a request for equitable relief such as back pay weighs against certification because here, even assuming without deciding that it does, Plaintiffs' request for back pay does not predominate over their request for the injunctive and declaratory relief and therefore does not prevent certification under Rule 23(b)(2).

Courts have provided two justifications for the conclusion that a request for back pay is consistent with certification under Rule 23(b)(2). First, appellate courts have noted that, "in the Title VII context, awards of backpay do not predominate over the injunctive remedies available because the 'calculation of back pay generally involves [relatively un]complicated factual determinations and few[ ] individualized issues.'" *Thorn*, 445 F.3d at 331-32 (alterations in original) (quoting *Coleman*, 296 F.3d at 449). The second rationale is that back pay is "an integral component of Title VII's 'make whole' remedial scheme," *see Allison*, 151 F.3d at 415, a scheme to which the drafters of the Federal Rules of Civil Procedure clearly intended Rule 23(b)(2) to apply. Fed. R. Civ. P. 23(b)(2) advisory committee's note to 1966 amends., 39 F.R.D. at 102 (stating that the principal category of cases certifiable under Rule 23(b)(2) are "actions in the civil-rights field where a party is charged with discriminating unlawfully against a class").

We find this reasoning persuasive and therefore join the consensus view that a request for back pay in a Title VII case is fully consistent with the certification of a Rule 23(b)(2) class action.[41] Accordingly,

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[41] The dissent claims that "the majority misses the point" in citing *Coleman* for the Sixth Circuit's statement "that back pay is a permissible remedy in a Rule 23(b)(2) class," 296 F.3d at 449, because "the issue is not that plaintiffs seek back pay, " but whether "individualized treatment makes class-wide relief improper." Dissent at 6275 n.28. While it is true that the Sixth Circuit rejected certification of the class in *Coleman*, it did so by distinguishing the plaintiff's claim for back pay and compensatory damages from previous cases that upheld certification of a class under Rule 23(b)(2) that sought back pay but *not* compen-

The dissent's claim of error is equally misguided to *Thorn* where the concern with individualized inquiries related to the subjective state of mind requirement for the Fourth Circuit's accrual rule for a statute of limitations. *See Thorn*, 445 F.3d at 317, 320. The Fourth Circuit addressed an earlier ruling in apparent conflict by explaining the previous case had dealt with constructive notice and was thus amenable to class resolution, but under the subjective, actual notice claim presented in *Thorn* there was no way around individualized inquiries. *Id.* at 325. Here, back pay and other claims can be calculated on a class-wide basis, and because this is a pattern and practice case, discrimination must be shown at a group level. *See Domingo v. New England Fish Co.*, 727 F.2d 1429, 1444 (9th Cir. 1984) (per curiam); *infra* notes 49 and 53. Further, the *Thorn* court, in discussing Title VII cases, stated that "in the Title VII context, awards of back pay do not predominate over the injunctive remedies available because the calculation of back pay generally involves relatively uncomplicated factual determinations and few individualized issues . . . . Rule 23(b)(2) class certification is proper in the Title VII context not *because* back pay is an equitable form of relief, but because injunctive or declaratory relief predominates *despite* the presence of a request for back pay." *Thorn*, 445 F.3d at 331-32 (brackets, citation, and internal quotation marks omitted). Again, given these statements

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satory damages. *Id.* at 449 ("[C]alculation of back pay generally involves less complicated factual determinations and fewer individualized issues."). Further, the *Coleman* court took issue with the plaintiff's own calculations of compensatory damages, which she sought to calculate "by reference to the markup [on a car loan] charged to each individual member of the class." *Id.* Given that Plaintiffs here are not seeking compensatory damages, and that, unlike here, there was no way in *Coleman* to calculate damages other than an individualized framework that, in fact, the plaintiff proposed, we find *Coleman* instructive for its statement "that back pay is a permissible remedy in a Rule 23(b)(2) class." *Id.* (citing *Alexander v. Aero Lodge No. 735*, 565 F.2d 1364, 1372 (6th Cir. 1977) ("A request for back pay does not preclude certification under [23(b)(2)].")).

we hold that the district court did not abuse its discretion when it concluded, like many courts before it, that this discrimination class action was certifiable under Rule 23(b)(2) notwithstanding Plaintiffs' prayer for back pay relief.

4. Monetary Relief May Predominate With Respect to Plaintiffs' Bifurcated Punitive Damages Claims

In determining whether "appropriate final relief relates exclusively or predominantly to money damages," Fed. R. Civ. P. 23(b)(2), advisory committee's note to 1996 amends., 39 F.R.D. at 102, claims for punitive damages weigh against certification under Rule 23(b)(2) because punitive damages are, of course, neither injunctive nor declaratory relief. The view that punitive damages can never be awarded consistent with Rule 23(b)(2), however, has not been adopted by this circuit.[42] On the other hand, this

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and distinguishing contexts, we find *Thorn* supportive of our conclusion that a request for back pay in a Title VII case is fully consistent with the certification of a Rule 23(b)(2) class action.

[42] Neither *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 928-29 (9th Cir. 1982), nor *Zinser*, 253 F.3d at 1195-96, supports Wal-Mart's argument that this circuit will not certify a class action that involves punitive damages. Rather, this court merely held that it was not an abuse of discretion to deny class certification based on the specific facts presented in those cases. *See* Williams, 665 F.2d at 929 (holding that damages requests were not incidental to the request for injunctive relief where requested compensatory damages were not clearly compatible with class injunctive relief); *Zinser*, 253 F.3d at 1195-96 (same, holding that a request for medical monitoring against manufacturer of pacemaker is not certifiable under Rule 23(b)(2) in the specific circumstances of the case, where the class primarily sought establishment of a reserve fund for past and future

court also has not approved class certification under Rule 23(b)(2) involving the potential for substantial punitive damages.

To decide whether certification under Rule 23(b)(2) is appropriate, per the standard described in Part II, a district court must squarely face and resolve the question of whether the monetary damages sought by the plaintiff class predominate over the injunctive and declaratory relief. If so, then the court may either deny certification under Rule 23(b)(2) or bifurcate the proceedings by certifying a Rule 23(b)(2) class for equitable relief and a separate Rule 23(b)(3) class for damages. *See Molski*, 318 F.3d at 951 n.16 (citing *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 897-98 (7th Cir. 1999)).[43]

Here, the district court certified Plaintiffs' punitive damages claims as a separate class, but did so under Rule 23(b)(2) rather than Rule 23(b)(3), exercising its discretion to impose additional requirements for notice and the opportunity to opt-out of this separate Rule 23(b)(2) class. *See Dukes*, 222 F.R.D. at 173 ("[N]otice and the opportunity to opt-out can be provided in a (b)(2) class action" and "shall be provided to the plaintiff class with respect to Plaintiffs' claim for punitive damages."). As the

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damages, compensation for future medical treatment, and other compensatory and punitive damages).

[43] Relying on Rule 23(c)(4), our own precedent also generally allows class treatment of common issues even when not all issues may be treated on a class basis. *See Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996); *see also Augustin v. Jablonsky (In re Nassau County Strip Search Cases)*, 461 F.3d 219, 226 (2d Cir. 2006) (same).

district court noted, its discretion to require notice and the opportunity to opt-out in a Rule 23(b)(2) class action is well established. *Id.* (citing *In re Monumental Life Ins. Co.*, 365 F.3d at 417; *Molski*, 318 F.3d at 951 n.16; *Robinson*, 267 F.3d at 165-67; *Jefferson*, 195 F.3d at 898-99).[44]

Notwithstanding its decision to require notice and an opportunity for opt-out, the district court abused its discretion by certifying the punitive damages claims under Rule 23(b)(2) without first undertaking an analysis of whether certification of the claim for punitive damages (in addition to injunctive and declaratory relief as well as back pay) rendered the final relief "predominantly" related to monetary damages. *See* Fed. R. Civ. P. 23(b)(2), advisory committee's note to 1996 amends., 39 F.R.D. at 102. Although notice and an opportunity for Plaintiffs to opt-out of the punitive damages claims alleviated some of the concerns regarding cohesiveness and due process that substantial punitive damages claims potentially raise, requiring these procedures does not remove the district court's obligation to determine whether each of the requirements of certification under either Rule 23(b)(2) or (b)(3) is met.

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[44] The dissent argues that *Ticor Title Insurance Co. v. Brown*, 511 U.S. 117 (1994) (per curiam), precludes district courts from granting notice and opt-out rights in class actions certified under Rule 23(b)(2). Dissent at 6270-71. *Ticor* involved the res judicata effect of a prior case certified under Rule 23(b)(2) without an opportunity for opt out, so the Court's attention, quite understandably, was not focused on the extent of the district court's discretion to provide for such measures. *Ticor's* reference to typical Rule 23(b)(2) procedures also was contained in an order dismissing a grant of certiorari and therefore was not even dictum, let alone a holding. *See id.*

[29] On remand, the district court must determine whether certification under Rule 23(b)(2) of the punitive damages claims would cause monetary relief to predominate. As discussed above, the district court should not limit its inquiry to the former *Molski* factors, but should also consider any other factors relevant to whether monetary relief predominates when determining if certification under Rule 23(b)(2) is appropriate.[45] We note at least four factors present in this case that are relevant to the question whether monetary relief predominates, but the district court need not limit its inquiry to these factors alone.

First, the inclusion of a punitive damages request means that the key issue in this case, Wal-Mart's liability, will be decided by a jury, rather than a judge. This significant procedural change weighs in favor of finding that monetary relief would predominate if the punitive damages claims are certified, although it is not dispositive.[46]

Second, Plaintiffs' request for punitive damages introduces a new and substantial factual issue. To recover punitive damages, Plaintiffs must show not only that Wal-Mart engaged in a pattern or practice of discrimination, but also that it did so "with malice or with reckless indifference to the federally protected rights of" Plaintiffs. 42 U.S.C. § 1981a(b)(1). This additional factual question will likely require the Plaintiffs to introduce significant evidence and legal argument that would not have otherwise been necessary; the need for such extra evidence and argument weighs in favor of a finding that monetary relief predominates.

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[45] The dissent largely ignores the limits herein imposed on the district court's certification order, particularly regarding the mode of proof described below. Dissent at 6271, 6277-78.

[46] We do not mean to suggest that the issue of Wal-Mart's liability could not ultimately be decided by a jury. If the district court concludes that the punitive damages class can be certified as a Rule 23(b)(3) class and adopts a hybrid approach, then a jury would have to decide the liability issue for both the Rule 23(b)(2) and the (b)(3) class.

Third, the size of a potential punitive damages award, measured on an individual basis, could be quite significant. Title VII permits a punitive damage award of up to $300,000 per employee. *See id.* § 1981a(b)(3). Such a large potential award raises due process and manageability concerns. Although the district court's decision to provide notice and opt-out to class members alleviates some of these concerns, the size of the potential award per class member in this case militates in favor of a finding that monetary relief predominates, triggering the need for other safeguards applicable when a class is certified under Rule 23(b)(3), rather than Rule 23(b)(2).

Finally, we note that, unlike in other punitive and compensatory damages cases, this case does not require individualized punitive damages determinations. Plaintiffs' theory of liability is a class-wide theory that is based on a company policy that allegedly affects all class members in a similar way. *See Allison*, 151 F.3d at 417 (leaving open the possibility that a punitive damage class could be certified under 23(b)(2) where the "plaintiffs challenge broad policies and practices" *and* "contend that each plaintiff was affected by th[o]se polices and practices in the same way"). While this factor counsels against a finding that punitive damages predominate, it also is not necessarily dispositive.

In sum, we hold that the district court abused its discretion when it certified a Rule 23(b)(2) class including punitive damages without first undertaking a comprehensive analysis of whether the inclusion of such damages in this case causes monetary relief to predominate. To allow for further pertinent fact-finding, we remand the certification of the bifurcated punitive damages claims to the district court to consider whether certification is proper under Rule 23(b)(2). We decline to prejudge the outcome of this determination because the question of whether monetary relief predominates should be answered by the district court in the first instance, consistent with the Federal Rules' intention to vest district courts with significant discretion.

[30] If the district court concludes that the punitive damage class in this action cannot be certified under Rule 23(b)(2), it should also consider whether class certification of the punitive damages claims is appropriate under Rule 23(b)(3). We and a number of other courts of appeals have endorsed such "hybrid certification" of Rule 23(b)(2) and Rule 23(b)(3) classes in one action, particularly in civil rights cases that may involve significant monetary damages. *See, e.g.*, ***Molski***, 318 F.3d at 951 n.16; *Jefferson*, 195 F.3d at 898; *Eubanks*, 110 F.3d at 96.

Under this hybrid approach, the highly cohesive Rule 23(b)(2) phase of the proceedings, including liability, can be adjudicated without the costly class notice and opt-out process required under Rule 23(b)(3). In order to protect the due process interests of absent class members, however, notice and opt-out *is* required for the Rule 23(b)(3) punitive damages proceedings. *See* Fed. R. Civ. P. 23(c)(2), advisory committee's note to 2003 amends. ("If a Rule 23(b)(3) class is certified in conjunction with a (b)(2) class, the (c)(2)(B) notice requirements must be satisfied *as to the (b)(3) class.*" (emphasis added)); *Eubanks*, 110 F.3d at 96 ("[Hybrid certification] effectively grant[s] (b)(3) protections . . . at the monetary relief stage."); *Diaz v. Hillsborough County Hosp. Auth.*, 165 F.R.D. 689, 695 (M.D. Fla. 1996) (explaining that in Stage I, the court will resolve liability using Rule 23(b)(2) procedures and, if liability is established, adjudicate damages using "opt out" procedures in Rule 23(b)(3)). This procedure retains the benefits of Rule 23(b)(2) and Rule 23(b)(3) for all parties, and "promotes both ease of administration and the underlying principles of Rule 23." *See Williams v. Local No. 19, Sheet Metal Workers Int'l Ass'n*, 59 F.R.D. 49, 56 (E.D. Pa. 1973) (explaining that the liability issue will be litigated first and, if the plaintiffs are successful, notice will be given for the damages proceeding).

We do not express a view on whether the punitive damages claims in this case meet the Rule 23(b)(3) requirements or, if so, how the district court should manage the class proceedings in order to comply with Seventh Amendment principles. We believe, however, that this might be a case in which "[d]ivided certification also is worth consideration." *Jefferson*, 195 F.3d at 898.

5. Class Certification May Not be Proper as to Class Members Who Were Not Wal-Mart Employees as of the Date Plaintiffs' Complaint Was Filed

Wal-Mart's final contention is that, because a substantial number of the putative class members no longer work for Wal-Mart—and, thus, no longer have standing to seek injunctive or declaratory relief—such relief cannot possibly predominate over monetary relief for purposes of certifying this class under Rule 23(b)(2).

[31] We agree with Wal-Mart to this extent: those putative class members who were no longer Wal-Mart employees at the time Plaintiffs' complaint was filed do not have standing to pursue injunctive or declaratory relief. *See Walsh v. Nev. Dep't of Human Res.*, 471 F.3d 1033, 1037 (9th Cir. 2006) (recognizing that former employees lack standing to seek injunctive relief because they "would not stand to benefit from an injunction requiring the anti-discriminatory policies [to cease] at [their] former place of work"); *ACLU of Nev. v. Lomax*, 471 F.3d 1010, 1015 (9th Cir. 2006) ("When evaluating whether [the standing] elements are present, we must look at the facts *'as they exist at the time the complaint was filed.'* " (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 n.4 (1992))). Under these circumstances, it is difficult to say that monetary relief does not predominate with respect to claims by plaintiffs who lack standing to seek injunctive or declaratory relief.

[32] However, this does not mean that former employees are ineligible to receive any form of relief. Although women who were not employed by Wal-Mart as of June 8, 2001, the date on which the complaint was filed, do not have standing to seek injunctive or declaratory relief, they may be eligible to receive back pay and punitive damages. The district court may, in its discretion, certify a separate Rule 23(b)(3) class of former employees for back pay and punitive damages.

Putative class members who *were* still Wal-Mart employees as of June 8, 2001, *do* have standing to seek the injunctive and declaratory relief requested in the complaint.[47] *See Lomax*, 471 F.3d at 1015. We are satisfied that class certification under Rule 23(b)(2) was not an abuse of discretion, at least as to those Plaintiffs' claims, for the reasons explained in Parts II.B.1-II.B.4.

In summary, we affirm the district court's certification of a Rule 23(b)(2) class insofar as the class consists of current employees (as of the date the complaint was filed), with respect to claims for injunctive relief, declaratory relief, and back pay. On remand, the district court should analyze whether certification under Rule 23(b)(2) or Rule 23(b)(3) is appropriate for the punitive damages claims and whether an additional class or classes may be appropriate under Rule 23(b)(3) with respect to the claims of former employees. The court may, if appropriate, certify an additional class or classes under Rule 23(b)(3).

IV. CLASS ACTION CAN PROCEED IN A WAY THAT IS BOTH MANAGEABLE AND IN ACCORDANCE WITH DUE PROCESS

[33] The district court was cognizant of the large size of the class when it concluded that the class size was not unmanageable. *See Dukes*, 222 F.R.D. at 173. Indeed, the district court acknowledged that, "[w]hile courts possess wide discretion to flexibly respond to manageability issues that may arise during the course of a class action, this Court must be confident that such issues will not be of such a magnitude as to defy its ability to oversee this case in a responsible and reasonable manner." *Id.* (citation omitted). After "giv[ing] these matters considerable thought and deliberation," the district court concluded that, with one minor exception,[48] "the size of the class would not present undue obstacles to managing" this class action. *Id.*

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[47] For this reason, the dissent's observation, Dissent at 6240, that four of the lead plaintiffs have left Wal-Mart since filing their complaint, is irrelevant. Their standing was established as of that date and they were under no obligation to continue to work for Wal-Mart throughout several years of subsequent litigation in order to maintain their legal rights.

To demonstrate the manageability of the class action, the district court outlined a trial plan based, in large part, on how other courts have handled similarly large and complex class action suits.[49] Wal-

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[48] This one exception related to Plaintiffs' promotion claim. The district court determined that it would be unmanageable to fashion a remedy for the subset of the class for whom objective applicant data did not exist. *See Dukes*, 222 F.R.D. at 183. As discussed above, the district court did not abuse its discretion in its analysis and resolution of this issue.

[49] The trial plan described by the district court involved two stages. In Stage I, Plaintiffs would attempt to prove that Wal-Mart engaged in a pattern and practice of discrimination against the class via its company-wide employment policies and that the pattern or practice "was undertaken maliciously or recklessly in the face of a perceived risk that defendant's actions would violate federal law." *Dukes*, 222 F.R.D. at 173. If Plaintiffs prevailed in Stage I, the case would move to Stage II, the remedy phase. The first task in Stage II would be to fashion class-wide injunctive relief. The second task would be to calculate and distribute the back pay award. As to Plaintiffs' promotional claim, a formula would be used to calculate the "lump sum" in back pay that Wal-Mart owes to the class (a procedure similar to that employed in *Domingo*, 727 F.2d at 1444-45). As to Plaintiffs' equal pay claim, the court would examine Wal-Mart's employment records to determine which class members were victims of this form of discrimination (and how much in back pay each is owed) to determine a second "lump sum" owed by Wal-Mart. *Dukes*, 222 F.R.D. at 174-86. A separate

Mart, supported by a number of business-related amici,[50] contend that at least some aspects of this trial plan violate their due process rights, as well as section 706(g)(2) of Title VII,[51] the Rules Enabling Act,[52] and the Supreme Court's decision in *Teamsters*, 431 U.S. at 359-60.[53]

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procedure would then be used to distribute these lump sums to those class members entitled to share in them — a stage in which Wal-Mart would no longer have an interest. *Id.* at 179 n.49.

[50] The court was favored with an extraordinary variety of amicus briefs that were both thoughtful and helpful to it in its deliberations.

[51] This section states that "[n]o order of the court shall require . . . the payment to [a person] of any back pay, if such individual . . . was refused employment or advancement or was suspended or discharged for any reason other than [unlawful] discrimination" and that, "[o]n a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court . . . shall not award damages." Title VII, § 706(g)(2) (codified at 42 U.S.C. § 2000e-5(g)(2)).

[52] This statute states that the Federal Rules of Civil Procedure, including Rule 23 regarding class actions, "shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." 28 U.S.C. § 2072(b).

[53] The dissent also argues that Wal-Mart "has a statutory right, recognized by the Supreme Court, to prove that its actions against individual employees were not discriminatory," which the dissent understands to mean that the district "court must allow up to 1.5 million individual determinations of liability." Dissent at 6238, 6265. However, as the dissent recognizes, this case is at least largely one for prospective relief,

[34] At this stage, we express no opinion regarding Wal-Mart's objections to the district court's tentative trial plan (or that trial plan itself), but simply note that, because there are a range of possibilities—which may or may not include the district court's proposed course of action—that would allow this class action to proceed in a manner that is both manageable and in accordance with due process, manageability concerns present no bar to class certification here.

For example, in *Hilao v. Estate of Marcos*, 103 F.3d 767, 782-87 (9th Cir. 1996), the district court employed the following procedure to determine the

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which is available once a pattern and practice of discriminatory conduct is proven. The dissent ignores that the pattern and practice *has* to be proven on a group basis. *Teamsters*, 431 U.S. at 336 (Plaintiffs have "to prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts. [They] ha[ve] to establish by a preponderance of the evidence that [gender] discrimination was the company's standard operating procedure—the regular rather than the unusual practice."). It is both uneconomical and inefficient to do so in individual actions. In fact, since *Teamsters*, we have affirmatively held that the district court may award class-wide relief at the damages phase of a Title VII class action without individualized hearings. *See Domingo*, 727 F.2d at 1444 ("The facts of this case justify a departure from an individualized remedy for each claimant . . . [because the defendant's] lack of objective hiring criteria and use of word-of-mouth recruitment . . . makes it difficult to determine precisely which of the claimants would have been given a better job absent discrimination, but it is clear that many should have." (citations omitted)). The dissent's view would thus essentially preclude class members from either obtaining relief that is available or proving the prima facie portion of the damages case under *Teamsters*.

amount of compensatory damages due the plaintiffs in a large class action:[54]

> In all, 10,059 claims were received. The district court ruled 518 of these claims to be facially invalid, leaving 9,541 claims. From these, a list of 137 claims was randomly selected by computer. This number of randomly selected claims was chosen on the basis of the testimony of James Dannemiller, an expert on statistics, who testified that the examination of a random sample of 137 claims would achieve "a 95 percent statistical probability that the same percentage determined to be valid among the examined claims would be applicable to the totality of claims filed." . . . .
>
> The district court then appointed Sol Schreiber as a special master (and a court-appointed expert under Rule 706 of the Federal Rules of Evidence). Schreiber supervised the taking of depositions . . . of the 137 randomly selected claimants . . . .

Id. at 782 (subheading omitted)." Schreiber then reviewed the claim[s]," and "[h]e recommended that 6 claims of the 137 in the sample be found not valid." *Id.* at 782-83." Schreiber then recommended the amount of damages to be awarded to the 131 [remaining] claimants." *Id.* at 783.

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[54] *Hilao* was a 10,000+ plaintiff class action filed by Philippine nationals and their descendants who were allegedly victims of torture, summary execution, and "disappearance" at the hands of Ferdinand E. Marcos, the Philippines' former president.

Based on his recommendation that 6 of the 137 claims in the random sample (4.37%) be rejected as invalid, he recommended the application of a five-per-cent invalidity rate to the remaining claims.

. . . .

He recommended that the award to the class be determined by multiplying the number of valid remaining claims . . . by the average award recommended for the . . . claims . . . .

. . . .

By adding the recommended awards . . . Schreiber arrived at a recommendation for a total compensatory damage award . . . .

. . . .

A jury trial on compensatory damages was [then] held . . . [Hilao's statistical expert] testified that the selection of the random sample met the standards of inferential statistics, that the successful efforts to locate and obtain testimony from the claimants in the random sample "were of the highest standards" in his profession, that the procedures followed conformed to the standards of inferential statistics, and that the injuries of the random-sample claimants were representative of the class as a whole. Testimony from the 137 random-sample claimants and their witnesses was introduced. Schreiber testified as to his recommendations, and his report was supplied to the jury. The jury was instructed that it could accept, modify or reject Schreiber's recommendations and that it could independently, on the basis of the evidence of the random-sample claimants, reach

> its own judgment as to the actual damages of those claimants and of the aggregate damages suffered by the class as a whole.
>
> The jury deliberated for five days before reaching a verdict. Contrary to the master's recommendations, the jury found against only two of the 137 claimants in the random sample. As to the sample claims, the jury generally adopted the master's recommendations, although it did not follow his recommendations in 46 instances. As to the claims of the remaining class members, the jury adopted the awards recommended by the master. The district court subsequently entered judgment for 135 of the 137 claimants in the sample in the amounts awarded by the jury, and for the remaining plaintiffs . . . in the amounts awarded by the jury, to be divided pro rata.

Id. at 783-84 (subheadings and footnotes omitted).

On appeal, the *Hilao* court was presented with some of the same objections to its trial plan as Wal-Mart presents here.[55] After a lengthy discussion, however, the *Hilao* court rejected these challenges and approved of the trial plan, addressing the due process issue as follows:

> While the district court's methodology in determining valid claims is unorthodox, it

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[55] For example, the defendant in *Hilao* argued that the trial plan "violated its rights to due process because individual questions apply to each subset of claims, *i.e.*, whether the action was justified, the degree of injury, proximate cause, etc." 103 F.3d at 785 (internal quotation marks omitted).

> can be justified by the extraordinarily unusual nature of this case. " 'Due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria and Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 . . . (1961).
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> . . . .
>
> The interest of the [defendant] that is affected is at best an interest in not paying damages for any invalid claims. . . . The statistical method used by the district court obviously presents a somewhat greater risk of error in comparison to an adversarial adjudication of each claim, since the former method requires a probabilistic *prediction* (albeit an extremely accurate one) of how many of the total claims are invalid. . . . Hilao's interest in the use of the statistical method, on the other hand, is enormous, since adversarial resolution of each class member's claim would pose insurmountable practical hurdles. The "ancillary" interest of the judiciary in the procedure is obviously also substantial, since 9,541 individual adversarial determinations of claim validity would clog the docket of the district court for years. Under the balancing test set forth in *Mathews* [*v. Eldridge*, 424 U.S. 319 (1976),] and [*Connecticut v.*] *Doehr*[, 501 U.S. 1 (1991)], the procedure used by the district court did not violate due process.

Hilao, 103 F.3d at 786-87 (footnote and citations omitted).

Because we see no reason why a similar procedure to that used in *Hilao* could not be employed in this case,[56] we conclude that there exists at least one method of managing this large class action that, albeit somewhat imperfect, nonetheless protects the due process rights of all involved parties.[57] Accordingly, we find no manageability-based reason to find this otherwise-certifiable class unsuited to class certification.

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[56] We note that this procedure would allow Wal-Mart to present individual defenses in the randomly selected "sample cases," thus revealing the approximate percentage of class members whose unequal pay or non-promotion was due to something *other* than gender discrimination. The "invalid claim rate" revealed by this process would, as it did in *Hilao*, come very close to the invalid claim rate one would expect to find among the entire class.

[57] We do not suggest that this is the *only* conceivable way in which this class action could lawfully progress. Indeed, the district court may want to consider whether a more limited "test case" procedure similar to that employed in *In re TMI Litig. Consol. Proceedings*, 927 F. Supp. 834, 837 & n.5 (M.D. Pa. 1996), would aid the parties in evaluating the strength of their respective claims.

And, of course, the option proposed by the district court may also remain viable; indeed, it appears that a number of circuits have approved of similar trial plans in discrimination cases. *See, e.g.*, *Segar*, 738 F.2d at 1291 (explaining why a similar trial plan did not violate § 706(g)(2) of Title VII and commenting that, "[i]f effective relief for the victims of discrimination necessarily entails the risk that a few nonvictims might also benefit from the relief, then the employer, as a proven discriminator, must bear that risk"); *see also Shipes*, 987 F.2d at 316-19; *Catlett v. Mo. Highway & Transp. Comm'n*, 828 F.2d 1260, 1266-67 (8th Cir. 1987). We point to the *Hilao* procedure above solely because this circuit has already considered and approved of that procedure.

CONCLUSION

For the reasons set forth above, we hold that the district court acted within its broad discretion in concluding that it would be better to handle some parts of this case as a class action instead of clogging the federal courts with innumerable individual suits litigating the same issues repeatedly. The district court did not abuse its discretion in finding the requirements of Rule 23 satisfied with respect to those Plaintiffs who were still Wal-Mart employees on June 8, 2001, and with respect to claims for injunctive and declaratory relief and back pay. Given the tentative nature of the district court's trial plan, we decline to address Wal-Mart's due process and manageability challenges to that plan. We note, however, that the district court has the discretion to modify or decertify the class should it become unmanageable. Although the size of this class action is large, mere size does not render a case unmanageable.

We deny Plaintiffs' cross-appeal, because the district court did not abuse its discretion when it found that back pay for promotions may be limited to those Plaintiffs for whom proof of qualification and interest exists. Finally, we must reiterate that our findings relate only to class action procedural questions; we neither analyze nor reach the merits of Plaintiffs' allegations of gender discrimination.

AFFIRMED in part; REMANDED in part. Each party to bear its own costs on appeal.

GRABER, Circuit Judge, concurring:

The majority and the dissent have written scholarly and complete explanations of their positions.

What the length of their opinions may mask is the simplicity of the majority's unremarkable holding:

> Current female employees may maintain a Rule 23(b)(2) class action against their employer, seeking injunctive and declaratory relief and back pay on behalf of all the current female employees, when they challenge as discriminatory the effects of their employer's company-wide policies.

If the employer had 500 female employees, I doubt that any of my colleagues would question the certification of such a class. Certification does not become an abuse of discretion merely because the class has 500,000 members.

I therefore concur fully in the majority opinion.

IKUTA, Circuit Judge, with whom Chief Judge KOZINSKI and Judges RYMER, SILVERMAN, and BEA join, dissenting:

No court has ever certified a class like this one, until now. And with good reason. In this case, six women who have worked in thirteen of Wal-Mart's 3,400 stores seek to represent every woman who has worked in those stores over the course of the last decade—a class estimated in 2001 to include more than 1.5 million women. According to the plaintiffs' theory, Wal-Mart has a corporate policy of discrimination which it implements through the discretionary decisions of store managers, resulting in class-wide injury in violation of Title VII of the Civil Rights Act of 1964.

But while the six plaintiffs allege they have suffered discrimination at the hands of a few individual store managers, they fail to present "[s]ignificant proof" of a discriminatory policy or practice of Wal-Mart that would make it possible to conclude that 1.5 million members of the proposed class suffered similar discrimination. *See Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 159 n.15 (1982). Without evidence of a company-wide discriminatory policy implemented by managers through their discretionary decisions, or other evidence of a discriminatory company-wide practice, there is nothing to bind these purported 1.5 million claims together in a single action. *See id.* at 158-59.

Then there is the problem of individual hearings. Under Title VII, Wal-Mart has the right to raise affirmative defenses as to each class member's claim. This means the court must allow up to 1.5 million individual determinations of liability. On its face, a class action of this sort makes no sense.

In certifying the class despite these obstacles, the district court abused its discretion. In affirming most of the district court's determinations, the majority compounds the error, and creates a precedent for class action suits that departs from the language and intent of Rule 23 of the Federal Rules of Civil Procedure, ignores Supreme Court mandates, and neglects the rights of defendants. I respectfully dissent.

I

A brief review of the facts highlights the obstacles to certifying this class. Wal-Mart is the largest private employer in the world, *Dukes v. Wal-Mart Stores, Inc.* (*Dukes I*), 222 F.R.D. 137, 141 (N.D. Cal. 2004), and the largest retail chain in the United States. At year-end 2001, when this suit was filed, Wal-Mart employed over 930,000 retail employees in hundreds of different jobs at roughly 3,400 stores nationwide.

Wal-Mart's corporate structure is complex. The company divides its retail operation into seven divisions, six for Wal-Mart and one for Sam's Club.[1] Those divisions are split into 41 separate regions, each of which is overseen by a regional vice president. The regions are further divided into roughly 400 individual districts, which are headed by district managers. Each of Wal-Mart's regions consists of 80 to 85 stores, with Wal-Mart employing anywhere from 80 to 500 people per store.

Individual stores are run by store managers who are responsible for hiring and promoting the hourly employees in their respective stores. At each store, assistant managers report to store managers; these management positions are salaried, and employees may be promoted to these positions after first working as entry-level, non-salaried management trainees. Wal-Mart's retail employees work hourly in 53 different departments and 170 different job classifications; these positions include cashiers, associates, team leads, and department managers.

Wal-Mart gives its managers substantial discretion in both pay and promotion decisions. Store managers make pay decisions for hourly employees, subject only to a general pay structure. *Id.* at 146. Store managers "are allowed to depart from the minimum start rates, within a two dollar per hour range, without being constrained by objective criteria and with limited oversight." *Id.* at 146-47. Wal-Mart also allows store managers to increase pay for exceptional performance. *Id.* at 147. District managers set the pay for salaried employees. They have "discretion to set pay rates with little guidance and limited oversight." *Id.*

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[1] Sam's Club is a separate corporate division within Wal-Mart, but operates in roughly the same manner and with a similar organizational structure as Wal-Mart.

Managers likewise have substantial discretion in making promotion decisions. Wal-Mart has corporate guidelines regarding entrance requirements for its management trainee program, but individual store managers may apply their own subjective criteria in selecting employees who will be invited to enter the program. *Id.* at 148. Decisions regarding advancement into the highest store-level managerial positions (assistant manager, co-manager, and store manager) are "similarly based on subjective assessments beyond adherence to corporate minimum guidelines." *Id.* Discretion is "further compounded by the fact that the company does not monitor the promotion decisions being made or otherwise systematically review the grounds on which candidates are selected for promotion." *Id.* at 149.

This action was brought by six women on behalf of all women who were employed in any retail store position throughout Wal-Mart. Two of these six women still work at Wal-Mart. Of the other four, one was terminated,[2] and three left Wal-Mart before the complaint was even filed.[3] In the aggregate, these six plaintiffs worked at ten stores in California, one store in Texas, one store in Oklahoma, and one store in Missouri. Three plaintiffs allege that they expressed interest in, or applied for, various promotions at the store in which they were then employed, but did not receive them. These three women allege that men were promoted instead. Only one of these plaintiffs, Christine Kwapnoski, has held a management position. Two plaintiffs allege that similarly situated men received higher pay. One plaintiff alleges that a less-qualified man received the same pay as she did.

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[2] Edith Arana was terminated in October 2001 for falsifying her time sheets.

[3] The complaint was filed in June 2001. Patricia Surgeson left Wal-Mart in March 2001 to take another job, Cleo Page resigned in November 2000 after she received a written warning

Together, these six women assert that they are adequate class representatives of a class comprising "[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998 who have been or may be subjected to Wal-Mart's challenged pay and management track promotions policies and practices." *Id.* at 141-42. The class includes every woman working in Wal-Mart's retail stores, which by definition encompasses salaried store managers who were responsible for the allegedly discriminatory hiring decisions,[4] assistant managers

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[Footnote continued from previous page]

for performance issues, and Deborah Gunter resigned in August 1999 after Wal-Mart reduced her hours.

[4] For example, proposed class representative Page alleges that she was passed over for promotion by her store manager, Monique Taylor. Proposed class representative Gunter complained about being passed over for a promotion by her store manager, Kathy Bishop, who Gunter also alleges brushed off allegations Gunter made about sexual harassment. Proposed class representative Kwapnoski discussed her interest in promotion with her assistant manager, Nancy Hom. Taylor, Bishop, and Hom are all members of the proposed class. This

and co-managers who were also responsible for much of the alleged discriminatory treatment, and hourly workers whose in-store positions range from personnel clerk to deli manager. At the time the suit was filed, the class was estimated to include 1.5 million women.[5]

II

Before it can certify a class, a court must ensure that the proposed class meets the standards set forth in Rule 23 of the Federal Rules of Civil Procedure. Rule 23 is a procedural rule that permits courts to aggregate the legal claims of multiple parties when it is efficient and fair to do so.[6] It does not alter the substance of claims or the plaintiffs' burden to prove their claims. *See* 28 U.S.C. § 2072(b).

[Footnote continued from previous page]

case features the unusual distinction of placing victims and their alleged victimizers on the same side of the counsel table.

[5] The majority criticizes the dissent for pointing out the large size of the class, reasoning that the class size may decrease by up to two-thirds if past employees are excluded. *See* Maj. Op. at 6148 n.3. In determining whether the district court abused its discretion, however, we must consider the class actually certified by the district court, which included past employees. *Dukes I*, 222 F.R.D. at 188. Moreover, as explained below, the reasons this class cannot be certified apply with equal force regardless of whether the class represents 1.5 million individuals or the class of 500,000 envisioned by the majority.

[6] Rule 23(a) of the Federal Rules of Civil Procedure provides that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all members only if" the class meets the prerequisites of numerosity, commonality, typicality, and adequacy of representation.

We review the district court's class certification decisions for abuse of discretion. *Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir. 2003). Abuse of discretion occurs when the district court commits a legal error, or when it "relies upon an improper factor, omits consideration of a factor entitled to substantial weight, or mulls the correct mix of factors but makes a clear error of judgment in assaying them." *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 939 (9th Cir. 2009) (citation and internal quotation marks omitted).

Here, the district court abused its discretion in two ways. First, it failed to follow the Supreme Court's direction to "evaluate carefully the legitimacy of the named plaintiff's plea that he is a proper class representative under Rule 23(a)." *Falcon*, 457 U.S. at 160, and to ensure "after a rigorous analysis" that the prerequisites of Rule 23(a) have been met, *id.* at 161. Second, the district court erred in ignoring Wal-Mart's statutory right to raise defenses to liability for back pay and punitive damages under Title VII, *see* 42 U.S.C. § 2000e-5(g)(2); Rules Enabling Act, 28 U.S.C. § 2072(b), and therefore abused its discretion in holding that the proposed class could be certified under Rule 23(b)(2). I would reverse and remand this action to the district court to correct these errors, which I address below in turn.

A

In *Falcon*, the Supreme Court held that when a small number of plaintiffs allege company-wide discrimination and attempt to certify a company-wide class, the district court must undertake a "rigorous analysis" to determine whether the Rule 23(a) commonality and typicality factors exist.[7] *Falcon*, 457 U.S. at 157, 161; *see Staton*, 327 F.3d at 953-54 (calling a proposed class of 15,000 members throughout six facilities an "ambitious" claim for commonality that was "therefore especially worthy of scrutiny"). As *Falcon* explained, the plaintiff's own experience of discrimination does not allow the district court to infer that "discriminatory treatment is typical of [the employer's employment] practices." 457 U.S. at 158; *see E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403-04 (1977). Indeed, the Court warned, "if one allegation of specific discriminatory treatment were sufficient to support an across-the-board attack, every Title VII case would be a potential company-wide class action." *Falcon*, 457 U.S. at 159. Instead, to maintain a company-wide class action based on discrimination, the plaintiff must bridge the "wide gap" between: (1) the plaintiff's own discriminatory treatment; and (2) the existence of a class that has suffered the same injury as the plaintiff as a result of a company-wide discriminatory policy. *Id.* at 157.

This principle is simple common sense. A female employee in a store in California, for example, may have a valid claim that her supervisor discriminated against her when making decisions regarding promotion opportunities. But this individual claim would not by itself entitle the California employee to bring the alleged discrimination claims of female employees in a store in Wyoming. Absent evidence that the Wyoming employees had been subject to the same sort of discrimination and could bring the same sort of claims, such a proposed class would clearly fail the Rule 23(a) commonality and typicality requirements. A fortiori, a female employee in California could not represent a class of all female employees in Wal-Mart absent similar proof to bridge the gap between her claim and the existence of company-wide discrimination.

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[7] The term "commonality" refers to the requirement in Rule 23(a) that "there are questions of law or fact common to the class"; "typicality" refers to the requirement that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a). *Falcon* noted that "[t]he commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." 457 U.S. at 158 n.13.

The Supreme Court has identified two situations in which a plaintiff could potentially bridge this gap. The first is where a plaintiff alleges that an employer "used a biased testing procedure" to evaluate all members of the proposed class. *Id.* at 159 n.15. This makes sense because if the employer used a biased testing procedure throughout the company, then every employee subject to the test would have a similar claim.

The Court's second example applies directly to this case: a plaintiff "conceivably" could bring a company-wide Title VII action if the plaintiff adduced "[s]ignificant proof that an employer operated under a general policy of discrimination" and the discriminatory policy was implemented through "entirely subjective decision making processes" in a manner that affected all members of the class. *Id.* This example also makes sense. As the majority acknowledges, Maj. Op. at 6208, subjective decision making by itself is not a discriminatory practice. *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 988, 990

(1988) ("It is true, to be sure, that an employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct."). But if an employer has a company-wide policy of discrimination against women, and the employer implements this policy through company-wide subjective decision making, then the plaintiff could reasonably claim that all female employees were subject to the same discriminatory employment practice. As in our prior example, if the female employee in the California store could offer proof of a company-wide policy of discrimination against women, she would be able to allege that female employees in stores throughout the country suffered a similar discriminatory injury as she did.

Although *Falcon* did not spell out what constitutes "significant proof" of the existence of a general policy of discrimination, it did make one thing clear: Evidence of discrete instances of discrimination are insufficient to sustain an inference of an employer's general policy and do not rise to the level of "significant proof." *See* 457 U.S. at 158 (holding that evidence that the plaintiff "was passed over for promotion when several less deserving whites were advanced" may support a claim of individual discrimination, but "would not necessarily justify" a company-wide claim of discrimination). This is the standard that must be applied to the claims here.

B

The majority offers several reasons for concluding it is not bound by *Falcon*'s "significant proof" requirement. First, the majority claims that this requirement has little weight because it was a "hypothetical in clear dicta."[8] Maj. Op. at 6178 n.15. This contention has no merit. We are bound by the Supreme Court's instructions whether they are stated in the first sentence of an opinion or in the final footnote. *Falcon*'s analysis of Rule 23(a) is controlling here, given that it is the sole Supreme Court case addressing Rule 23(a) in the Title VII discrimination context and is directly on point in this case. Moreover, the significant proof requirement is clearly a reasonable interpretation of Rule 23(a); a plaintiff cannot bring a company-wide discrimination class action unless there is sufficient evidence that the alleged discriminatory injury actually affected employees throughout the company.

Second, the majority attempts to cabin *Falcon* to its facts, asserting that the "significant proof" requirement applies only when the plaintiff is an employee of the company and other members of the purported class are job applicants. In such a case, the majority asserts, the plaintiff and the purported members of the class have "distinct legal theories of recovery." Maj. Op. at 6179. The majority's efforts to distinguish *Falcon* on this ground are unpersuasive. *Falcon*'s determination that the district court erred in certifying a class of existing employees and job applicants was based on the general principle that a plaintiff's claims must "fairly encompass" those of the class to meet the Rule 23(a) commonality and typicality requirements. *See Falcon*, 458 U.S. at 156. In elaborating further on this principle, the Supreme Court explained that plaintiffs who seek to bridge the gap between their claims and those of the class members by alleging a general company-wide policy of discrimination must adduce "significant proof" that such a policy exists. *Id.* at 159 n.15. The Supreme Court did not limit this principle to classes combining plaintiffs with hiring and promotion claims.

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[8] To support this point, the majority cites to a dissent from the denial of rehearing en banc, *Lopez-Rodriguez v. Holder*, 560 F.3d 1098 (9th Cir. 2009), which provides no support. *See* Maj. Op. 6178-79 n.15. *Lopez-Rodriguez* merely stated that the Supreme Court's language should not be applied "to create a new rule—one [the Court] never envisioned." Maj. Op. at 6178 n.15 (quoting *Lopez-Rodriguez*, 560 F.3d at 1099). This truism does not support the majority's position that we have the option to ignore the Supreme Court's guidance on an issue directly before the Court, as in *Falcon*.

Finally, the majority claims that *Falcon's* "significant proof" requirement conflates the class certification and merits phases of the litigation. Maj. Op. at 6180 n.17. This is incorrect. *Falcon* does not require plaintiffs to prove the merits of their claim; here, for example, plaintiffs need not establish a prima facie case of discrimination that can survive the employer's rebuttal evidence, nor need they prove their claims for individual relief. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 360 (1977). But *Falcon* does require the plaintiffs to put forth some significant proof, i.e., evidence beyond allegations, that a general policy of discrimination exists. *Falcon*, 457 U.S. at 159 n.15. More important, as *Falcon* states (and as the majority acknowledges), courts at the class certification stage must "probe behind the pleadings" to examine evidence which goes to the requirements of Rule 23, even if such evidence also relates to the underlying merits of the case. *Id.* at 160. In this context, the degree of overlap between the merits determination and the determination that the class meets the Rule 23 requirements is largely irrelevant. *Id.* Rather, *Falcon*'s principle that a handful of individual incidents of discrimination are insufficient for class certification is applicable both at the merits stage and the class certification stage. *See Cooper v. Fed. Reserve Bank*, 467 U.S. 867, 876-77 (1984). If plaintiffs cannot demonstrate that the proposed class was subject to a general policy of discrimination, then the class action is not an efficient mechanism for pursuing relief, and the district court may not certify the class.

C

We must consider plaintiffs' motion for class certification under Rule 23(a) in light of *Falcon*'s requirements. In this case, the plaintiffs asked the district court to certify a class of 1.5 million women based on: (i) 120 anecdotes; (ii) statistical evidence; and (iii) expert testimony.[9] In light of *Falcon*, the district court's responsibility to conduct a rigorous scrutiny of this evidence was clear. As explained below, the evidence does not come close to meeting the *Falcon* requirements for demonstrating commonality and typicality.

1

On its face, 120 anecdotes, or one anecdote for every 12,500 class members, does not support plaintiffs' claim that Wal-Mart had a company-wide policy of discrimination. The affidavits describe the affiants' experiences in, at most, 235 of Wal-Mart's 3,400 stores, meaning that the affidavits provide no information about working conditions in over 3,100 stores. A single affidavit from a single store in Michigan tells little about whether there is discrimination at each of the other 72 stores in Michigan, let alone the rest of the company. *Cooper*, 467 U.S. at 877-78; *see Cooper v. S. Co.*, 390 F.3d 695, 714-15 (11th Cir. 2004) (holding that evidence of discrimination in one part of a company does not necessarily give rise to an inference of discrimination in a different part of the company), *overruled on other grounds by Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 457-58 (2006) (per curiam).

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[9] As pointed out by the majority, the plaintiffs also produced "facts supporting the existence of company-wide policies and practices." Maj. Op. at 6187. Because it is undisputed that Wal-Mart maintains uniform company-wide policies, and because the mere existence of company-wide policies says nothing about whether such policies are discriminatory, there is no need to discuss such "facts" separately from plaintiffs' other purported evidence.

Nor are the 120 affidavits geographically representative of Wal-Mart as a whole. *See Cooper*, 390 F.3d at 719 (upholding the district court's determination that, "given the sheer size and geographically dispersed nature of the defendants' workforce, the anecdotal evidence—disturbing as some of it may have been—was inadequate to establish discrimination class-wide"). Here, more than half of the 120 women who submitted affidavits are concentrated in only six states—Alabama, California, Florida, Missouri, Texas, and Wisconsin—where less than a third of Wal-Mart stores are located. There are no more than one or two affidavits relating to Wal-Mart operations in half the states, and 14 states are not represented at all.[10]

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[10] The number of Wal-Mart stores and managers set forth in this paragraph are based on information provided by plaintiffs' expert, Dr. Marc Bendick, and are current as of 1999.

The Supreme Court has held that a court may find a company-wide policy of discrimination where plaintiffs have offered a substantial number of affidavits compared to the size of the class, along with sufficient statistical evidence.[11] *Teamsters*, 431 U.S. at 339. In *Teamsters*, for example, 40 anecdotes of discrimination out of a class of some 334 employees (one out of every eight class members) were held probative of a pattern or practice of discrimination. *See United States v. T.I.M.E.-D.C., Inc.*, 517 F.2d 299, 308 (5th Cir. 1975), *overruled by Teamsters*, 431 U.S. 324. These 40 anecdotes were from employees spread throughout the company and represented seven of the company's ten largest operations. *See id.* at 315 & n.30.

On the other hand, the Supreme Court has concluded that a handful of discriminatory incidents is insufficient evidence of a company-wide policy of discrimination to justify certification of a company-wide class. *Falcon*, 457 U.S. at 159. A plaintiff's individual experience of discriminatory treatment does not itself raise the inference that such treatment is typical of the employer's practices. *Id.* at 158; *see Cooper*, 467 U.S. at 877-78 ("[A] class plaintiff's attempt to prove the existence of a companywide policy, or even a consistent practice within a given department, may fail even though discrimination against one or two individuals has been proved.").

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[11] Until today, this circuit's largest stretch to uphold certification in an employment discrimination class action based on a small number of incidents of discrimination occurred in *Staton*, where 237 individuals sought to represent a class of 15,000 African American employees. 327 F.3d at 948 n.4, 953. Cautioning that this was an "ambitious" claim for commonality that was "especially worthy of scrutiny," *id.* at 954, we nevertheless upheld the district court's class certification. In doing so, we noted that plaintiffs' lawyers interviewed more than 1,300 employees from facilities across the country, filed detailed documentation of discrimination experienced by 200 of those employees, and produced a company-wide internal survey to support their claims of class-wide racial discrimination. *Id.* Accordingly, at a minimum, the plaintiffs presented anecdotal evidence from one out of every 75 class members. No court, however, has ever held that one anecdote could suffice to represent the experiences of as vast a number as 12,500 class members.

Here, 120 affidavits compared to 1.5 million members of the class amount to nothing more than evidence of "isolated or sporadic" incidents of discrimination, *Cooper*, 468 U.S. at 876, which are insufficient to show a company-wide policy of discrimination. *See Falcon*, 457 U.S. at 159. The affiants claim discrimination in different forms, at the hands of different people, in different stores, in different parts of the country, at different times, and under a constellation of facts unique to each individual. Whether or not these 120 employees have actionable discrimination claims against the store and management where they worked, their individual stories do not constitute significant proof that Wal-Mart has adopted a general policy of discrimination or that such a policy prevails in the remaining 3,100 stores. In relying on such scanty anecdotal evidence to support class certification, the district court failed to "probe behind the pleadings" to determine whether the six plaintiffs actually did "possess the same interest and suffer the same injury" as the proposed class members. *Id.* at 160.

The majority makes the same mistake. Discarding Wal-Mart's objection that the district court abused its discretion in considering the 120 affidavits to be an adequate basis for certifying the class, the majority states, "we find no authority requiring or even suggesting that a plaintiff class submit a specific number of declarations for such evidence to have any value." Maj. Op. at 6205. This is a straw-man argument. The Supreme Court has not specified a threshold number of affidavits that a plaintiff alleging company-wide discrimination must have in hand. But if the plaintiff's affidavits do not raise the inference that the employer's practices are "motivated by a policy of [gender] discrimination" pervading the employer's company, they do not support class certification. *Falcon*, 457 U.S. at 158. Here, the majority's conclusion that one declaration for every 12,500 women, amounting to a handful of declarations scattered among 3,400 stores in fifty states, "raise[s] an inference of common discriminatory experiences," Maj. Op. at 6206, does not pass even the straight-faced test.

2

The plaintiffs' statistical evidence is no better. Plaintiffs relied most heavily on the statistical study produced by Dr. Richard Drogin, a retired professor of statistics from California State University, Hayward. Drogin conducted a regional analysis comparing the percentage of women promoted into management positions at Wal-Mart with the percentage of women in the available pool of hourly workers, and concluded that women were underrepresented in management in almost every one of Wal-Mart's 41 regions. Drogin also compared the earnings of women to the earnings of men at Wal-Mart and concluded that in each region, Wal-Mart pays women less than men in comparable hourly positions.

Wal-Mart objected to this evidence on the ground that data aggregated at the regional or national level did not demonstrate there was a general policy of discrimination throughout Wal-Mart's 3,400 individual retail stores. The district court dismissed these objections. Rejecting what it characterized as Wal-Mart's effort "to engage the Court in a merits evaluation of the expert opinions," the district court stated it would "delve[ ] into the substance of the expert testimony only to the extent necessary to determine if it is sufficiently probative of an inference of discrimination to create a common question as to the existence of a pattern and practice of gender discrimination at Wal-Mart." *Dukes I*, 222 F.R.D. at 155. Applying this standard, the court held that Drogin's regional analysis was not "lacking in probative value," was "at least *a* reasonable means of conducting a statistical analysis," *id.* at 159, and therefore was sufficient to "create an inference of discrimination" for class certification purposes, *id.* at 164.

The district court's superficial examination of Drogin's statistics constituted legal error. The plaintiffs' class proposal hinged on its proof that Wal-Mart had a general policy of discrimination; absent convincing proof on that point, the plaintiffs could not bridge the gap between their discrimination claims and the purported claims of the class. Accordingly, the district court was obliged to scrutinize plaintiffs' evidence and make a reasoned determination as to whether it constituted significant proof that Wal-Mart had a general policy of discrimination, and thus whether the requirements of Rule 23(a) had been met. *See Falcon*, 457 U.S. at 161.

The district court expressly rejected this responsibility. Instead of rigorously analyzing whether the plaintiffs' evidence was significant proof of a general policy of discrimination, the district court made it Wal-Mart's burden to prove that Drogin's statistics were no longer probative or were "fatally flawed."

See Dukes I, 222 F.R.D. at 161-62; *see also id.* at 159 (concluding that Wal-Mart failed to persuade the court "that Dr. Drogin's regional analysis should be rejected . . . because it is lacking in probative value"); *id.* at 160 (concluding that "[Wal-Mart] has not discredited or nullified Dr. Drogin's results" with respect to Wal-Mart's objection that Drogin's methodology failed to account for a variety of relevant factors). The majority affirms this error by simply labeling the district court's analysis as "rigorous" and insisting (without analysis) that the district court adequately probed behind the pleadings.

Had the district court properly analyzed the evidence, it could not have concluded that Drogin's statistics constituted significant proof of plaintiffs' theory. Information about disparities at the regional and national level does not establish the existence of disparities at individual stores, let alone raise the inference that a company-wide policy of discrimination is implemented by discretionary decisions at the store and district level. As Wal-Mart's statistical expert, Dr. Joan Haworth, explained, the statistical disparities at the regional level could be due to decisions made at only a small percentage of Wal-Mart stores.[12] Indeed, Haworth concluded that, when data is considered at the store level, over 90 percent of Wal-Mart's stores showed no statistical difference in the hourly pay rates between men and women associates with similar work-related characteristics. Although Drogin argued that it was proper to conduct an analysis on a regional level because "the subjective decision-making in compensation and promotions takes place within parameters and guidelines that are highly uniform, and within a strong corporate culture," *Dukes I*, 222 F.R.D. at 157, this argument makes little sense. Among other things, this argument is contrary to the thrust of plaintiffs' legal theory, namely, that the decisions of individual managers regarding pay and promotions are subjective and not subject to uniform "parameters and guidelines." It is also contrary to the district court's own determination that "in-store pay and promotion decisions are largely subjective and made within a substantial range of discretion by store or district level managers." *Id.* at 152. More important, because statistical disparities may exist at the regional level even if the majority (or all) of the store managers made nondiscriminatory decisions at the store level,

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[12] In fact, Haworth pointed out that the statistical disparities between men and women at the regional level could also be the result of the aggregation of the data itself. This problem is known as "Simpson's Paradox," which refers to "illusory disparities in improperly aggregated data that disappear when the data are disaggregated." *Eng'g Contractors Ass'n of S. Fla. Inc. v. Met. Dade County*, 122 F.3d 895, 919 n.4 (11th Cir. 1997); *see also* P.J. Bickel, E.A. Hammel, & J.W. O'Connell, *Sex Bias in Graduate Admissions: Data from Berkeley*, 187 Science 398 (1975) (using Simpson's Paradox to explain how researchers

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found a statistically significant bias in favor of male applicants when analyzing admissions data from all 101 of Berkeley's graduate departments, despite the fact that only 4 departments had a statistically significant bias in favor of males and 6 departments had a statistically significant bias in favor of females). As the article cited by the majority shows, it is especially likely that Drogin's statistics would display illusory disparities, because Drogin based his study on pre-existing information that was collected from a large sample size. *See* Marios G. Pavlides & Michael D. Perlman, *How Likely Is a Simpson's Paradox*, 63 Am. Statistician 226, 230 (2009).

Drogin's data is not sufficiently probative of conditions at the store level to constitute significant proof of the existence of a class subjected to a policy of company-wide discrimination.[13]

The majority disposes of Wal-Mart's objection that regional data is not indicative of a general discriminatory policy at individual stores by criticizing Wal-Mart's statistics, which aggregated data at the sub-store rather than the store level, an approach the district court had previously allowed. *Dukes I*, 222 F.R.D. at 157 n.25. But the quality of the defendant's statistics is not the issue here; rather, it is the plaintiffs' burden to produce significant proof of a policy of discrimination across Wal-Mart that manifested itself in similar ways throughout the company. *See Falcon*, 457 U.S. at 160. Plaintiffs' statistics lack probative value even without Wal-Mart's opposing data.

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[13] The district court also relied on a study prepared by Dr. Marc Bendick, Ph.D., an economist and consultant, which made a company-wide comparison of Wal-Mart with twenty purportedly similar (but much smaller) retail companies. The study concluded that on a company-wide basis Wal-Mart promoted a smaller percentage of women than its competitors. Again, the district court applied the wrong legal standard. Instead of conducting a rigorous evaluation of the evidence as required by *Falcon*, it accepted Bendick's study at face value because it held it was "sufficiently probative to assist the Court in evaluating the class certification requirements at issue in this case." *Dukes v. Wal-Mart, Inc.* (*Dukes II*), 222 F.R.D. 189, 195 (N.D. Cal. 2004). In fact, Bendick's study did not provide support for plaintiffs' claim that the 1.5 million women in the class were subject to discriminatory treatment in promotions, because it too failed to provide information derived from the level at which promotion and pay decisions were actually made.

Finally, the district court committed legal error by failing to test the reliability of the expert opinion of William Bielby, Ph.D., as required by Federal Rule of Evidence 702[14] and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993). In brief, Bielby presented his theory that subjective decision making, such as that which occurs at Wal-Mart stores, is "susceptible to unconscious discriminatory impulses."[15] Wal-Mart moved to strike

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[14] Federal Rule of Evidence 702 states that:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

[15] The majority cites to Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 Fordham L. Rev. 37 (2009), for a description of Bielby's "social framework analysis." Maj. Op. at 6189 n.21. In employment discrimination litigation, social framework experts purport to summarize social science research regarding the workplace to give the finder of fact a "context" in which to decide key legal issues. Hart & Secunda, *supra*, at 44. The article by Hart and Secunda discusses the dispute among social psychologists over whether it is appropriate for experts like Bielby to use social framework analysis to draw specific factual conclusions about a company's operations without the use of case-specific research. *See id.* at 51-55. The controversy over the reliability of this methodology highlights the need for a proper *Daubert* inquiry here.

Bielby's testimony on the ground that his opinion was not reliable. According to Wal-Mart, Bielby failed to apply the same standards to his work in preparing his testimony that he applied to his work as a scientist. Wal-Mart alleged, *inter alia*, that Bielby had misrepresented aspects of the literature upon which he relied, made unsustainable extrapolations from that literature, failed to consider evidence that tended to undermine his theory, and failed to test his data.

Instead of evaluating the reliability of Bielby's report in light of Wal-Mart's arguments, the district court denied Wal-Mart's motion on the ground that "courts should not even apply the full *Daubert* 'gatekeeper' standard" at the class certification stage. *Dukes II*, 222 F.R.D. at 191. Rather, the district court held that "[t]he appropriate question at this stage of the litigation is not whether Dr. Bielby can make a conclusive determination, but whether [his opinion] could add probative value to the inference of discrimination that plaintiffs allege." *Dukes I*, 222 F.R.D. at 154. Concluding that the report was not "so flawed that it lacks sufficient probative value to be considered in assessing commonality," the district court relied on Bielby's report in making its determination that plaintiffs met the Rule 23(a) requirements. *Dukes II*, 222 F.R.D. at 192.

In so ruling, the district court misunderstood *Daubert* and the level of inquiry required at the class certification stage. The purpose of conducting a *Daubert* inquiry is to ensure that proffered expert testimony is relevant and reliable. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). "It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id.* To this end, a court must make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592-93. Courts are obliged to address allegations that an expert's opinion is not supported by the data, and may reject "opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

These principles are equally applicable in the class certification context. The district court must "assess all of the relevant evidence admitted at the class certification stage and determine whether each Rule 23 requirement has been met, just as the judge would resolve a dispute about any other threshold prerequisite for continuing a lawsuit." *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006). Like any other evidence, expert evidence introduced to "establish a component of a Rule 23 requirement" must be reliable; it is not enough that the expert testimony is "not fatally flawed." *Id.*; *see also Am. Honda Motor Co. v. Allen*, No. 09-8051, slip op. at 6 (7th Cir. April 7, 2010) (holding that the court must conduct a *Daubert* analysis on key expert testimony even at the class certification stage); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 323 (3d Cir. 2008) ("Expert opinion with respect to class certification, like any matter relevant to a Rule 23 requirement, calls for rigorous analysis."). A court cannot reasonably certify a class based on evidence that is not "based upon sufficient facts or data, . . . the product of reliable principles and methods," and the product of reliable application of the methods to the facts. Fed. R. Evid. 702. Although a district court has considerable discretion under *Daubert*, there is no basis for the district court's conclusion that it can forego a reliability inquiry altogether. The district court abused its discretion in doing so.[16]

The majority's discussion of this claim misses the mark entirely. First, instead of engaging the question whether the district court properly tested the reliability of Bielby's testimony, the majority simply concludes that "Dr. Bielby presented scientifically reliable evidence." Maj. Op. at 6193. This not only assumes the answer to the very question at issue, but is wrong on its face: The district court explicitly did not consider whether the evidence was "scientifically reliable," holding instead that the evidence was not "so flawed that it lacks sufficient probative value to be considered in assessing" whether class certification was appropriate. *Dukes II*, 222 F.R.D. at 192.[17]

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[16] The majority writes that it is "not convinced by the dissent's argument that *Daubert* has exactly the same application at the class certification stage as it does to expert testimony relevant at trial." Maj. Op. at 6191 n.22. But the majority never accounts for why it is "not convinced," nor does it explain why the district court can rely on an expert's testimony that is not reliable, at the class certification stage or any other. Rule 702 and the Supreme Court make clear that evidence that is not scientifically valid does not " 'assist the trier of fact to understand the evidence or to determine a fact in issue.' " *Daubert*, 509 U.S. at 589 (quoting Fed. R. Evid. 702).

[17] The majority errs in suggesting that the district court performed a proper *Daubert* inquiry, see Maj. Op. at 6191-92 n.22, because it stated that Bielby's opinion "is based on valid principles." *Dukes II*, 222 F.R.D. at 192. Whether Bielby based his testimony on valid principles says nothing about whether he applied those principles via a valid methodology to produce

The majority focuses its discussion on what it characterizes as Wal-Mart's objection to the persuasiveness of Bielby's testimony. According to the majority, Wal-Mart "did not (and does not) challenge Dr. Bielby's methodology." Maj. Op. at 6190. In fact, Wal-Mart never challenged the persuasiveness of Bielby's testimony, but rather challenged Bielby's methodology, a challenge that is proper under *Daubert*. *See Daubert*, 509 U.S. at 592-93; *see also Joiner*, 522 U.S. at 144. By missing this point, the majority erroneously approves the district court's reliance on an arguably unreliable expert opinion.

D

When plaintiffs' evidence is subjected to the rigorous inquiry required by *Falcon*, it is inadequate to bridge the gap between the six plaintiffs' claims of individual discrimination and a class-wide claim of company-wide discrimination. None of plaintiffs' evidence is probative of company-wide discrimination. Every piece of evidence merely purports to support another. While plaintiffs' anecdotes do not show company-wide discrimination, plaintiffs argue they support the statistical evidence. The statistics are not probative of a company-wide policy of discrimination, but plaintiffs allege they may be "attributable" to such a policy when viewed in connection with Wal-Mart's uniform corporate policies. Maj. Op. at 6187-88. The uniform corporate policies are not themselves discriminatory but, according to plaintiffs, provide a potential "conduit" for discrimination. Maj.

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relevant and reliable evidence, which is the critical issue under *Daubert*.

Op. at 6187. The expert opinions do not point to discrimination on a company-wide basis, but merely "support[ ] the existence of company-wide policies and practices that *likely* include a culture of gender stereotyping." Maj. Op. at 6187 (emphasis added). And Wal-Mart's corporate policy of subjective decision making is not discriminatory in itself but, plaintiffs urge, may be evidence of company-wide discrimination in light of the statistical evidence and anecdotes. Maj. Op. at 6207. Like the proverbial shell game, the plaintiffs' circular presentation cannot conceal the fact that they have failed to offer any significant proof of a company-wide policy of discrimination, no matter which shell is lifted.

By taking the district court's determination at face value, the majority erroneously accepts a chain of weak inferences as sufficient to carry plaintiffs' burden of adducing significant proof that Wal-Mart "operated under a general policy of discrimination" that affected all members of the class. *Falcon*, 457 U.S. at 159 n.15. Any reasonable scrutiny of the evidence in this case compels the conclusion that although the six plaintiffs here may have individualized claims of discrimination, they cannot represent a class of 1.5 million past and present employees. The district court abused its discretion in holding that the plaintiffs met the commonality and typicality requirements of Rule 23(a).

III

Even assuming the district court was correct in concluding that the proposed class satisfied the Rule 23(a) standard, the district court made two crucial errors when it certified the class under Rule 23(b)(2). First, the district court failed to consider whether it could protect the parties' substantive rights in the class action context. Although the plaintiffs were bringing Title VII claims, the district court erroneously concluded that it had no obligation to allow Wal-Mart to raise the statutory defenses provided by Title VII. This was an error: A court must ensure that its certification of a class does not affect the substantive rights of either party. *See* Rules Enabling Act, 28 U.S.C. § 2072(b)[18]; *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) ("[N]o reading of the Rule can ignore the Act's mandate that rules of procedure shall not abridge, enlarge or modify any substantive right." (internal quotation marks omitted) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997))). This mistake led to a second legal error: Because the district court turned a blind eye to Wal-Mart's right to individual hearings, the district court failed to realize that the class did not fit the historical model of Rule 23(b)(2), and therefore could not be certified under that section of the rule.

A

The parties' substantive rights in this case are defined by Title VII. The majority acknowledges that the legal and factual frameworks of different causes of action can impact the outcome of a court's Rule 23 determination. Maj. Op. at 6152-53, 6171-72. Yet the majority fails to address the specific legal and factual framework of Title VII or consider how it impacts the certification of plaintiffs' proposed class. It is therefore necessary to provide some background regarding the structure of claims and defenses under Title VII before discussing the majority and district court's error in certifying the proposed class under Rule 23(b)(2).

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[18] 28 U.S.C. § 2072(b) provides:

> (b) Such rules [of practice and procedure prescribed by the Supreme Court] shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

1

Under Title VII, the plaintiff has the ultimate burden of establishing that the employer is engaged in an unlawful employment practice described in 42 U.S.C. § 2000e-2. If the plaintiff prevails in a Title VII action, the court "may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . ., or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g)(1). In cases where the plaintiff alleges that the employer engaged in intentional discrimination, the plaintiff may also seek compensatory and punitive damages. § 1981a(a)(1). Punitive damages are available only if the plaintiff can show the employer acted "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." § 1981a(b)(1); *e.g.*, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 254 (1994).

Title VII affords defendant-employers certain affirmative defenses. If the employer can prove that an adverse employment action against an individual employee was "for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title," a court shall not order the "hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay."

§ 2000e-5(g)(2)(A). Even if the employee proves that the adverse employment action was motivated in part by a discriminatory motive, *see* § 2000e-2(m), a court cannot award damages or back pay if the employer can prove that it "would have taken the same action in the absence of the impermissible motivating factor," § 2000e-5(g)(2)(B)(ii). *See Costa v. Desert Palace, Inc.*, 299 F.3d 838, 848 (9th Cir. 2002) (explaining that in a mixed motive case, an employer "may assert an affirmative defense to bar certain types of relief by showing the absence of 'but for' causation"), *aff'd*, 539 U.S. 90. If the employer is successful in proving an affirmative defense, Title VII limits the court to granting declaratory or injunctive relief, as well as certain attorneys' fees and costs. 42 U.S.C. § 2000e-5(g)(2)(B)(ii).

These defenses are available to a defendant regardless of whether the plaintiffs allege discrimination against a single individual or against a class. *See* 28 U.S.C. § 2072(b); *Teamsters*, 431 U.S. at 360 (citing *Franks v. Bowman Trans. Co.*, 421 U.S. 747 (1976)). An employer cannot be deprived of its statutory right to raise individualized defenses to claims for monetary relief merely because plaintiffs characterize their claim as a pattern or practice of discrimination and bring the suit on behalf of a class. Instead, the Supreme Court has created a framework for litigating pattern-or-practice claims that provides employers the opportunity to put forth individual defenses. *See Teamsters*, 431 U.S. at 360-62.[19]

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[19] *Teamsters* involved a suit by the Attorney General under 42 U.S.C. § 2000e-6, which allows the government to bring an action when it has cause to believe that a person "is engaged in a pattern or practice of resistance to the full enjoyment of any of

The first phase of a Title VII pattern-or-practice lawsuit focuses on company-wide practices. The party bringing the suit must first attempt "to establish by a preponderance of the evidence that . . . discrimination was the company's standard operating procedure[,] the regular rather than the unusual practice." *Id.* at 336. In this phase, the plaintiff need not show that each member of the class "was a victim of the employer's discriminatory policy." *Id.* at 360. If the plaintiff "establish[es] a prima facie case that such a policy existed[,]" the burden shifts to the employer to show there was no such pattern of discrimination at a company-wide level. *Id.* If the employer fails to rebut the inference of discrimination arising from the plaintiffs' prima facie case, the district court may "conclude that a violation has occurred" and order prospective relief. *Id.* at 361.

But if plaintiffs seek individual relief such as reinstatement or back pay, the district court must conduct additional proceedings in the second phase of the trial "to determine the scope of individual relief." *Id.* In this second phase, "[t]he proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy." *Id.* at 362. Therefore, individual

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the rights" secured by Title VII. 431 U.S. at 328 n.1. *Teamsters*'s two-step framework is equally applicable to class actions brought by individuals alleging discrimination. *See id.* at 358-59 (noting that it was adopting the two-step framework set forth in *Franks*, 424 U.S. 747, a class action brought by individuals alleging discrimination); *see also Cooper*, 467 U.S. at 876 n.9 (applying the *Teamsters* pattern-or-practice framework to class actions brought by individuals).

class members may establish a prima facie case merely by showing that an individual "unsuccessfully applied for a job and therefore was a potential victim of the proved discrimination." *Id.* (footnote omitted). The burden then shifts to the employer to raise its affirmative defenses and to "demonstrate that the individual applicant was denied an employment opportunity for lawful reasons." *Id.* *Teamsters* acknowledged that the district court's task of determining individual relief would "not be a simple one," because "the court will have to make a substantial number of individual determinations in deciding which of the minority employees were actual victims of the company's discriminatory practices."[20] *Id.* at 371-72.

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[20] While *Teamsters* referred to the second stage of individualized hearings as the "remedial" stage of trial, 431 U.S. at 361, this is a misnomer. As explained by Justice O'Connor in her concurrence in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *superceded in part by statute*, Civil Rights Act of 1991, the second stage of individualized hearings is not remedial, but rather a second phase of liability, in which the employer is entitled to raise individual statutory defenses: "It is misleading to speak of the additional proof required by an individual class member for relief as being a part of the damage phase, that evidence is actually an element of the liability portion of the case." *Id.* at 266 (O'Connor, J., concurring) (quoting *Dillon v. Coles*, 746 F.2d 998, 1004 (3d Cir. 1984)). We have explained the two-step procedure in a similar way. *See EEOC v. Gen. Tel. Co. of Nw., Inc.*, 599 F.2d 322, 332 (9th Cir. 1979) (holding that the demonstration of a discriminatory pattern and practice in the first phase of the case establishes the individual class members' prima facie case of discrimination, and shifts the burden to the employer "to prove that individuals were not in fact victims of previous discrimination"); *see also Domingo v. New Eng. Fish Co.*, 727 F.2d 1429, 1445 (9th Cir. 1984) (holding that once class-wide discrimination has been shown, a claimant is pre-

As should be clear, claims for monetary relief cannot be resolved until this second phase. *See, e.g.*, *Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 651 (6th Cir. 2006); *Lemon v. Int'l Union of Operating Eng'rs, Local No. 139*, 216 F.3d 577, 581 (7th Cir. 2000); *Allison*, 151 F.3d at 417. This applies equally to punitive damages. Because the Supreme Court has indicated that punitive damages must bear a "reasonable relationship to compensatory damages," *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580 (1996) (internal quotation marks omitted), "punitive damages must be determined after proof of liability to individual plaintiffs at the second stage of a pattern or practice case, not upon the mere finding of general liability to the class at the first stage," *Allison*, 151 F.3d at 418; *see also* 42 U.S.C. § 1981a(b)(1) (an employer may avoid punitive damages by showing lack of requisite mens rea as to each aggrieved individual); *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545-46 (1999) (holding that an employer may avoid punitive damages under § 1981a if it has made good-faith efforts to prevent discrimination in the workplace); *Rodriguez-Torres v. Caribbean Forms Mfr., Inc.*, 399 F.3d 52, 64 (1st Cir. 2005) (holding that an employer's good faith efforts to implement an

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sumptively eligible for back pay, subject to the employer "proving that the applicant was unqualified or showing some other valid reason why the claimant was not, or would not have been, acceptable"). Other circuits are in accord. *See, e.g.*, *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 159 (2d Cir. 2001); *Allison* v. *Citgo Petroleum Corp.*, 151 F.3d 402, 417-18 (5th Cir. 1998); *Dillon*, 746 F.2d at 1004; *Craik v. Minn. State Univ. Bd.*, 731 F.2d 465, 469-70 (8th Cir. 1984); *Mitchell v. Mid-Continent Spring Co. of Ky.*, 583 F.2d 275, 284 (6th Cir. 1978).

anti-discrimination policy in the workplace is an affirmative defense to an award of punitive damages under § 1981a).

In sum, a determination that an employer has engaged in a pattern or practice of discrimination in violation of Title VII entitles the class to prospective relief and creates a presumption of liability for individual relief. The employer then has a statutory right, recognized by the Supreme Court, to prove that its actions against individual employees were not discriminatory. The Rules Enabling Act prohibits a district court from depriving an employer of this right simply to facilitate the certification of a class action.[21] *See* 28 U.S.C. § 2072(b).

2

In this case, notwithstanding the requirements of Title VII, the district court rejected Wal-Mart's arguments that it was entitled to raise a defense with respect to each class member's claim for back pay and punitive damages. *Dukes I*, 222 F.R.D. at 173-74. The district court did not provide any reason for this decision, stating only that "holding individual hearings for the number of women potentially entitled to backpay in this case is impractical on its face, and thus the traditional *Teamsters* mini-hearing approach is not feasible here." *Id.* at 176.

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[21] The majority accuses the dissent of "ignor[ing] that the pattern and practice *has* to be proven on a group basis." Maj. Op. at 6231 n.53 (emphasis in original). On the contrary, there is no doubt that a plaintiff must establish a pattern and practice of discrimination on a company-wide basis in the first phase of their case, as explained above. It is the majority that turns a blind eye to the second phase of Title VII litigation, where defendants have the right to raise affirmative defenses as to each class member. The majority never satisfactorily answers the question of how the district court would conduct up to 1.5 million individualized hearings during the second phase that *Teamsters* mandates.

It seems obvious that the district court's determination that it could not certify the class in compliance with *Teamsters* compels the conclusion that it could not certify the class at all. Nevertheless, the district court determined it could bypass Supreme Court precedent. Relying on cases the court characterized as allowing back pay awards to be calculated on a class-wide basis, *see Dukes I*, 222 F.R.D. at 176-78, 180, 184, the district court held that once plaintiffs proved that Wal-Mart engaged in a pattern or practice of discrimination, liability as to individual class members could be determined by means of a formula for employees denied promotions, *id.* at 176-78, or by analyzing Wal-Mart's personnel data to identify employees entitled to back pay, *id.* at 184-86. Further, the district court rejected Wal-Mart's argument that punitive damages could not be awarded on a class-wide basis, holding that it could "limit recovery of any punitive damages to those class members who actually recover an award of lost pay," as determined by a formula. *Id.* at 172.

In adopting the approach described above, the district court deprived Wal-Mart of its statutory right to raise its defenses and violated the mandate of the Rules Enabling Act. If Wal-Mart can prove that it took an adverse employment action with respect to a particular plaintiff for non-discriminatory reasons, or that it "would have taken the same action in the absence of the impermissible motivating factor," 42 U.S.C. § 2000e-5(g)(2)(A), (B), it cannot be held liable for back pay or punitive damages as to those individual class members. *See Teamsters*, 431 U.S. at 361.

The cases relied on by the district court, *see Dukes I*, 222 F.R.D. at 176-78, 180, 184, do not justify its refusal to provide individual hearings, but rather provide that defendants are entitled to raise statutory defenses to liability. *See Domingo*, 727 F.2d at 1445; *see also McKenzie v. Sawyer*, 684 F.2d 62, 77-78 (D.C. Cir. 1982), *abrogated on other grounds by Berger v. Iron Workers Reinforced Rodmen, Local 201*, 170 F.3d 1111 (D.C. Cir. 1999); *Hameed v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers Local Union No. 396*, 637 F.2d 506, 520 (8th Cir. 1980) ("If a black applicant was rejected for a nondiscriminatory reason, that applicant would not be a member of the class of potential discriminatees."). The district court could not properly rely on cases that preceded *Teamsters*, *see, e.g.*, *Stewart v. Gen. Motors Corp.*, 542 F.2d 445, 452-53 (7th Cir. 1976), nor those from other circuits that are contrary to *Teamsters*, *see, e.g.*, *EEOC v. O & G Spring & Wire Forms Specialty Co.*, 38 F.3d 872, 879-80 & n.9 (7th Cir. 1994); *Segar v. Smith*, 738 F.2d 1249, 1291-92 (D.C. Cir. 1984).

B

The district court's crucial misunderstanding of Title VII and *Teamsters* led to a second mistake: it failed to undertake a proper analysis of whether the proposed class should be certified under Rule 23(b)(2) or Rule 23(b)(3). The majority makes the same error, with nary an acknowledgment that the Supreme Court has provided general guidelines for making this determination. *See, e.g.*, *Ortiz*, 527 U.S. at 845-46; *Amchem*, 521 U.S. at 625. Again, to understand how the district court and majority went astray, it is first necessary to describe the basic analytical structure for categorizing classes under Rule 23(b).

1

Rule 23(b) establishes three different types of classes. In certifying a proposed class, courts must determine whether a proposed class fits into the historical models on which Rule 23(b)(1) or (2) were based, or is a more "adventuresome" class action, *Amchem*, 521 U.S. at 614, that must be certified under Rule 23(b)(3). *See Ortiz*, 527 U.S. at 832-37.

Courts considering whether to certify a class under Rule 23(b)(1) or (2) must take the "prudent course" of staying "close to the historical model" and "traditional paradigm" as understood by the Advisory Committee in drafting the rule. *Ortiz*, 527 U.S. at 842, 864. The Advisory Committee intended Rule 23(b)(1) classes to be "limited fund" actions, a type of action where multiple plaintiffs seek to divide a limited fund among claimants. *Id.* at 838-41. Rule 23(b)(2) allows a court to certify a class action when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). A review of the historical sources relied upon by *Ortiz* reveals that the Advisory Committee based Rule 23(b)(2) on "various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration." Fed. R. Civ. P. 23(b)(2) advisory committee's note (1966). Specifically, the Committee cited, as the historical predicate of the Rule 23(b)(2) action, cases where plaintiffs endeavored to desegregate public accommodations through prospective declaratory and injunctive relief applicable to the class as a whole. Notably, these historical actions sought the correction of a specific discriminatory policy affecting all members of the class in the same way. *See, e.g., Bailey v. Patterson*, 323 F.2d 201, 206 (5th Cir. 1963).

None of the cases cited by the Advisory Committee included claims for monetary relief or individual relief of any kind. Fed. R. Civ. P. 23(b)(2) advisory committee's note.[22] The Advisory Committee Notes explain that, "[t]he subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." *Id.* In other words, Rule 23(b)(2) was designed for classes seeking class-wide injunctive relief to remedy a common injury to the class as a whole, not for classes seeking individual damages, back pay, or other individual relief.

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[22] The Advisory Committee Notes cites the following cases, none of which involved monetary relief: *Potts v. Flax*, 313 F.2d 284 (5th Cir. 1963) (class action by two African-American parents against a "system wide policy of racial segregation" in city schools); *Bailey*, 323 F.2d 201 (class action against laws segregating common carriers); *Northcross v. Bd. of Ed.*, 302 F.2d 818 (6th Cir. 1962) (class action by 18 African-American students and their parents seeking an order that the city end its biracial school system); *Brunson v. Bd. of Trs. of Sch. Dist. No. 1*, 311 F.2d 107 (4th Cir. 1962) (class action for school desegregation brought by 42 African-American students); *Green v. Sch. Bd.*, 304 F.2d 118 (4th Cir. 1962) (non-class action by 28 African-American students seeking transfer to white schools and an injunction against school segregation); *Mannings v. Bd. of Pub. Inst.*, 277 F.2d 370 (5th Cir. 1960) (class of African-American students seeking an injunction against school segregation); *Orleans Parish Sch. Bd. v. Bush*, 242 F.2d 156 (5th Cir. 1957) (class action on behalf of African-American school children to desegregate schools); *Frasier v. Bd. of Trs. of Univ. of N.C.*, 134 F. Supp. 589 (M.D.N.C. 1955) (3-judge court) (class action by three African-Americans challenging a university's discriminatory admissions policies), *aff'd*, 350 U.S. 979 (1956).

While Rule 23(b)(1) and (2) are linked to well-understood historical models, Rule 23(b)(3) was designed for those cases in which "class-action treatment is not as clearly called for." *Amchem*, 521 U.S. at 615 (internal quotation marks omitted); *see also Ortiz*, 527 U.S. at 842 (explaining that the "Advisory Committee looked cautiously at the potential for creativity" under Rule 23(b)(1) and (2) and was "not forward looking as it was in anticipating innovations under Rule 23(b)(3)"); Fed. R. Civ. P. 23(b)(3) advisory committee's note. Specifically, Rule 23(b)(3) provides for class actions that potentially allow plaintiffs to seek monetary relief on a class-wide basis. Fed. R. Civ. P. 23(b)(3) advisory committee's note; Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (I), 81 Harv. L. Rev. 356, 393 (1967).

Because these more "adventuresome" class actions, *Amchem*, 541 U.S. at 614, raise due process concerns, the Advisory Committee imposed two safeguards on courts certifying such a class. First, a district court must "find[ ] that the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). This inquiry ensures that deviation from "the usual rule that litigation is conducted by and on behalf of the individual named parties only" is justified. *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979). Second, a district court must give prospective class members the opportunity to be excluded from the class, which is commonly known as the right to "opt out." Fed. R. Civ. P. 23(c)(2)(B)(v). This option protects "the interests of the individuals in pursuing their own litigations[, which] may be so strong here as to warrant denial of a class action altogether." Fed. R. Civ. Pro. 23(c)(2) advisory committee's note. The opt-out option also ensures that the class is binding on those members of the class who choose not to opt out. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974).

This right to opt out of a class action, however, is exclusive to classes certified under Rule 23(b)(3). On its face, Rule 23 does not provide absent class members the right to request exclusion in classes certified under Rule 23(b)(2), and it is clear from the Rule's structure that the Advisory Committee did not intend for such a right to exist under Rule 23(b)(2).[23] Moreover, the Supreme Court has interpreted Rule 23(b)(2) as precluding opt outs. *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994). In *Ticor*, the Supreme Court dismissed its grant of certiorari on the question whether binding absent class members to a class-wide settlement would violate their constitutional due process rights, where the district court certified the class under Rules 23(b)(1)(A) and (b)(2), and the absent members had not had the chance to opt out of the class. *Id.* at 120-21. The Court first noted that Rule 23(b)(3) permits opt outs, and Rules 23(b)(1) and (b)(2) do not. *Id.* at 121. From this, the Court reasoned it could avoid the constitutional question raised in the petition for certiorari if it held that "in actions seeking monetary damages, classes can be certified only under Rule 23(b)(3)," not Rules

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[23] For example, while Rule 23 provides that a court *must* give members of Rule 23(b)(3) classes notice and the right to opt out of the class, and *may* give notice to members of Rule 23(b)(2) classes, the Rule is silent on whether a court *may* give members of Rule 23(b)(2) classes the right to opt out. *See* Fed. R. Civ. Proc. 23(c)(2) and (d). The inference is that a court may not allow members of a Rule 23(b)(2) class to opt out of the class.

23(b)(1) and (b)(2). *Id.* The Court concluded that this interpretation of Rule 23 "is at least a substantial possibility." *Id.*[24]

2

In certifying this class under Rule 23(b)(2), the district court failed to take the "prudent course" required by *Ortiz*, 527 U.S. at 842, and consider the history and structure of Rule 23(b). Had the district court undertaken such a review, it would have been compelled to conclude that the proposed class does not fit the historical model for Rule 23(b)(2) classes, and cannot be certified in that category. First, the proposed class raises an enormous number of individual questions. Although the plaintiffs' action is in civil rights, the plaintiffs do not ask merely for class-wide injunctive relief (as in the cases cited by the Advisory Committee); they also seek individualized relief in the form of back pay and punitive damages. As explained above, this may result in up to 1.5 million individual questions about Wal-Mart's liability for individual relief. A class that raises so many individual questions also raises the concerns the Advisory Committee expressly considered in drafting

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[24] To avoid the import of *Ticor*, the majority once again claims it is not bound by an order in which six Supreme Court justices have joined, characterizing *Ticor* as "not even dictum, let alone a holding." Maj. Op. at 6224 n.44. Yet, the majority cites no authority for this position, perhaps because the Ninth Circuit has relied upon such orders in prior opinions. *See, e.g.*, *Carroll v. Nakatani*, 342 F.3d 934, 946-47 (9th Cir. 2003) (relying on an order dismissing a writ as improvidently granted). Indeed, many of the cases relied upon by the majority cite to *Ticor*. *E.g.*, *Reeb*, 435 F.3d at 646; *Coleman v. Gen. Motors Acceptance Corp.*, 296 F.3d 443, 447 (6th Cir. 2002); *Allison*, 151 F.3d at 411 n.3.

Rule 23(b)(3), and requires the court to ask whether "the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). Given the facts in this case, it is far from certain that the proposed class could be certified under the more flexible model provided by Rule 23(b)(3), let alone meet the narrower historical model for Rule 23(b)(2).

Second, the class's claims for monetary relief raise the very due process concerns considered by the Advisory Committee in drafting Rule 23(b)(3). The district court acknowledged that due process required that absent class members in this case be given the right to opt out of the class. *See Dukes I*, 222 F.R.D. at 172-73. Because Rule 23(b)(2) does not permit opt-outs, such recognition should have led the district court to determine that certification under Rule 23(b)(2) was inappropriate, and to instead consider whether the class met the criteria for certification under Rule 23(b)(3).

Given the Supreme Court's direction to adhere to the historical models in considering which classes can be certified under Rule 23(b)(1) and (2), *see Ortiz*, 527 U.S. 815; *Amchem*, 521 U.S. 591, there was no reason for the district court here to sidestep the procedural requirements of Rule 23(b)(3) to certify this class under Rule 23(b)(2). *See Eubanks v. Billington*, 110 F.3d 87, 93 n.9 (D.C. Cir. 1997) (noting that when notice and opt-outs are required by the district court, "the arguments supporting certification . . . under subdivision (b)(2) [as opposed to (b)(3)] are surprisingly weak"). This is particularly true given that the district court's primary justification for certification under Rule 23(b)(2) was that the suit was similar to the historical model contemplated by the Advisory Committee. *See Dukes*, 222 F.R.D. at 170.

In certifying this class under Rule 23(b)(2), the district court abused its discretion.

C

In holding that the district court did not err in certifying the class under Rule 23(b)(2), the majority focuses not on the text, structure, and history of this rule, but rather on a single sentence in the Advisory Committee Notes which states that Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." Maj. Op. at 6215 (quoting Fed. R. Civ. P. 23(b)(2) advisory committee's notes). The majority infers from this single sentence that Rule 23(b)(2) must therefore extend to cases in which the appropriate final relief does *not* relate "exclusively or predominantly to money damages." Maj. Op. at 6215. The majority then turns to a dictionary definition of the word "predominant" and derives a new test: "a class must seek only monetary damages that are not 'superior [in] strength, influence, or authority' to injunctive and declaratory relief." Maj. Op. at 6215 (citing *Merriam-Webster's Collegiate Dictionary* 978 (11th ed. (2004)).[25] In furtherance of this test, the majority directs district courts to consider "the objective 'effect of the relief sought' on the litigation," by recourse to "[f]actors such as [1] whether the monetary relief sought determines the key procedures that will be used, [2] whether it introduces new and significant legal and factual issues, [3] whether it requires individualized hearings, and [4] whether its size and nature . . . raise particular due process and manageability concerns." Maj. Op. at 6217.[26]

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[25] The majority admits that it breaks with the Second Circuit in rejecting the subjective intent test, as well as with the Fifth, Sixth, Seventh, and Eleventh Circuits in rejecting the "incidental damages standard" test. Maj. Op. at 6215. In creating this three-way circuit split, the majority not only ignores our own precedent, *see Zimmerman v. Or. Dep't of Justice*, 170 F.3d 1169, 1184 (9th Cir. 1999) (we create a circuit split "only after the most painstaking inquiry"), but aggravates the already-existing inconsistency between the circuits.

But in upholding the district court's certification with regard to back pay, the majority fails to apply these factors from its own test. Had it done so, it would have concluded that the district court erred in certifying the class under Rule 23(b)(2). First, the plaintiffs' claim for back pay triggers the need for a key procedure (factor 1), namely the requirement for individualized hearings (factor 3). Second, the plaintiffs' claims for individual relief introduced significant new legal and factual issues into the case (factor 2), including Wal-Mart's defenses to liability, as well as due process concerns that necessitate opt-outs (factor 4). Third, the need for individualized hearings raises serious manageability concerns (factor 4).

The majority avoids these issues, however, and dismisses Wal-Mart's arguments as mere objections to the district court's "trial plan." Maj. Op. at 6231. The majority "express[es] no opinion regarding Wal-Mart's objections to the district court's tentative trial plan" and concludes that there are many steps the district court could take "that would allow this class action to proceed in a manner that is both manageable and in accordance with due process." Maj. Op. at 6232 (citing *Hilao v. Estate of Marcos*, 103 F.3d 767, 782-87 (9th Cir. 1996)).[27]

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[26] As formulated by the majority, this test is essentially unusable. When is back pay "superior in strength" to an injunction? When do punitive damages have more "influence" than declaratory relief? It is unlikely that this test, particularly as applied by the majority, provides the district court with the guidance it needs on remand.

The majority's failure to address these objections runs contrary to the Supreme Court's mandate, *Ortiz*, 527 U.S. at 861, and the majority's own rule, Maj. Op. at 6217 (stating that courts must consider "whether [the proposed class action] requires individualized hearings" when it determines whether a class may be certified under Rule 23(b)(2)).

Presumably because the application of its own test would lead to the conclusion that the district court erred, the majority does not apply its test (or remand back to the district court to apply it, as it did with the punitive damages class). Instead, the majority determines that the back-pay remedy does not predominate over the claims for injunctive and declaratory relief for two reasons: (1) the calculation of back pay in Title VII cases "generally involves [relatively un]complicated factual determinations and few[ ] individualized issues," and (2) back pay is a " 'make whole' remedial scheme, a scheme to which the drafters of the Federal Rules of Civil Procedure clearly intended Rule 23(b)(2) to apply." Maj. Op. at 6220-21 (alterations in original) (citations omitted). As noted above, neither of these rationales is correct. In this case, back pay cannot be calculated until after Wal-Mart has had an opportunity to raise its defenses, which will involve the litigation of a multitude of individual issues. Moreover, while the drafters of Rule 23 intended that classes involving demands for injunctive relief be certified under Rule 23(b)(2), the majority provides no evidence that the Advisory Committee thought Rule 23(b)(2) was appropriate for classes seeking back pay.[28]

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[27] Quite apart from the question whether Wal-Mart is objecting to the certification of the class (as it claims) or to the trial plan (as the majority states), the procedure set forth in *Hilao* cannot be used in a Title VII case and the majority errs in suggesting it can. We held in *Hilao* that a court could determine compensatory damages for over 10,000 claimants in a human rights action by means of a formula without violating the due process rights of the defendants. *See Hilao*, 103 F.3d at 782-87; *but see id.* at 788 (Rymer, J. dissenting) ("If due process in the form of a real prove-up of causation and damages cannot be accomplished because the class is too big or to do so would take too long, then (as the Estate contends) the class is unmanageable and should not have been certified in the first place."); *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 319 (5th Cir. 1998) (refusing to apply *Hilao* and noting that "we find ourselves in agreement with the thrust of the dissenting opinion there"). But *Hilao* has no bearing on this effort to certify a Title VII class action, because Title VII itself, and the Supreme Court's interpretation of Title VII pattern-or-practice actions, see *Teamsters*, 431 U.S. at 360, give defendants their right to a defense to each individual's claim. *See* 42 U.S.C. § 2000e-5(g)(2).

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[28] The majority claims it need not consider the problem posed by the class's pursuit of individual monetary relief because it is merely "join[ing] the consensus view that a request for back pay in a Title VII case is fully consistent with the certification of a Rule 23(b)(2) class action," citing as support *Thorn v. Jefferson-Pilot Life Insurance Co.*, 445 F.3d 311, 331-32 (4th Cir. 2006) and *Coleman*, 296 F.3d 443. Maj. Op. at 6221-22 & n.41. Again, the majority misses the point. The issue is not that plaintiffs seek back pay; the issue is Wal-Mart's statutory right to raise individual defenses in response to the request for back pay, and whether such individualized treatment makes class-wide relief improper. *Thorn* and *Coleman* reinforce this point. In *Coleman*, the Sixth Circuit held that the district court abused its discretion in certifying a class that included a claim for com-

As to claims for punitive damages, the majority remands the case to the district court to determine under its new test whether the case could be certified under Rule 23(b)(2). Maj. Op at 6226. Before doing so, however, it determines in a single sentence that punitive damages do not require individualized determinations because the plaintiffs allege that Wal-Mart's policy "affects all class members in a similar way." Maj. Op. at 6226. This unprecedented holding, made with virtually no analysis, is wrong both as a matter of law and fact. As noted above, it conflicts with the statutory language of Title VII, *see* 42 U.S.C. § 2000e-5(g)(2)(B), and with the Supreme Court's reasoning regarding punitive damages, *see BMW*, 517 U.S. at 581. Moreover, it is factually wrong: even assuming there was significant proof of a company-wide policy of discrimination, plaintiffs do not allege that Wal-Mart's alleged policy affected all class members in the same way for purposes of determining monetary relief. Plaintiffs acknowledge

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pensatory damages, in large part because such relief would require individual determinations as to each class member, thus obviating the efficiencies of pursuing the action on a class-wide basis. 296 F.3d at 449. Likewise, in *Thorn*, the Fourth Circuit upheld the district court's denial of class certification, in part because the availability of a statute of limitations defense presented individual issues that could not be determined on a class-wide basis. 445 F.3d at 327. *Thorn* distinguished prior cases that certified classes requiring the calculation of back pay on the ground that such calculations "generally involve[d] . . . fewer individualized issues." *Id.* at 331 (alteration and internal quotation marks omitted). When considered as a whole (rather than taking a few phrases out of context), *Thorn* and *Coleman* support the conclusion that class-wide relief is inappropriate where claims may need be litigated on an individual basis.

that Wal-Mart's allegedly discriminatory practices have affected class members differently, stating that "different class members may have been undercompensated in different amounts; some employees may have been denied promotion to assistant manager while others may have been denied promotion to store manager." The district court cannot reasonably determine whether an individual class member was injured, let alone the nature and amount of injury, until the second phase of individual hearings has been accomplished. Other circuits addressing the issue have agreed with this analysis. *See, e.g., Reeb*, 435 F.3d at 651; *Lemon*, 216 F.3d at 581; *Allison*, 151 F.3d at 417. By untethering punitive damage claims in a Title VII case from evidence regarding how the plaintiffs were actually injured, the majority opens the door to results that would be unfair to both claimants and defendants in future Title VII class actions.

IV

The class action device is a procedural mechanism to aggregate individual claims for purposes of judicial efficiency. *Falcon*, 457 U.S. at 159. By allowing claims to go forward that ordinarily would not be litigated, the class action has proven to be an invaluable tool in litigating civil rights and other cases involving systemic discrimination. But, because Rule 23 creates a procedural device that constitutes "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only," *Califano*, 442 U.S. at 700-01, courts must use it carefully, ensuring that the proposed class action complies with controlling law and does not jeopardize the parties' substantive rights. *See Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981) (holding that, in considering a proposal to certify a class, the district court's discretion is "bounded by the relevant provisions of the Federal Rules"). The "[m]ere invocation of the language of Rule 23 in Title VII suits is no mystical legal talisman guaranteeing class treatment." *Doniger v. Pac. Nw. Bell, Inc.*, 564 F.2d 1304, 1312 (9th Cir. 1977).

The district court here failed in its duty to apply Rule 23 carefully and correctly. In its enthusiasm for allowing the class action to proceed, the district court sped forward, dodging substantive and procedural hurdles, and making an end-run around Title VII, the Rules Enabling Act, and Supreme Court precedent. It conducted no rigorous analysis to determine "the existence of a class of persons who have suffered the same injury" as the class representatives. *Falcon*, 457 U.S. at 157. It certified the class even after determining that compliance with the Supreme Court's framework in *Teamsters* was infeasible. Finally, the district court failed to consider the text, structure, and historical framework of Rule 23(b) that should have guided its analysis. The resultant class certification runs directly contrary to controlling precedent.

Despite these flaws, the majority affirms those legal errors with even less analysis and inquiry than the district court. Never before has such a low bar been set for certifying such a gargantuan class. The majority's ruling provides scant limits to the types of classes that can be certified. Put simply, the door is now open to Title VII lawsuits targeting national and international companies, regardless of size and diversity, based on nothing more than general and conclusory allegations, a handful of anecdotes, and statistical disparities that bear little relation to the alleged discriminatory decisions. The district court abused its discretion in certifying this class. The majority errs in concluding otherwise. While class actions have a vital role to play in the battle against discrimination, the majority's decision to allow this case to go forward epitomizes the Supreme Court's warning that "the rulemakers' prescriptions for class actions may be endangered by those who embrace Rule 23 too enthusiastically just as they are by those who approach the Rule with distaste." *Amchem*, 521 U.S. at 629 (internal citations, quotation marks, and alterations omitted). I respectfully dissent.

KOZINSKI, Chief Judge, dissenting:

Maybe there'd be no difference between 500 employees and 500,000 employees if they all had similar jobs, worked at the same half-billion square foot store and were supervised by the same managers. But the half-million members of the majority's approved class held a multitude of jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed depending on each class member's job, location and period of employment. Some thrived while others did poorly. They have little in common but their sex and this lawsuit.

I therefore join fully Judge Ikuta's dissent.

APPENDIX B

FILED

JUN 21 2004

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Betty DUKES, Patricia Surgeson, Cleo Page, Deborah Gunter, Karen Williamson, Christine Kwapnoski, and Edith Arana, on behalf of themselves and all others similarly situated, Plaintiffs,

v.

WAL-MART STORES, INC., Defendant.

No. C01-02252 MJJ.

United States District Court,
N.D. California

June 21, 2004

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR CLASS CERTIFICATION

JENKINS, District Judge.

INTRODUCTION

Plaintiffs have filed a Third Amended Complaint, brought on behalf of six named plaintiffs and all others similarly situated, asserting a claim against Wal-Mart Stores, Inc. ("Wal-Mart") for sex discrimination under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq.* ("Title VII"). Generally stated, plaintiffs allege that women employed in Wal-Mart stores (1) are paid less than men in comparable positions, despite having higher performance ratings and greater seniority; and (2) receive fewer promotions to in-store management positions than do men, and those who are promoted must wait longer than their male counterparts to advance.

Plaintiffs assert that the policies and practices underlying this discriminatory treatment are consistent throughout Wal-Mart, and that the discrimination of which they complain is common to all women who work or have worked in Wal-Mart stores. Plaintiffs seek class-wide injunctive and declaratory relief, lost pay, and punitive damages. They do not seek any compensatory damages on behalf of the class.

Wal-Mart is the largest private employer in the world. *See* Defendant's Opposition to Motion for Class Certification ("Def.'s Opp'n") at 1. It operates approximately 3,400 stores in the United States and currently employs well over a million people. *See* Declaration of Christine Webber ("Webber Decl.") Ex. 70 at 3-5, 12. Wal-Mart is best known for its "Discount Stores," which offer a wide variety of discounted goods and services, and "Supercenters," which are similar to Discount Stores but also include full grocery departments. The company also operates "Sam's Clubs," which are membership-only stores that sell items in bulk or at deep discounts, and "Neighborhood Markets," which are smaller stores primarily selling food and drugs.[1]

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[1] At the time this motion was briefed, Wal-Mart operated 1,568 Discount Stores nation wide, each of which employed at

Currently before the Court is Plaintiffs' motion to certify a nation-wide class of women who have been subjected to Wal-Mart's allegedly discriminatory pay and promotions policies.[2] Specifically, plaintiffs propose that the Court certify the following class pursuant to Federal Rule of Civil Procedure 23(a) and 23(b)(2):

> All women employed at any Wal-Mart domestic retail store at any time since December 26, 1998 who have been or may be subjected to Wal-Mart's challenged pay and management track promotions policies and practices.

Plaintiffs' Motion for Class Certification ("Pls.' Mot.") at 37.[3] In preparation for this motion, the

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least 150 individuals; 1,259 Supercenters (making Wal-Mart the nation's largest grocer), with 200 to 500 employees per store; 525 Sam's Clubs, with 120 to 225 employees per store; and 49 Neighborhood Markets, with 80 to 100 employees per store. Webber Decl., Ex. 70 at 3-5; Def.'s Opp'n at 13.

[2] Also before the Court are various motions to strike submitted by both parties. The Court rules on these motions separately in its Order Granting in Part and Denying in Part Plaintiffs' and Defendant's Motions to Strike Expert and Non-expert Testimony ("Order re Motions to Strike"), filed concurrently with the present order.

[3] In their briefs, Plaintiffs note that they are not challenging decisions on promotions into, or compensation for, the position of Store Pharmacist, which is subject to special educational and state licensing requirements. Pls.' Mot. at 37 n.30. Accordingly, this position would be excepted from the class. Plaintiffs also propose to sever the racial discrimination claims alleged by two named plaintiffs and exclude these claims from the class case. *Id.* at 48 n.36.

parties undertook extensive discovery. They also filed extensive briefing along with volumes of documentary and testimonial evidence. On September 24, 2003, the Court heard oral argument over the course of seven hours.

Before proceeding further, the Court wishes to acknowledge Defendant's characterization of this motion as historic in nature. Defendant emphasizes that the proposed class covers at least 1.5 million women who have been employed over the past five years at roughly 3,400 stores, thus dwarfing other employment discrimination cases that have come before. In its view, these numbers alone make this case impossible. Certainly, the size of the putative class raises concerns regarding manageability which this Court must, and does, carefully consider. Title VII, however, contains no special exception for large employers. Enacted in 1964 during the height of the civil rights movement, this Act forbids gender and race-based discrimination in the American workplace. Two years later, federal class action rules were amended to facilitate the vindication of these rights on a broader basis. *See In re Monumental Life Ins. Co.*, 365 F.3d 408, 417 n.16 (5th Cir. 2004) (Fed. R. Civ. P. 23(b)(2) was added in 1966 primarily to facilitate the bringing of civil rights class actions). Insulating our nation's largest employers from allegations that they have engaged in a pattern and practice of gender or racial discrimination—simply because they are large—would seriously undermine these imperatives. Indeed, it is interesting to note, as a matter of historical perspective, that Plaintiffs' request for class certification is being ruled upon in a year that marks the 50th anniversary of the Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). This anniversary serves as a reminder of the importance of the courts in addressing the denial of equal treatment under the law wherever and by whomever it occurs. *Id.* at 495.

Notions of historical import aside, the Court also takes this opportunity to acknowledge two important factors. First, the Court, by this motion, is not called upon to make any determination on the merits of Plaintiffs' allegations of gender discrimination; rather, only procedural questions are presented. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). Thus, resolution of this motion for class certification should not be construed in any manner as a ruling on the merits or the probable outcome of the case. Second, in spite of Defendant's concerns regarding the historic nature of this motion, the Court does not encounter the issues raised herein on a barren legal landscape. Rather, this Court is satisfied that ample legal precedent is available to guide the Court in determining the propriety of Plaintiffs' request for class certification. Indeed, while the size of the proposed class is unique, the issues are not novel, and Plaintiffs' claims are relatively narrow in scope.[4]

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[4] Although Defendant characterizes this case as a "wall-to-wall" and "across-the-board" class action, Def.'s Opp'n at 1, it overstates the breadth of the case. While, as noted, the proposed class size is extremely large, the types of claims asserted are relatively limited in the context of other judicially sanctioned class actions. As described above, Plaintiffs challenge Defendant's alleged discriminatory actions solely pursuant to Title VII, without attempting to combine multiple legal claims through other statutes or constitutional provisions, as is common in other cases. The class is also limited to women; plaintiffs do not attempt to combine gender with race, age, disability, or other classifications. Further, Plaintiffs allege class-wide discrimination only in terms of pay and promotion—not hiring, hostile work environment, failure to train, retaliation, or other

Having fully analyzed the pleadings, evidence, and oral argument presented by the parties, and the entire record herein, the Court grants in part and denies in part Plaintiffs' motion for class certification. Specifically, and as explained in greater detail below, the Court rules as follows:

1) With respect to Plaintiffs' claim for *equal pay*, Plaintiffs' motion is granted and the proposed class is certified with respect to issues of liability and all forms of requested relief;

2) With respect to Plaintiffs' *promotion* claim, Plaintiffs' motion is granted in part and denied in part. Specifically, the Court certifies the proposed class with respect to issues of liability (including liability for punitive damages) and injunctive and declaratory relief. The Court finds, however, that with respect to the remedy of lost pay, it is manageable only with respect to those challenged promotions where objective data is available to document class member interest in the challenged promotion. Thus, the Court denies certification, on grounds of unmanageability, with respect to Plaintiffs' promotion claims for lost pay (and thus punitive damages) as to those class members for whom no such data is available.

[Footnote continued from previous page]

adverse employment actions. The class also is limited to certain categories of in-store employees, and does not seek to include other categories of workers; importantly, the proposed class does not reach into the upper levels of management. Nor does it seek compensatory damages. Thus, while this is a "wall-to-wall" case geographically speaking, in all other respects it is substantially more limited than Defendant suggests.

LEGAL STANDARD

A party seeking to certify a class must demonstrate that it has met all four requirements of Federal Rule of Civil Procedure 23(a), and at least one of the requirements of Rule 23(b). *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Rule 23(a) requires that all of the following four factors be met: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." In short, the class must satisfy the requirements of numerosity, commonality, typicality, and adequacy. Fed. R. Civ. P. 23(a).

Rule 23(b) requires, in relevant part, that one of three additional requirements be met. Here, plaintiffs assert that this case falls within Rule 23(b)(2), which provides that the "party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). Rule 23(c) allows a court to maintain a class action as to particular issues only or to divide a class into subclasses. Fed. R. Civ. P. 24(c)(4).

The party seeking certification must provide facts sufficient to satisfy Rule 23(a) and (b) requirements. *Doninger v. Pacific Northwest Bell, Inc.*, 564 F.2d 1304, 1308-09 (9th Cir. 1977). In turn, the district court must conduct a rigorous analysis to determine that the prerequisites of Rule 23 have been met. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161

(1982). If a court is not fully satisfied, certification should be refused. *Id.* Conditional certification is no longer proper. *See* Fed. R. Civ. P. 23, Advisory Committee Notes, 2003 Amendments.

While the court's analysis must be rigorous, Rule 23 confers "broad discretion to determine whether a class should be certified, and to revisit that certification throughout the legal proceedings before the court." *Armstrong v. Davis*, 275 F.3d 849, 872, n.28 (9th Cir.2001); *see also Knight v. Kenai Peninsula Borough Sch. Dist.*, 131 F.3d 807, 816 (9th Cir.1997). "'Implicit in this deferential standard is recognition of the essentially factual basis of the certification inquiry and of the district court's inherent power to manage and control pending litigation.'" *In re Monumental Life Ins. Co.*, 365 F.3d at 414 (citation omitted); *see also Hartman v. Duffey*, 19 F.3d 1459, 1471 (D.C. Cir. 1994) ("In light of the fact that trial courts have the primary responsibility of ensuring the 'orderly management of litigation' and that the purpose of class actions lies in 'advanc[ing] the efficiency and economy of multi-party litigation,' trial courts 'are uniquely well situated to make class certification decisions.'") (citations omitted).

In *Falcon*, the Court reiterated the well-recognized precept that "'the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Falcon*, 457 U.S. at 160 (*quoting Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978)). Nevertheless, "[w]e find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen*, 417 U.S. at 177. Thus, "[a]lthough some inquiry into the substance of a case may be necessary to ascertain satisfaction of the commonality and typicality requirements of Rule 23(a), it is improper to advance a decision on the merits to the class certification stage." *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 480 (9th Cir. 1983) (citation omitted); *see also Nelson v. United States Steel Corp.*, 709 F.2d 675, 679-80 (11th Cir. 1983) (plaintiffs' burden at class certification "entails more than the simple assertion of [commonality and typicality] but less than a prima facie showing of liability") (citation omitted); *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 292 (2d Cir. 1999); Fed. R. Civ. P. 23, Advisory Committee Notes, 2003 Amendments (court review of the merits should be limited to those aspects relevant to making the certification decision on an informed basis).[5] With these principles in mind, the Court turns to the requirements of Rule 23(a).

ANALYSIS

I. Rule 23(a) Factors

A. *Numerosity*

Under the first Rule 23(a) factor, the class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1); *Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir. 2003). Plaintiffs need not state the exact number of potential class members; nor is a specific minimum number of class members required. *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 448 (N.D. Cal. 1994). Rather, whether joinder is impracticable depends on the facts and circumstances of each case. *Id.* Wal-Mart does not contest that numerosity is satisfied here, given that both parties estimate that the proposed class numbers over one million women. Indeed, it is beyond dispute that joinder would be impracticable in this case. Accordingly, the Court finds that this factor is satisfied.

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[5] The restriction on conducting a merits inquiry applies equally to the Court's review of the expert testimony presented by the parties. Rather than resolving the "battle of the experts," and without conclusively ruling on admissibility, the Court's role at the class certification stage is to determine whether the expert evidence adds probative value to plaintiffs' claims. *See Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives and Composites, Inc.*, 209 F.R.D. 159, 162-63 (C.D. Cal. 2002).

B. *Commonality*

Rule 23(a)(2) requires that common questions of law or fact exist among class members. As the Supreme Court has explained, this requirement overlaps with the typicality requirement:

> [T]he commonality and typicality requirements . . . tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.

Falcon, 457 U.S. at 157 n.13. Nonetheless, each factor serves a discrete purpose—commonality focuses on the relationship of common facts and legal issues among class members, while typicality examines the relationship of facts and issues between the representatives and the class. *See* Conte & Newberg on Class Actions, Vol. I, at 411 (4th ed.) (hereafter "Newberg"). In other words, commonality refers to the group characteristics of the class as a whole, and typicality refers to the individual characteristics of the named plaintiffs in relation to the class. As such, the Court will address each factor separately.

Rule 23(a)(2) does not require that all questions of law or fact be common. The test is qualitative rather than quantitative—one significant issue common to the class may be sufficient to warrant certification. *Savino v. Computer Credit, Inc.*, 173 F.R.D. 346, 352 (E.D.N.Y.1997), *aff'd*, 164 F.3d 81 (2d Cir. 1998); Newberg, Vol. I, at 272-74. Indeed, the necessary showing to satisfy commonality is "minimal." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). Specifically, plaintiffs may demonstrate commonality by showing that class members have shared legal issues but divergent facts or that they share a common core of facts but base their claims for relief on different legal theories. *Id.* at 1019.

Plaintiffs present extensive evidence to support their contention that there are significant factual and legal questions common to all class members with respect to whether Wal-Mart has engaged in company-wide discrimination against female in-store employees in pay and promotions. This evidence can be grouped into three major categories: (1) facts and expert opinion supporting the existence of company-wide policies and practices; (2) expert statistical evidence of class-wide gender disparities attributable to discrimination; and (3) anecdotal evidence from class members around the country of discriminatory attitudes held or tolerated by management. The Court concludes that this evidence more than satisfies plaintiffs' burden to demonstrate commonality under Rule 23(a)(2). Each category is discussed in detail below.

1. *Company-Wide Policies and Practices*

This first category can be further divided into two discrete areas. First, Plaintiffs present evidence that Wal-Mart's policies governing compensation and promotions are similar across all stores, and build in a common feature of excessive subjectivity which provides a conduit for gender bias that affects all class members in a similar fashion. Second, Plaintiffs submit evidence that Wal-Mart cultivates and maintains a strong corporate culture which includes gender stereotyping. While the parties vigorously dispute certain aspects of this evidence, and certainly draw different inferences therefrom, it is sufficient at this juncture to support Plaintiffs' claim that there are common issues as to whether Wal-Mart engages in discriminatory policies and practices that affect putative class members in a similar manner.

a. *Policies and Practices Governing Compensation and Promotion*

Defendant argues that it utilizes a myriad of distinct systems for compensating and promoting in-store employees depending on the position and type of store (or store department), and that these differences preclude any finding of commonality. It further argues that decisions regarding pay and promotions are too decentralized to create any questions common to the class. As discussed below, however, while some variations exist, there is a basic organizational structure that is consistent across store types and throughout the company's domestic stores in important respects. Furthermore, the policies governing in-store compensation and promotions uniformly provide for managers to exercise significant subjectivity in making pay and promotion decisions. Indeed, although the parties disagree about many of the fine points, they essentially agree that Wal-Mart managers make pay and promotion decisions for in-store employees in a largely subjective manner.

(1) *Overview of Wal-Mart Store Structure*

As noted above, Wal-Mart operates four different types of stores: Discount Stores, Supercenters, Neighborhood Markets, and Sam's Clubs. Wal-Mart considers the first three to be part of a single operation, while Sam's Club operates as a separate division. All stores (except Sam's Clubs) are divided into six divisions, for a total of seven divisions including Sam's Clubs. Each division in turn is divided into regions for a total of 41 regions nationwide. Each region contains roughly 80-85 stores. K. Harper Depo. at 177, 215 (Webber Decl. Ex. 1); Butler Depo. at 39 (Webber Decl. Ex. 4).

Merchandise sold in the stores is generally segregated in up to 40-53 separate departments (e.g.— apparel, jewelry, hardware).[6] Certain departments are designated "specialty departments" and are considered to operate as semi-autonomous units within the stores. The eight specialty departments are One-Hour Photo, Optical, Pharmacy, Shoes, Jewelry, Tire & Lube Express, Hearing, and Wireless Services. Grocery sections in the Supercenters also are considered to be semi-autonomous units within the stores. K. Harper Depo. at 90, 155-56 (Webber Decl. Ex. 1).

While the size and inventory of Wal-Mart stores vary, the evidence indicates that the personnel structure within each store operates in a basically similar fashion using similar job categories, job descriptions, and management hierarchies.[7] At the top of the in-store management structure are the salaried positions beginning with the Store Manager. *See* K. Harper Depo. at 152 (Webber Decl. Ex. 1). In certain larger stores, there are Co-Managers who report to the Store Manager and often oversee the grocery departments. *See id.* at 35-36, 155-56; Haworth Decl. ¶ 50. Next in line are the Assistant Managers, with several per store, depending on store size. Specialty Department Managers report directly to District Managers as well as the Store Manager.

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[6] Because of their relatively small size, Neighborhood Markets do not have departments but instead are "organized into areas." Haworth Decl. ¶ 57.

In order to transition into a salaried management position, employees must generally go through a four-to-five month training program as a "Management Trainee." *See* Def.'s Opp'n at 40. The Management Trainees are considered as being in a limbo phase between the hourly and salaried ranks, although they are paid on an hourly basis.

With respect to the hourly positions, the highest is that of Support Manager, which is considered a feeder into the Management Trainee position. Below Support Manager are the Department Managers and Customer Service Managers, who serve as lower-level hourly supervisors. At the bottom rung are the entry level Cashiers, Sales Associates, Stockers, and others.

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[7] Some divisions may use slightly different nomenclature. For example, Sam's Club follows essentially the same hierarchy as the other Wal-Mart divisions, but uses different titles for some positions. Thus, the head of a Discount Store or Supercenter is called a Store Manager, while the head of a Sam's Club is called a General Manager, yet both positions have virtually identical duties. *See* Burner Depo. at 144:16-24 (Webber Decl. Ex. 5).

In general, roughly 65 percent of hourly employees are women, while roughly 33 percent of management employees are women. Drogin Decl. ¶ 19. The approximate percentages of women in specific hourly and salaried management positions are as follows:

Salaried Positions

Store Manager—14%

Co-Manager (only in larger stores)—23%

Assistant Manager—36%

Hourly Positions

Management Trainee—42%

Support Manager—50%

Department Manager—78%

Customer Service Manager—85-90%

Other hourly positions—70%[8]

See Drogin Decl. ¶ 23, Table 7.

(2) *Policies Governing Compensation*

(a) *Hourly Employees*

All hourly employees at every Wal-Mart store are compensated pursuant to the same general pay structure. Each store has a minimum starting wage for each class of hourly jobs that is set by the Wal-Mart Home Office in Arkansas (hereafter "Home Office"). Beyond that, Store Managers are granted substantial discretion in making salary decisions for hourly employees in their respective stores. Specifically, they are allowed to depart from the minimum start rates, within a two dollar per hour range, without being constrained by objective criteria and with limited oversight. *See* Def.'s Opp'n at 5-6 & n.4. Indeed, "[i]n setting pay, a Store Manager makes the call based on his or her needs." *Id.* at 15; Haworth Decl. ¶ 4 ("This is a company that relies on its Store Managers to set the specific wage rates of each store's employees."). Given that hourly workers typically earn approximately $18,000 per year (based on 2001 wages), *see* Drogin Decl. ¶ 19, the two dollar per hour discretionary range is significant. Store Managers also are allowed to increase pay for exceptional performance, again with limited guidance or oversight.

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[8] This category comprises the four largest hourly jobs as follows: (1) Department Head (78%), (2) Sales Associate (68%), (3) Hardlines/Home Area Overnight Associates (57%), and (4) Cashier (93%). Drogin Decl. ¶ 26, Tables 10-11.

As a partial constraint on this local control Wal-Mart utilizes a system of oversight known as "management by exception." Under this system, District Managers and Specialty Group Regional Managers receive "exception reports" if Store Managers set an employee's pay rate at more than six percent above the minimum rate set by the Home Office, and must approve such rates. Defendant's national pay structure also specifies a 25 cent-per-hour gap between start rates in consecutive pay classes. *See* Drogin Reply Decl. ¶ 23; Webber Decl., Exhs. 93-94. This limited oversight, however, still leaves individual Store Managers with substantial discretion in setting pay rates for in-store employees. As one Store Manager explained, "There's [a presumptive limit of two dollars above the base], but I can do what I want. I mean, if I start throwing money around, I mean, eventually the phone is going to ring. But the store manager has the flexibility to do what he needs to do to run the building." Shatz Depo. at 66 (Weber Decl. Ex. 46).

(b) *Salaried Employees*

All types of Wal-Mart stores also compensate their salaried in-store management employees pursuant to common policies and practices. These decisions are made primarily by District Managers (the first level in the management hierarchy above Store Managers) and their superiors, the Regional Managers.

(1) *Assistant Managers*: For these lowest level salaried managers, Wal-Mart's Exempt Associate Pay Guidelines establish a broad salary range within which District Managers have discretion to set pay rates with little guidance and limited oversight. Assistant Managers receive a base salary and are eligible to receive annual performance and merit increases and a bonus. *See* Haworth Decl. ¶ 221; Def.'s Opp'n at 35 n.21. Those working in areas with a high cost of living receive Geographical Assistance Pay (GAP). *See* Arnold Decl. ¶ 19. The base salary range for Assistant Managers starts at $29,500 and goes to between $42,000 to $47,000 depending on store size. *See* Haworth Decl. ¶ 222.[9]

(2) *Co-Managers*: Similarly, Co-Manager pay rates are set by District Managers who exercise complete discretion, with little guidance and limited oversight, to set salaries within a base salary range from $42,000 to $47,000 (with GAP adjustments).

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[9] Assistant Managers at Sam's Clubs have a similar pay structure, except that they are eligible for incentive plans based on store profitability. *See* Haworth Decl. ¶¶ 231-33.

Co-Managers are also eligible to participate in an incentive plan based on store profitability. They do not receive merit or performance increases. *Id.* at ¶ 225.[10]

(3) *Specialty Departments:* Specialty Department Managers also have similar, albeit not identical, pay structures. Defendant's expert, Dr. Joan Haworth, states that each Specialty Department has a "different compensation plan," but she only identifies four of the eight departments (Tire & Lube Express [TLE], Photo, Optical, and Pharmacy). Among those, all have base salaries in broad ranges (spanning from $24,000 to over $40,000 at the top, with GAP adjustments), all are eligible for incentive plans, and all are eligible for merit and performance increases. *Id.* at ¶¶ 241-45. Again, these managers' pay rates are set by higher level managers with complete discretion within the relevant range, with limited guidance or oversight.

(4) *Store Managers:* Store Managers are paid a base salary determined by store size, ranging from $44,000 to $50,000, with GAP adjustments. They also are eligible to receive incentives based on store size and profitability. *Id.* at ¶ 227. Again, their base salaries are determined by upper level managers with broad discretion within the established range.

As the above reflects, there is a basic compensation structure that applies similarly to all in-store salaried management positions across all types of Wal-Mart stores, in that the computation begins with a base salary within a range set by the corporation (with an allowance for GAP), with adjustments allowed for profit incentives and/or merit increases. While certain differences exist—e.g., some positions allow for profit incentives while others build in merit incentives or both—they do not fundamentally alter the common nature of the positions. Most importantly, all of the in-store salaried positions—like all of the hourly positions—share the common feature that there is a broad range of discretion built into the compensation structure for each position. As discussed further *infra*, this feature also provides a potential conduit for gender discrimination that is common to all class members. At this point, however, it suffices to say that Defendant's policies governing compensation of hourly and salaried employees do not preclude a finding of commonality; on the contrary, the evidence indicates that there is significant uniformity across stores, and that Defendant's policies all contain a common feature of subjectivity that is relevant to Plaintiffs' claims of class-wide gender discrimination thus supporting the existence of questions common to the class.

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[10] Co-Managers at Sam's Clubs have a similar pay structure. *See* Haworth Decl. ¶ 236.

(3) *Policies Governing Promotions*

As with salary decisions, the parties agree that subjectivity is a primary feature of promotion decisions for in-store employees. In the words of Wal-Mart President and CEO Thomas Coughlin, "We push down to the manager of the facility level, [*sic*.] the responsibility to run those stores right." Haworth Decl. ¶ 7. The subjectivity in promotion decisions occurs in two fundamental ways: (a) a largely subjective selection practice hindered by only minimal objective criteria, combined with (b) a failure to post a large proportion of promotional opportunities.

(a) *Subjectivity in the Selection Practice*

The first promotion category challenged by Plaintiffs—the Support Manager position—is the primary feeder for the Management Training Program. It is undisputed that Wal-Mart allows Store Managers to apply their own subjective criteria when selecting candidates for the Support Manager position. Decisions regarding advancement into the Management Training Program are made by District and Regional Managers. Wal-Mart has minimum corporate guidelines for promotion into these positions, which include requirements that candidates have an "above average" evaluation, have at least one year in their current position, be current on training, not be in a "high shrink" department or store, be on the company's "Rising Star" list, and be willing to relocate. However, since the guidelines set forth only the minimum requirements for advancement, the decisions as to who will actually be selected for the Management Training Program are based largely on subjective criteria, resulting in what is fairly characterized as a "tap on the shoulder" process. *See* Butler Depo. at 135:4-11 (Webber Decl. Ex. 4) ("Each District Manager kind of has their own way of identifying talent within their district for development."); Kintzele Depo. at 86:20-23 (Webber Decl. Exh. 13) (explaining that Store Managers nominate candidates for promotion); M. Miller Depo. at 65:2-13 (Webber Decl. Ex. 54); June 27, 2002 E-mail from Jarrells-Porter (Webber Decl. Ex. 100) (statement of Senior Vice President that Wal-Mart "[does] not have a poster, brochure, nothing that I am aware of" to inform hourly workers "how to get promoted into the management training program"); Bielby Decl. ¶ 22 (citing testimony of Wal-Mart managers that promotions to in-store management positions are made based on largely discretionary criteria). Decisions regarding advancement to the highest in-store positions—Assistant Manager, Co-Manager, and Store Manager—are similarly based on subjective assessments beyond adherence to corporate minimum guidelines. *See, e.g.*, Kintzele Depo. 130:10, 133:9-135:16, 165:22-167:1 (Webber Decl. Ex. 13); Bielby Decl. ¶ 37. The subjective nature of Defendant's promotion practices is further compounded by the fact that the company does not monitor the promotion decisions being made or otherwise systematically review the grounds on which candidates are selected for promotion. Bielby Decl. ¶¶ 37-38 & n.53 (citing testimony of numerous Wal-Mart executives and managers).

(b) *Failure to Post Promotional Opportunities*

It is undisputed that, until January 2003, Wal-Mart did not post job vacancies for its Assistant Management Training Program, and it posted only a small number of vacancies for the Co-Manager position. *See* Def.'s Opp'n at 40 ("Wal-Mart does not have applicant flow data for the Trainee position before 2003"); Drogin Decl. ¶ 46 & Table 20.[11] Also, despite a stated policy to post hourly Support Manager positions, roughly 80 percent of these openings were not in fact posted. Drogin Decl. ¶ 44 & Table 19. Because most positions were not posted, class members had no ability to apply for, or otherwise formally express their interest in, openings as they arose. As a result, Managers did not have to consider all interested and qualified candidates, thus further intensifying the subjective nature of the promotion process.[12]

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[11] From December 1998 through October 2002, Wal-Mart posted only 238 Co-Manager openings. *Id.* at 120 (chart identifying number of offers for "Co-Mgr-Supercenter" and "Co-Mgr Div. 1").

Wal-Mart did post openings for Store Manager positions during the relevant class period. This was not, however, an "open" application process; rather, candidates were required to obtain permission from their District Manager before being allowed to apply. In selecting who could apply, such managers have been free to rely upon subjective criteria beyond the minimum corporate guidelines. Thus the posting of Store Manager positions did not fully ameliorate the subjective nature of the promotion process for these positions.

(4) *Whether Defendant's Compensation and Promotion Policies Support a Finding of Commonality*

Having reviewed the extensive evidence submitted by the parties, this Court is satisfied that Wal-Mart's systems for compensating and promoting in-store employees are sufficiently similar across regions and stores to support a finding that the manner in which these systems affect the class raises issues that are common to all class members. Moreover, the fact that Wal-Mart's compensation and promotion policies consistently permit managers to utilize a great deal of subjectivity further supports a finding of commonality.

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[12] Defendant argues that its wide-scale lack of posting is ameliorated by an aspect of its annual review process whereby employees "list what job they wished to be considered for in the ensuing year." Transcript of September 24, 2003 Oral Argument ("Oral Arg. Tr.") at 199:22-200:5. However, there is no evidence in the record that this was a systematic process, that the company tracked these expressions of interest, or that the process substituted for a true posting system in any manner.

While some level of subjectivity is inherent in, and in fact a useful part of, personnel decisions, courts have long recognized that the deliberate and routine use of excessive subjectivity is an "employment practice" that is susceptible to being infected by discriminatory animus. *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990-91 (1988) (subjective decision-making is a "practice" subject to challenge under Title VII); *Falcon*, 457 U.S. at 159 n.15; *Sengupta v. Morrison-Knudsen Co.*, 804 F.2d 1072, 1075 (9th Cir. 1986) (citation omitted); *Casillas v. United States Navy*, 735 F.2d 338, 345 (9th Cir. 1984) (citation omitted). In the same vein, a general practice of not posting promotional opportunities also supports a finding of commonality. *See Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1187 n.17 (9th Cir. 2002) ("Failure to post vacancies and the use of subjective promotions practices . . . may be evidence of discrimination").

And while the presence of excessive subjectivity, alone, does not necessarily create a common question of fact, where, as here, such subjectivity is part of a consistent corporate policy and supported by other evidence giving rise to an inference of discrimination, courts have not hesitated to find that commonality is satisfied. *See e.g.*, *Shipes v. Trinity Industries*, 987 F.2d 311, 316 (5th Cir. 1993) ("Allegations of similar discriminatory employment practices, such as the use of entirely subjective personnel processes that operate to discriminate, satisfy the commonality and typicality requirements of Rule 23(a).") (citation omitted); *Caridad*, 191 F.3d at 292; *Beckmann v. CBS*, 192 F.R.D. 608, 613 (D. Minn.2000); *Shores v.*

Publix Super Markets Inc., 1996 WL 407850, at *6 (M.D. Fla. Mar.12, 1996) (defendant's "policy of delegating hiring and promotion decisions to managers, who make those decisions on the basis of subjective criteria, is a common course of conduct . . . adequate to meet the commonality requirement of Rule 23").[13]

The situation here is similar to *Morgan v. United Parcel Service, Inc.*, 169 F.R.D. 349 (E.D. Mo.1996), in which the parties agreed that United Parcel Service had a subjective, decentralized decision-making process for promotions. The defendant claimed that this process should defeat commonality because individualized decisions are made at the local level, whereas plaintiffs argued that the policy of giving local managers unfettered authority was part of a nation-wide corporate policy to which all employees were subjected and which resulted in racial discrimination. *Id.* at 356. The court agreed with plaintiffs that the subjective decision-making practice was sufficient to satisfy the commonality requirement. *Id.*

Wal-Mart similarly argues that the fact that pay and promotion decisions are made locally by individual Store Managers necessarily defeats a finding of commonality. To support this argument, it attempts to align itself with those cases in which courts have denied certification based on geographically diverse corporations with localized decision-making. In the principal case relied on by Defendant, *Reid v. Lockheed Martin Aeronautics Co.*, 205 F.R.D. 655 (N.D. Ga. 2001), the court held that because the challenged employment practices were highly localized among many facilities, plaintiffs could not establish commonality. While *Reid* recognized that subjective decision-making may give rise to an inference of discrimination, it determined on the facts of the case that there was no evidence to provide a nexus between the subjective decision-making and discrimination. *Id.* at 670-72. Here, in contrast, plaintiffs have presented evidence of such a nexus by presenting evidence of gender stereotyping and a corporate culture of uniformity (discussed in greater detail below). Furthermore, *Reid* emphasized that all of the named plaintiffs in that case worked at the same facility, thereby leaving the court without any basis upon which to conclude that similar practices existed among diverse facilities. *Id.* Here, in contrast, the named plaintiffs work in different stores and Plaintiffs have submitted over a hundred declarations by designated class members showing common subjective practices across the country. The Court therefore finds *Reid* distinguishable.[14]

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[13] *See also Butler v. Home Depot, Inc.* (*Butler I*), 1996 WL 421436 (N.D. Cal. Jan.25, 1996); *Adams v. Pinole Point Steel Co.*, 65 Fair Empl. Prac.Cas. (BNA) 782, 1994 WL 515347, at *9 (N.D. Cal. May 18, 1994) ("[Plaintiffs] allege that [defendant's discriminatory] practices stem from a subjective hiring criteria and a high level of discretion afforded supervisory employees. A general policy of discrimination that affects individual class members provides a 'common nucleus of operative fact,' and thus sufficient commonality to support class certification."); *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259, 335 (N.D. Cal.1992); *Wofford v. Safeway Stores, Inc.*, 78 F.R.D. 460, 479 (N.D. Cal. 1978).

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[14] Similarly, in the other case principally relied on by defendant, *Rhodes v. Cracker Barrel Old Country Store, Inc.*, 2002 WL 32058462, at *56-58 (N.D. Ga. Dec.31, 2002), *magistrate judge op. approved and adopted*, 213 F.R.D. 619 (N.D. Ga. 2003), the court denied class certification where plaintiffs failed to show any kind of nexus between subjective decision-making

The Court also rejects Wal-Mart's suggestion that its practice of giving managers substantial discretion in making pay and promotion decisions should defeat commonality because it would embroil the court or jury in an endless series of individual fact scenarios regarding each pay or promotion decision. As discussed in section II.B.1, Plaintiffs' task at the liability stage of the trial is to prove a pattern and practice of discrimination. To do so, they will need to show sufficient evidence of excessive subjectivity to convince a jury that it is a wide-scale practice, which along with other evidence, is sufficient to create an inference of, and ultimately prove, discrimination. Because the focal point will be the practice of utilizing excessive subjectivity, rather than the facts concerning each individual decision, the Court is satisfied that the subjective nature of Defendant's personnel practices does not defeat commonality in this case.

b. *Corporate Culture*

Plaintiffs also present evidence that Wal-Mart has developed and continually reinforces a strong, centralized corporate culture. This evidence, taken together with evidence concerning Wal-Mart's com-

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[Footnote continued from previous page]

and discrimination. Defendant also attempts to analogize Wal-Mart's promotion system to that of Microsoft, as addressed in *Donaldson v. Microsoft*, 205 F.R.D. 558 (W.D. Wash. 2001). There the court denied class certification in part based on a lack of commonality. *Id.* at 566. Wal-Mart's practices, however, are significantly more subjective than those described in *Donaldson*. Microsoft used a well-crafted combination of both objective and subjective measures, with features not present in Wal-Mart, such as bi-annual evaluations, advance mapping of goals and objectives, and an appeal process. *Id.* at 566.

pany-wide subjective compensation and promotion practices discussed above, provides a further indicator of commonality. Specifically, Plaintiffs present evidence that Wal-Mart corporate culture includes two principal common aspects relevant to this case: (1) a strong emphasis on building and maintaining a uniform culture, and (2) an environment that may include gender stereotyping.

(1) *Wal-Mart's Emphasis on Uniform Culture*

There is no genuine dispute that Wal-Mart has carefully constructed and actively fosters a strong and distinctive, centrally controlled, corporate culture.[15] *See, e.g.*, R. Harper Depo. at 121 (Webber Decl. Ex. 36) (describing Wal-Mart culture as a "very tight, deep culture" and "a very closed culture from a total corporation standpoint"). This culture, labeled by Defendant as the "Wal-Mart Way," promotes and sustains uniformity of operational and personnel practices. This is important in the Rule 23 commonality analysis because, as Plaintiffs' expert, Dr. William Bielby, states, "[a] strong and widely shared organizational culture promotes uniformity of practices throughout an organization." Bielby Decl. ¶ 18.

Every new employee nation-wide goes through the same orientation process and, as part of that process, is trained about the Wal-Mart culture. Thereafter, employees at Wal-Mart stores attend a daily meeting held at shift changes, where managers discuss the company culture and employees do the

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[15] Sam's Club shares the same culture as the Wal-Mart stores. *See* Swanson Depo. 140:16-19 (Webber Decl. Ex. 14); Reeves I Depo. 103:1-25 (Webber Decl. Ex. 2).

Wal-Mart cheer. *See* Muzingo Depo. at 85-86 (Webber Decl. Ex. 32). Employees also receive weekly training on culture topics at mandatory store meetings.[16] Wal-Mart Store Managers are provided with a detailed schedule of corporate culture lessons and accompanying training materials to present at these weekly meetings. The same Computer-Based Learning Modules are used in all stores, including required training on culture topics. Culture is also an integral part of all management training programs. Home Office managers also attend a meeting each Saturday morning which is dedicated once a month to presenting one of the company's culture lessons. *See* Muzingo Depo. 135-36 (Webber Decl. Ex. 32). In short, the inculcation of Wal-Mart culture is an ongoing process for all employees regardless of seniority; as one manager puts it, the company has a "continual process of learning culture." *See* Swanson Depo. at 141 (Webber Decl. Ex. 14).

Additionally, Wal-Mart has a strong policy of "promoting from within," so that the culture lessons learned by junior-level employees contribute to building a foundation of common understanding and practice among the management team. *See* Peterson Depo. at 72:2-6 (Webber Decl. Ex. 16). The company also regularly moves store level managers from one retail facility to another, often from one state to another, and between Wal-Mart and Sam's Club divisions. On the average, each Store Manager is transferred to a different store 3.6 times after achieving that title. A majority of these transfers are into different districts and are often into different regions. *See* Drogin Decl. ¶ 35; Drogin Reply Decl. ¶ 24. This degree of mobility could only be efficient in a company with a high degree of store-to-store uniformity. These practices also help ensure that a uniform Wal-Mart Way culture operates consistently throughout all stores.

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[16] The Culture Topic Index provided to store management employees states: "It is important for our Associates to understand how important culture is to their company. We have provided you with a culture topic for mandatory weekly discussions with all store Associates on each shift during store meetings." *See* Bielby Decl. ¶ 20, n.30 (and citation therein to document WMHO598668).

Wal-Mart also has a very advanced information technology system which allows managers in the Home Office to monitor the operations in each of its retail stores on a close and constant basis. For example, the Home Office is connected through a real-time computer link (called "Managers' Workbench") to every Store Manager throughout the country. The company uses the same Computer-Based Learning Modules in all stores, it broadcasts "Wal-Mart TV" into all stores, and employs a number of other uniform communications tools. Centralization at Wal-Mart extends to the point where the Home Office controls the temperature and music in each store throughout the country.

Finally, plaintiffs present evidence from Dr. Bielby, a sociologist, to buttress their claim that Wal-Mart has a strong corporate culture. After undertaking an extensive review of the depositions of Defendant's managers, Wal-Mart policies, and the professional research and literature in the field, Dr. Bielby gives the following opinion:

> In sum, consistent with the organizational research on this topic, Wal-Mart's distinctive corporate culture is sustained by focused ef-

> forts of the firm through on-going training and socialization, communication specifically designed to reinforce its distinctive elements, promotion from within and relocating managers from store to store, and shared experiences among employees that build commitment to shared beliefs and values. As a result of these efforts, employees achieve a common understanding of the company's ways of conducting business.

Bielby Decl. ¶ 21.[17]

Wal-Mart counters the suggestion that its strong corporate culture creates any commonality among class members in disparate locations by arguing that each of its stores is a virtual "main street" of stores within a store, all run by independent managers. *See* Def.'s Opp'n at 13. It also contends that each division of stores has its own unique hierarchical structure of reporting and supervision. *Id.* at 14. While it is true that the terminology and some details vary from division to division, and within store departments, there does not appear to be a significant difference in actual function. Rather, as discussed *supra*, Plaintiffs have presented evidence that the basic operational structure and staffing patterns of stores are quite uniform, and each individual store is subject to oversight from the company's Home Office, where all regional and higher level managers are based.

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[17] Additionally, Dr. Bendick, Plaintiffs' labor economics expert, concludes that Wal-Mart has a high management centralization ratio, in that 15.4 percent of its managers are located at the company headquarters, compared with an average of 8.1 percent for its twenty closest comparators. From this data, Dr. Bendick concludes that Wal-Mart has a strong corporate culture that is both perpetuated by and reflected in employment policies and practices that are common companywide. Bendick Decl. ¶¶ 64-65.

The Court recognizes that there is a tension inherent in characterizing a system as having both excessive subjectivity at the local level and centralized control. To clarify, the evidence indicates that in-store pay and promotion decisions are largely subjective and made within a substantial range of discretion by store or district level managers, and that this is a common feature which provides a wide enough conduit for gender bias to potentially seep into the system. These subjective decisions are not, however, made totally in isolation. Rather, the company maintains centralized corporate policies that provide some constraint on the degree of managerial discretion over in-store personnel decisions. The evidence suggests that the company relies also on its strongly imbued culture to guide managers in the exercise of their discretion. It would be premature and inappropriate for the Court to determine the precise degree to which the forms of centralized control at Wal-Mart keep managerial discretion in check. *See Eisen*, 417 U.S. at 177; *Orlowski v. Dominick's Finer Foods, Inc.*, 172 F.R.D. 370, 373-74 (N.D. Ill. 1997) (court found commonality in promotion process where degree of centralized decision-making could not be definitively determined without performing full merits inquiry). It is clear, however, that given the evidence regarding strong uniform culture and policies, the degree and impact of this practice is a significant question of fact common to the class as a whole. *See Morgan*, 169 F.R.D. at 356 (commonality requirement can be met where company combines "subjective, decentralized system of decisionmaking" with personnel policies that are "uniform throughout the country and are promulgated by the national corporate office").

(2) *Gender Stereotyping*

Plaintiffs also rely on the expert testimony of Dr. Bielby to support their contention that gender stereotyping is likely to exist at Wal-Mart, and that it persists to the present day. Dr. Bielby notes that there are many reasons why men and women can have different career trajectories, some of which are not generally considered discriminatory, such as differing job-related skill requirements. *See* Bielby Decl. ¶ 28. Employers create gender barriers, however, when they allow stereotypes to affect personnel decisions. *Id.* at ¶ ¶ 28-29.[18]

Dr. Bielby opines that the social science research demonstrates that gender stereotypes are especially likely to influence personnel decisions when they are based on subjective factors, because substantial decision-maker discretion tends to allow people to "seek out and retain stereotyping-confirming information and ignore or minimize information that defies stereotypes." *Id.* at ¶ 34. With respect to Wal-Mart in particular, Dr. Bielby confirms that managers make decisions with considerable discretion and little oversight. *Id.* at ¶¶ 37-41. He concludes that subjective decisions such as these, as well as discretionary wage decisions, are likely to be biased "unless they are assessed in a systematic and valid manner, with clear criteria and careful attention to the integrity of the decision-making process." *Id.* at ¶ 39. Dr. Bielby further concludes that these systematic elements are missing from Wal-Mart's decision-making process. *Id.* Dr. Bielby also notes that the company's practice of requiring relocation across stores for salaried managers, which generally creates a greater burden for women, makes the promotion process "especially vulnerable to gender stereotyping." *Id.* at ¶ 45.

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[18] As another example, both parties recognize that family constraints limit women more than men, and that this is a broad phenomenon that is not entirely attributable to Wal-Mart. However, Dr. Bielby states that in an environment of stereotyping, people tend to act on assumptions that overstate the extent to which they are true. Without a systematic mechanism for determining availability and interest in promotion, stereotypes lead decision-makers to overlook or discount women's desire and qualifications for advancement. *See* Bielby Decl. ¶ 30.

Lastly, Dr. Bielby reviewed Wal-Mart's diversity and equal opportunity policies, many of which have been implemented in just the last few years. He concluded that they have identifiable weaknesses that limit their effectiveness for identifying and eliminating discriminatory barriers. *Id.* at ¶ 62. For example, while Wal-Mart regularly compiles statistics on the gender composition of its workforce, it has not undertaken a systematic assessment to identify possible barriers to women's advancement. *Id.* at ¶ 52. As another example, while Wal-Mart sets diversity goals for female representation in management, the goals appear to be largely ad hoc. Rather than setting the goals based on an understanding of the number of qualified and interested women available for a given position, many of the managers simply make their own subjective determinations or set their goals as incremental improvements over the prior year. *Id.* at ¶¶ 54-55. On the whole, Dr. Bielby recognizes that Wal-Mart has increased its emphasis on diversity issues in the past few years, but because the company has not translated that emphasis into practical and effective measures, there has been little actual impact on gender differentials in pay and promotion. *Id.* at ¶¶ 56-57 (citing former Vice President's view that by failing to tie diversity achievement to manager's incentive pay, the company's diversity efforts remain "lip service"). Additionally, although Wal-Mart regularly surveys its employees on a number of job-related issues (through its "Grass Roots" personnel program), it has never performed any kind of survey addressing diversity or gender issues. *Id.* at ¶ 61.

Defendant contests the accusation of gender stereotyping on the facts and by challenging Dr. Bielby's opinions. As a factual matter, Defendant points out a number of ways in which Wal-Mart culture promotes diversity. Wal-Mart has earned national diversity awards and its executives discuss diversity and include it in the company handbooks and trainings. *See* Porter Decl. ¶¶ 5-22. The company also has diversity goals, performance assessments, and penalties for EEO violations. *See* Def.'s Opp'n at 20.

Defendant also challenges Dr. Bielby's opinions as unfounded and imprecise. It is true that Dr. Bielby's opinions have a built-in degree of conjecture. He does not present a quantifiable analysis; rather, he combines the understanding of the scientific community with evidence of Defendant's policies and practices, and concludes that Wal-Mart is "vulnerable" to gender bias. *See* Bielby Decl. ¶ 63. Defendant rightly points out that Dr. Bielby cannot definitively state how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart. *See* Def.'s Opp'n at 20:25-28. However, this is the nature of this particular field of science. *See* Fed. R. Evid. 702 (allowing "scientific, technical, *or other spe-*

cialized knowledge [that] will assist the trier of fact to understand the evidence") (emphasis added).

The appropriate question at this stage of the litigation is not whether Dr. Bielby can make a conclusive determination, but whether it could add probative value to the inference of discrimination that plaintiffs allege. Here, Dr. Bielby presents enough of a basis, both in his review of the scientific literature and on the facts of the case, to provide a foundation for his opinions. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989) (considering similar evidence by expert social psychologist). Whether those opinions, if presented to a jury, are ultimately worthy of belief will be for a jury to decide. For present purposes, Dr. Bielby's testimony raises an inference of corporate uniformity and gender stereotyping that is common to all class members.

2. *Statistical Evidence of Discrimination*

The second category of evidence presented by plaintiffs is statistical evidence of class-wide gender disparities. Use of statistical analysis to raise an inference of class-wide discrimination and satisfy commonality is well accepted. *See, e.g., Caridad*, 191 F.3d at 292. Plaintiffs rely primarily on the expert testimony of Dr. Richard Drogin,[19] a statistician who concludes, in essence, that there are statistically significant disparities between men and women at Wal-Mart in terms of compensation and promotions, that these disparities are wide-spread across regions, and that they can be explained only by gender discrimination. Plaintiffs bolster Dr. Drogin's analysis regarding promotion discrimination with the expert testimony of a labor economist, Dr. Marc Bendick, who performed a "benchmarking" study of twenty of Wal-Mart's competitors and concluded that Wal-Mart promotes a lower percentage of women than its retail counterparts.

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[19] Dr. Drogin is an emeritus professor in the Department of Statistics at California State University, Hayward and is a partner in a statistical consulting firm. *See* Drogin Decl. ¶¶ 1-2.

Defendant contends that Dr. Drogin's analysis is substantially flawed and that in fact there is no statistical pattern of discrimination at Wal-Mart. Defendant relies on the testimony of its own expert economist, Dr. Haworth, who provides both a critique of Dr. Drogin's analysis and a separate analysis that she performed.[20] Defendant also challenges Dr. Bendick's expert testimony as methodologically and factually flawed.

Defendant's arguments seek to engage the Court in a merits evaluation of the expert opinions. The Court rejects this approach, and views the statistical evidence and testimony through the proper lens of the standards applicable to a class certification motion. *See* Legal Standards, *supra*; *Eisen*, 417 U.S. at 177 (admonishing courts not to engage in a preliminary assessment of the merits).[21] Accordingly, the

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[20] Dr. Haworth is the Chair and CEO of ERS Group, which specializes in the economic and statistical analysis of employment discrimination cases and other matters. Dr. Haworth is a former faculty member of the Department of Economics at Florida State University. *See* Haworth Decl. ¶¶ 5-6.

[21] *See also Caridad*, 191 F.3d at 292 ("Though [defendant's] critique of the Class Plaintiffs' evidence may prove fatal at the merits stage, the Class Plaintiffs need not demonstrate at this stage that they will prevail on the merits. Accordingly, this sort of 'statistical dueling' is not relevant to the certification deter-

Court delves into the substance of the expert testimony only to the extent necessary to determine if it is sufficiently probative of an inference of discrimination to create a common question as to the existence of a pattern and practice of gender discrimination at Wal-Mart. *See Avagliano v. Sumitomo Shoji America, Inc.*, 103 F.R.D. 562, 574 (S.D.N.Y. 1984) ("While [plaintiffs] may have made a greater showing than is required on a motion for certification, certainly no *more* than an inference need be shown.") (emphasis in original).

a. *Statistical Evidence Regarding Compensation*

(1) *Overview*

Both parties' experts performed tests on an extensive array of Wal-Mart payroll and personnel data to determine whether gender disparities in salary exist and whether such disparities can be attributed to discrimination. Plaintiffs present largely uncontested descriptive statistics which show that women working in Wal-Mart stores are paid less than men in every region, that pay disparities exist in most job categories, that the salary gap widens over time even for men and women hired into the same jobs at the same time, that women take longer to enter into management positions, and that the higher one looks in the organization the lower the

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mination.") (citation omitted); *EEOC v. Gen. Tel. Co.*, 885 F.2d 575, 579-82 (9th Cir. 1989), *cert. denied*, 498 U.S. 950 (1990); *Butler I*, 1996 WL 421436, at *3 (N.D. Cal. Jan.25, 1996) ("the evidence upon which plaintiffs propose to rely—statistical evidence of widespread discrimination—is common to the class as a whole").

percentage of women. *See* Drogin Decl. ¶¶ 21, 23; Haworth Depo. at 67:14-70:16, 76 (Suppl. Webber Decl. Ex. 129); *see also* section I.B.1.a.

Evidence that certain disparities exist, however, does not, by itself, explain *why* they exist. Accordingly, Plaintiffs also present inferential statistical evidence in the form of multiple regression analysis to demonstrate that the above disparities can be explained only by gender discrimination and not by chance or other neutral variables.[22] Defendant follows suit with a critique of Plaintiffs' regression analysis and with a separate regression analysis of its own. Thus, while they disagree as to application, the parties agree in principle that regression analysis is an appropriate and scientifically valid statistical technique which has gained general acceptance, indeed a general preference, by the courts. *See Hemmings*, 285 F.3d at 1183-84 & n.9 ("regression analysis is a common statistical tool"); *Lavin-McEleney v. Marist College*, 239 F.3d 476, 482 (2d Cir. 2001) ("It is undisputed that multiple regression analysis . . . is a scientifically valid statistical technique for identifying discrimination.").

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[22] Multiple regression analysis, in general terms, provides estimates of the effect of several independent variables on a single dependent variable. The purpose is to estimate the extent to which a particular independent variable (in this case, gender) has influenced the dependent variables of compensation and promotion. So long as the analysis includes enough relevant non-discriminatory independent variables (*e.g.*—education, experience, performance, etc.), the results will indicate whether any salary disparities are attributable to gender (thereby raising an inference of discrimination) or whether the disparities are attributable to other factors (and thereby refuting such an inference). *See Hemmings*, 285 F.3d at 1183-84 & n.9.

Since the parties rely mostly on their regression analyses in this case, the Court is not called upon to decide whether plaintiffs' descriptive statistics alone suffice to support a finding of commonality or a prima facie case. *See* Reference Manual on Scientific Evidence, p. 148-49 n.224 (2d ed. 2000) ("The conditions under which a simple disparity between two groups amounts to a prima facie case that shifts the burden of proof to the defendant in Title VII and other discrimination cases have yet to be articulated clearly and comprehensively.") (citations omitted).

With respect to compensation, Dr. Drogin performed separate regression analyses for hourly and salaried employees for each Wal-Mart region. In general, the regressions showed statistically significant[23] gender-based disparities for all in-store job classifications in all 41 Wal-Mart regions. *See* Drogin Decl. ¶ 77. Specifically, total earnings paid to women ranged between 5 and 15 percent less than total earnings paid to similarly situated men in each year of the class period. *Id.* at ¶ 77. Dr. Drogin's regression analyses included seniority, turnover, performance, and other factors, none of which accounted for the disparities, thereby leaving him to conclude that gender is the only explanatory factor. In short, all of Dr. Drogin's regressions show that gender is a statistically significant variable in accounting for the salary differentials between female class members and male employees at Wal-Mart stores. *Id.* at ¶ 76.

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[23] Statistical significance is measured by standard deviations. The standard deviation is a number that quantifies the probability that chance is responsible for any difference between an expected outcome and the observed outcome in a sample containing two groups. The greater the number of standard deviations, the less likely it is that chance is the cause of any difference between the expected and observed results." [A]s a general rule for . . . large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the [disparity] was random would be suspect to a social scientist." *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977).

Defendant's statistical expert, Dr. Haworth, rejected Dr. Drogin's focus at the regional level and conducted her regression analyses at the store subunit level. Consequently, while Dr. Drogin ran a separate regression analysis for each of the 41 regions, Dr. Haworth ran a separate regression analysis for (a) each of the Specialty Departments within each store, (b) each grocery division within each store, and (c) the remainder of each store. *See* Haworth Decl. ¶ 191.[24] Due to the focus on sub-units, Dr. Haworth performed approximately 7,500 separate regression analyses. Her results show a lack of broad-based gender differential in pay for hourly employees, although they show some gender disparities in limited instances. Dr. Haworth did *not* perform regression analyses for most salaried positions because, in her view, "total compensation for these jobs is at least in part a function of factors that are not available in the data provided to either side," and therefore "the regression models may not provide a meaningful explanation of variations in total compensation." Haworth Decl. ¶¶ 253-55.

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[24] As noted earlier, most stores have roughly 40 to 53 departments, such as automotive, jewelry, apparel, etc. Webber Decl. Ex. 70 at 8-9. Some of these departments are highly sex segregated (*e.g.* cashiers are 89.5% female, hardware sales associates are over 75% male), while others are roughly even in terms of gender (*e.g.* electronics is 47.2% female). Bielby Decl. ¶ 22.

(2) *Defendant's Challenges to Plaintiffs' Statistical Analysis*

Defendant does not dispute the accuracy of Dr. Drogin's calculations, but instead argues that his analysis fails to support an inference of class-wide discrimination because his methodology is fundamentally flawed in two respects: (1) Dr. Drogin improperly aggregated the data at the regional level, and (2) Dr. Drogin failed to account for certain variables. Each point is addressed in turn.

(a) *Aggregation at the Regional Level*

Defendant argues that because Dr. Drogin's regression analysis was conducted at the regional, rather than the store (or store department) level, his results are too generalized and fail to account for the significant differences in compensation practices that exist among the individual stores. In statistical language, Dr. Drogin's regional analyses suffer from "aggregation bias," and the only way to cure this bias, according to Defendant, would be to "disaggregate" the data and test it at the store-by-store level.[25]

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[25] Defendant argues in its briefing that the statistical analysis should be performed at the store level, but Dr. Haworth went a level lower by analyzing store sub-units, as described above. This could be seen as a methodological inconsistency that would undermine Defendant's argument. However, Defendant's rationale for focusing on the store level is that most compensation decisions occur at the store level; Dr. Haworth's sub-unit analysis is logically consistent with that rationale because it is based on an understanding (disputed by Plaintiffs) that Specialty Department and Grocery unit employees are paid through a different structure than other store employees. The Court therefore concludes that the inconsistency between Defendant's focus

The proper test of whether workforce statistics should be viewed at the macro (regional) or micro (store or sub-store) level depends largely on the similarity of the employment practices, and the interchange of employees, at the various facilities. *See Kirkland v. New York State Dept. of Correctional Servs.*, 520 F.2d 420, 425 (2d Cir. 1975) (focus of analysis depends on nature of defendant's employment practices); Lindemann & Grossman, *Employment Discrimination*, at 1598, 1723. Here, Dr. Drogin contends that it is proper to conduct the analysis on a regional level because the subjective decision-making in compensation and promotions takes place within parameters and guidelines that are highly uniform, and within a strong corporate culture. Plaintiffs also have shown, as discussed above, that the primary salary decision-makers, Store Managers, experience frequent relocation among the various stores.[26]

Dr. Haworth challenges Dr. Drogin's regional focus largely based on a survey taken of Store Managers regarding factors individual managers utilize in

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on "stores" in its briefs versus Dr. Haworth's focus on store sub-units to be mostly semantic.

[26] Dr. Haworth attempts to frame this issue differently, by arguing that Plaintiffs assume that Wal-Mart is a company with "one decision-maker" who sets pay rates for all employees across the country. Haworth Decl. ¶¶ 4, 23. This is an argumentative distortion of Dr. Drogin's analysis. It is one thing to conclude that stores operate pursuant to common policies based on evidence that a number of core practices have a strong degree of similarity; it is another to infer the existence of a single decision-maker from the existence of common policies. Dr. Drogin did the former and not the latter.

setting compensation. Specifically, she argues that aggregating data on a regional level "is not consistent with the variety in the responses of a randomly selected group of Store Managers as to what they believe to be important factors in making pay decisions." Haworth Decl. ¶ 25. As discussed in this Court's Order re Motions to Strike, however, this survey is stricken from the record. Accordingly, Defendant's reliance on this survey to challenge Dr. Drogin's statistical methods is misplaced.

Defendant also attacks Dr. Drogin's reliance on regional level statistics because he failed to perform a "Chow" test. This test (named after the statistician who created it) can be used to analyze whether two or more sets of data may be aggregated as a single sample in a statistical model. Dr. Haworth contends that because Store Managers possess substantial discretion and latitude in setting pay rates, stores act as distinct units; therefore, Dr. Drogin should be required to successfully apply the Chow test before aggregating the data on a regional level.

Defendant does not, however, point to any authority that would require use of a Chow test in this case. Defendant relies on *Coates v. Johnson & Johnson*, 756 F.2d 524, 542 (7th Cir. 1985), a decision on the merits, in which plaintiffs' expert aggregated (or "pooled") data over a number of years, rather than performing separate analyses on a yearly basis. The district court found that the weight of the competing expert testimony favored the defendant's position that the data was more reliable on a yearly basis. The Seventh Circuit emphasized that this was a close decision based on the particular facts of the case, *id.* at 542, and that "[p]ooling data is sometimes not only appropriate but necessary." *Id.* at 541. Defendant of course will be free to rely on the Chow test as a means of attempting to discredit Dr. Drogin at trial. Nothing in *Coates*, however, mandates a Chow test on the facts of this case.[27]

Nor does the present factual record compel the conclusion that a Chow test must be performed. As noted, Dr. Haworth emphasizes that each store should be treated as a distinct unit, given that individual Store Managers possess substantial latitude in setting pay rates. Plaintiffs also present evidence, however, that the stores, while autonomous in certain respects, do not operate in isolation; rather, managerial discretion and subjectivity are exercised in the context of a strong corporate culture and overarching policies. In such circumstances, there is less justification for treating each store as a distinct unit for purposes of statistical analysis. As such, the Court is not persuaded that Dr. Drogin's aggregated statistical analysis should be rejected because he did not choose to utilize the Chow test.

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[27] *See also Rossini v. Ogilvy & Mather*, 615 F. Supp. 1520, 1522-23 (S.D.N.Y. 1985), *vacated and remanded on other grounds*, 798 F.2d 590 (2d Cir. 1986) (in decision on merits regarding salary discrimination, the court found that the Chow test showed statistically significant differences in regressions run on data before and after limitations date; nonetheless, the court held that "categorical rejection" of a single regression combining all data before and after the limitations date was "not warranted"); *Vuyanich v. Republic Nat'l. Bank*, 505 F. Supp. 224, 299, 314 (N.D. Tex. 1980), *vacated on other grounds*, 723 F.2d 1195 (5th Cir. 1984) ("Because the controversy here [regarding the Chow test] appears to center on an issue on the frontier of econometrics, and there seems, at least to a court unschooled in the intricacies of econometrics, to be genuine conflict between the experts as to the proper approach, we do not decide the issue.").

Moreover, the Ninth Circuit recently held that plaintiffs may rely on aggregated data to present claims of employment discrimination in *Paige v. California*, 291 F.3d 1141 (9th Cir. 2002). In that case, the plaintiffs' statistician aggregated data from various promotion examinations rather than viewing each examination on its own. *Id.* at 1148. All non-white plaintiffs were also aggregated as a single group rather than viewing each race separately. *Id.* The court began by stating that "it is a generally accepted principle that aggregated statistical data may be used where it is more probative than subdivided data." *Id.* (citation omitted). After noting that plaintiffs' theory was that defendant's employment practices had an identical discriminatory effect upon all members of the class, the court stated that "[r]ight or wrong, [plaintiffs] are entitled to attempt to prove their case" and "plaintiffs may aggregate data . . . for comparison purposes." *Id.* at 1149.

Clearly, the specific forms of aggregation in *Paige* are quite different than the geographical aggregation at issue here. The general issue, however, is the same: whether a particular level of generalization should be declared the only legally relevant focal point for statistical analysis, or whether statistical results may be presented at various levels of generality or specificity with the ultimate determination being made after all the evidence is evaluated by the finder of fact. The Ninth Circuit answered this question by holding that statistical analyses run on aggregated data should not be excluded, and may in fact be highly relevant.

Finally, the Court notes that *Abram v. United Parcel Service of America, Inc.*, 200 F.R.D. 424 (E.D. Wis. 2001), relied upon by Defendant, does not undermine the use of regional statistics in this case. In

Abram, the court denied class certification in part because plaintiffs' statistics failed to support commonality. *Id.* at 431. The parties agreed that there was a statistically significant pay gap between African-Americans and Caucasians when the data was considered in the aggregate at the *nation-wide* level. *Id.* However, at the district-by-district level, plaintiffs' expert *conceded* that there was no statistically significant difference. *Id.* Furthermore, the court found that plaintiffs' expert failed to control for non-racial variables, such as education and employment history, which, when properly accounted for even at the nation-wide level, led to the conclusion that there was no statistically significant difference among the races. *Id.* at 431 n.3. Thus, the *Abram* decision is essentially a rejection of plaintiffs' statistical evidence on the merits of that particular case. To the extent that a general proposition can be extracted from *Abram*, it would be that aggregated data at the nation-wide level is highly suspect, but that aggregation at a district level could be appropriate. Notably, United Parcel Service divides the country into sixty-five districts, some of which extend to an entire state or bloc of states. *Id.* at 426. Wal-Mart uses a similar organizational scheme with forty-one regions nationwide. Since Dr. Drogin analyzed the data at a level similar to the United Parcel Service district range, and controlled for a variety of relevant non-gender factors, his regional analyses is actually consistent with the *Abram* decision.[28]

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[28] Defendant also relies on *Lott v. Westinghouse Savannah River Co.*, 200 F.R.D. 539 (D.S.C. 2000), in which the court denied class certification. In *Lott*, plaintiffs presented mostly "simple grade-school level analyses" of the data through lay

In sum, the Court is not persuaded that Dr. Drogin's regional analysis should be rejected for purposes of this motion because it is lacking in probative value. The ultimate question of whether subjective decision-making and a uniform culture contribute to a nation-wide pattern of gender discrimination will, of course, be for a jury to decide. At this stage, however, these factors are apparent enough to support Dr. Drogin's regional approach as at least *a* reasonable means of conducting a statistical analysis. *See, e.g., Barefield v. Chevron U.S.A., Inc.*, 44 FEP 1885, 1987 WL 65054 (N.D. Cal. 1987) (rejecting challenge to plaintiffs' statistics at class certification stage when objection went to the merits of the case).[29]

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witnesses. *Id.* at 546. Plaintiffs also presented the testimony of an expert witness, which the court does not specifically describe, but which appears to have been a break-down of racial disparities in employment in each EEO job category. *Id.* at 547. While understandably concluding that "[p]laintiffs' statistical reports fail to demonstrate satisfaction of the commonality criteria because of critical deficiencies in their composition," the court also criticized plaintiffs for aggregating the data across divisions and classes of employees, reasoning that "[s]uch aggregated statistics 'fail to 'reveal whether there is a pattern of disparities across the various decisionmaking units or a reliable sample of them.'" *Id.* at 560-61 (*quoting Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267, 278 (4th Cir. 1980)). The court provides no further explanation for its decision regarding the statistics. Its single conclusory statement can not be extended to justify Defendant's proposed rejection of Dr. Drogin's aggregated analysis, which as discussed above, is based on a substantial factual record.

[29] *See also Caridad*, 191 F.3d at 292-93 (in employment class action where defendant had subjective decision-making practices, plaintiffs' expert conducted multiple regression analyses

(b) *Selection of Variables*

Defendant also contends that Dr. Drogin's statistical analysis should be rejected because it fails to account for a variety of factors, or control elements, that could be responsible for the disparities in question— referred to as "omitted variable bias." The question of which factors a statistician should account for in any given case is not governed by any bright-line rules; rather, it depends upon the theory and facts of each particular situation.

Here, Dr. Drogin controlled for a number of major variables, including: gender, length of time with the company, number of weeks worked during the year, whether the employee was hiring or terminated during the year, full-time or part-time, which store the employee worked in, whether the employee was ever hired into a management position, job position, and job review ratings. *See* Drogin Decl. ¶¶ 67-71. Defendant argues, however, that these variables do not fully reflect its compensation decision making structure, thereby leaving open the possibility that one or more missing variables could explain the gender disparities in question. In particular, Dr. Haworth identifies eleven variables that Dr. Drogin al-

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on both a company-wide and a department-by-department basis; the court concluded that the statistical disparities were "not insignificant," that the "statistical dueling" in which defendant sought to engage the Court was "not relevant to the certification determination," and that while "[m]ore detailed statistics might by required to sustain the Plaintiffs' burden of persuasion [at trial]," they "satisfie[d] the Class Plaintiffs' burden of demonstrating commonality for purposes of class certification.").

legedly omitted: hours worked, seniority, leave of absence, full-time/part-time status at hire, recent promotion or demotion, prior grocery experience, pay group, night shift, department, store size, and store profitability. *See* Haworth Decl. ¶¶ 280-92.

Dr. Haworth's methodology for determining which variables are relevant was formed in large part by selecting certain decision-making factors identified by Store Managers in a survey. *See* Haworth Decl. ¶ 20. As previously noted, however, Dr. Haworth can not properly rely on this survey. Even assuming that Dr. Haworth could show that Dr. Drogin omitted one or more relevant factors, this would not justify disregarding Dr. Drogin's findings for purposes of this motion.

First, as the Ninth Circuit recently emphasized in *Hemmings*, 285 F.3d at 1188, "the law does not require the near-impossible standard of eliminating *all* possible nondiscriminatory factors." *Id.* (emphasis in original). Rather, "it is clear that a regression analysis that includes less than 'all measurable variables' may serve to prove a plaintiff's case." *Id.*, *quoting Bazemore v. Friday*, 478 U.S. 385, 400 (1986). Given that Dr. Drogin clearly considered a broad array of significant factors, whether he omitted some other, relevant factors—and if so, whether that failure is of sufficient magnitude to discredit his analysis—are questions that should await resolution at trial *Hemmings*, 285 F.3d at 1183-84, 1187 (multiple regression analysis that controlled for experience and seniority, but did not account for employee qualifications, education, motivations, preferences, and individual fields was relevant and admissible); *See Adams v. Ameritech Serv., Inc.*, 231 F.3d 414, 427-28 (7th Cir. 2000) (defendant's objections that analysis did not control for outside factors went to the weight of the evidence, not its admissibility); *Bouman v. Block*, 940 F.2d 1211, 1225 (9th Cir. 1991) ("Whether the statistics are undermined or rebutted in a specific case would normally be a question for the trier of fact.").[30] Second, Defendant fails to show, as it must, that "'curing the alleged flaws would also cure the statistical disparity.'" *Hemmings*, 285 F.3d at 1188 (citation omitted).[31]

In short, Defendant has shown only that its choice of variables presents an alternative approach; it has not discredited or nullified Dr. Drogin's results, at least on the record thus far presented. On the contrary, Dr. Drogin's selection of variables appears to go well above the minimal threshold established by the courts, and thus his analysis is sufficient to raise an inference of discrimination for purposes of this motion.[32]

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[30] *See also Mangold v. Cal. Pub. Utils. Comm'n*, 67 F.3d 1470, 1476 (9th Cir. 1995); *EEOC v. Gen. Tel. Co.*, 885 F.2d 575, 582 (9th Cir. 1989) (concluding that plaintiff's statistical analysis was probative of discrimination despite its failure to include employment interests); *Bruno v. W.B. Saunders Co.*, 882 F.2d 760, 767 (3d Cir. 1989) (affirming district court's admission of statistical studies, despite the failure of the studies to take "account of the minimum qualifications of the jobs into which promotion or transfer occurred").

[31] Defendant's citation to *Sheehan v. Purolator, Inc.*, 839 F.2d 99 (2d Cir. 1988) does not further its cause. In *Sheehan* (1) the plaintiffs' expert failed to account for critical factors, (2) the court found that these factors could in fact explain the gender disparities at issue, and (3) plaintiffs failed to adduce other significant evidence to support their claims. *Id.* at 103. The court also recognized that even with the serious flaws infecting plaintiffs' regression analysis, it would have been improper to exclude it from evidence. *Id.*; *see also EEOC v. IBM, Inc.*, 583 F. Supp. 875, 898 (D. Md. 1984) (the court conducted a *merits* inquiry at trial, finding that plaintiffs' expert failed to account for critical non-discriminatory variables, including seniority, job level, and education).

b. *Statistical Evidence Regarding Promotions*

(1) *Internal Data Analysis*

(a) Overview

Dr. Drogin conducted a statistical analysis of Wal-Mart's internal promotion data during the class period, and concluded that, on a company-wide basis, there is a statistically significant shortfall of women being promoted into each of the in-store management classifications over the entire class period. He further found that the pattern of under-promotion into each of the in-store managerial classifications is "consistent in nearly every geographic region at Wal-Mart." Drogin Decl. ¶ 63. His data essentially supports this conclusion in statistically significant terms for Support Managers and Management Trainees. *Id.* & Table 26.[33]

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[32] This is not to say that the omitted variables would have no impact on the regression results. For example, Defendant properly notes that prior grocery experience is a distinguishing factor which could warrant Store Managers to use their discretion to award higher pay, and that more men have this experience than women (57.4% men versus 46.6% women). *See* Def.'s Opp'n at 26 n.15; Oral Arg. Tr. at 190:7-25. On the other hand, Wal-Mart's compensation structures make no distinction between grocery and non-grocery. The Court simply is not in a position at this stage of the litigation to definitively resolve this issue. For present purposes, as discussed above, it is enough that Dr. Drogin's analyses account for a sufficient number of the principal variables to support Plaintiffs' position.

Although Defendant has not made an issue of the number of regions lacking a statistically significant gender differential at the higher level in-store managerial jobs, the Court became concerned that this evidence raises the question of whether a nation-wide class should be narrowed to lower level in-store managers (Support Managers and Management Trainees) with respect to promotions. The Court raised this issue with counsel at oral argument, and Plaintiffs responded by arguing that the wide-spread discrimination at the lower levels carries through to the upper levels, especially where most promotions are made from within. *See* Oral Arg. Tr. at 48:23-49:11. As Plaintiffs also stated in their briefs: "Obviously, as women have been under-promoted to the first-level management positions, their representation in the feeder pools for store manager is commensurately diminished." Pls.' Mot. at 29.

The Court is persuaded, at least for purposes of class certification, that the evidence is sufficient to support an inference that the statistically significant disparities identified at the lower levels affect the experience of women seeking promotion at the higher levels. This evidence consists of: (1) the sizable number of regions with statistically significant disparities, (2) descriptive statistics showing a steep drop in female presence the higher one goes in the in-store managerial hierarchy (*see* section I.B.1.a.(1); Drogin Decl. ¶ 23, Table 7), (3) the significantly longer time it takes women to achieve promotions than men generally (Drogin Decl. ¶ 29); (4) Defendant's practices affecting promotions—such as broad subjectivity, wide-scale lack of posting, and relocation policies—as discussed above (*see* sec-

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[33] The Court observes, however, that Dr. Drogin's data shows that while female Co-Managers received fewer promotions than similarly situated men in 37 of 40 regions across the country, the disparity was of a statistically significant value in only 22 regions. Furthermore, while the data shows that for Store Manager positions women received fewer promotions than men in 34 of 40 regions, the disparity was of statistically significant value in only 13 regions. *Id.*

Dr. Drogin also studied the time that it has taken employees to reach in-store management positions. He found, and Defendant does not dispute, that it consistently takes women longer than comparable men to reach the higher management levels. On average, it took women 4.38 years from date of hire to be promoted to assistant manager, while men

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tions I.B.1.a.(3) & I.B.1.b.(1)), and (5) anecdotal evidence of discrimination (*see* section I.B.3).

The Court's determination is further supported by the case law in this area. As the court explained in ruling on the merits in *Stender*:

> The statistical evidence is significant for some positions, but not for others. However, the court finds that the lack of statistically significant disparities in promotions of women to [upper-level jobs] is caused by women being blocked from upper management positions at the lower rungs of the promotional ladder. In addition, the court has considered direct and indirect evidence of discriminatory intent on the part of Lucky managers. In considering plaintiffs' evidence cumulatively, the court concludes that Lucky's promotion process is tainted by discretionary decision making and the use of variable and subjective criteria. Accordingly, the court finds that the evidence is sufficient to sustain plaintiffs' burden of proving disparate treatment in Lucky's promotion practices as a whole.

Stender, 803 F. Supp. at 333; *see also McClain v. Lufkin Indus., Inc.* 187 F.R.D. 267, 274 (E.D. Tex. 1999) ("Discrimination in hiring and advancement, even at the lower levels of the hierarchy, has a rippling effect upwards through that hierarchy.") (citation omitted); *Carpenter v. Stephen F. Austin State Univ.*, 706 F.2d 608 (5th Cir. 1983).

took 2.86 years. It took 10.12 years for women to reach Store Manager, compared with 8.64 years for men. *See* Drogin Decl. ¶ 29.

Dr. Haworth rejects Dr. Drogin's approach and concludes, using her own methodology, that women have been selected for all in-store management positions at a rate substantially equivalent to the rate at which they apply (or the rate at which they can be deemed to have applied). In fact, she concludes that women are promoted at a higher rate than predicted by their representation among those who applied. *See* Haworth Decl. ¶ 139. To the extent that some gender differentials exist, she contends that they are attributable to differing job aspirations and interests between men and women which exist in the general labor force and cannot be blamed on Wal-Mart.

(b) *Defendant's Challenge to Dr. Drogin's Choice of Applicant Pools*

Defendant's principal challenge to Dr. Drogin's analysis is that it fails to rely solely on actual applicant flow data. This defect, Defendant argues, renders Dr. Drogin's methodology fatally flawed. As explained below, however, this Court concludes that Dr. Drogin's analysis is sufficiently probative to support a finding of commonality.

Both parties' experts attempt to compare the number of women hired into different positions with the number of women applicants seeking advancement to those positions. In circumstances where (a) the employer notifies employees of openings through a neutral job posting or other system, (b) allows all interested employees to apply, and (c) maintains complete records, the actual applicant flow data (i.e. the number of employees actually applying for the job) exists and is recognized as the best basis for making this comparison. *See Paige*, 291 F.3d at 1147. Where, however, openings are not posted, or where the system is poorly documented or biased, it is impossible to determine with certainty how many employees would have applied for openings; accordingly, statisticians look for the next best source available to estimate what the actual applicant flow would have been. *See id.* at 1145.

The parties agree that the actual applicant flow data for promotions at Wal-Mart during the class period is limited to the following: (1) from 1998 to 2002 the company conducted numerous postings for the lowest level hourly management position (which is not part of the class), and a very limited number of postings for Support Manager,[34] (2) from 1998 to 2002, most Store Manager positions were posted,[35] and (3) in January and April-May 2003, Wal-Mart conducted a limited posting for the Management

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[34] From the inception of the class period on December 27, 1998 through September 30, 2002, Wal-Mart posted roughly 6,800 job openings for Support Manager. Approximately 41,000 applications were submitted for these openings, and 46.1% of the applicants were women. *See* Haworth Decl. ¶¶ 12, 84.

[35] Between December 27, 1998 and October 17, 2002, Wal-Mart Management Career Selection (MCS) system documented over 46,000 applications to roughly 4,400 *salaried* management positions. *See* Haworth Decl. ¶ 119. Most of these documented moves were to Store Manager positions. *Id.* at ¶ 128 & Table entitled "Comparison of Moves, Management Career Selection Data versus Global PeopleSoft Data from December 27, 1998 through March 8, 2002." Most of the moves to other salaried management positions were not documented by the MCS system. *Id.*

Trainee position.[36] As such, the data contains the following substantial gaps:

(1) There is no documented job applicant data for 80 percent of the actual promotions to the position of Support Manager. *See* Drogin Decl. ¶ 44; Drogin Reply Decl. ¶ 6.

(2) Prior to January 2003, there is no documented job applicant data for entry level salaried management positions.

(3) The amount of Management Career Selection (MCS) information on Assistant Manager vacancies (less than 1% of the promotions are documented) and Co-Manager vacancies (less than 3% are documented) is negligible. *See* Haworth Decl. ¶ 128. Furthermore, the MCS system contains no data for any management positions in Sam's Club stores. *See* Drogin Decl. ¶ 45.

Predictably, the experts draw opposite conclusions from the limited amount of actual applicant-flow data available. Dr. Haworth argues that the data, while limited, is nonetheless sufficient to justify an extrapolation for all job openings during the entire class period. In contrast, Dr. Drogin concludes that Wal-Mart's job posting systems "provide no useful data for analyzing promotions into the upper level hourly supervisory, and store management positions." Drogin Decl. ¶ 43. Therefore, he looked to what he considered the next best source to estimate actual applicant flow by tabulating "the incumbents in historical feeder jobs for [each] promotion." *Id.* at ¶ 48.

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[36] Wal-Mart conducted a seven-day company-wide posting in January 2003 for admission to the Management Trainee position. Roughly 30,000 candidates applied, of which 44% were female. *See* Haworth Decl. ¶¶ 16, 72, 96. Approximately 1,400 positions were filled through this posting. *See* Drogin Reply Decl. ¶ 11. Wal-Mart posted job vacancies for the Management Trainee position again in April-May 2003, although this posting was limited to Wal-Mart Discount Stores and SuperCenters. This posting generated approximately 11,500 applicants, of which 41% were female. *See* Haworth Decl. ¶ 72 & n.33, 103.

While Defendant vigorously attacks Dr. Drogin's approach, it is well recognized that where actual applicant flow data is inadequate or unavailable, other measures of applicant flow—including but not limited to "feeder pools"—are deemed acceptable so long as they are used in a reliable manner. *See* R. Paetzold and S. Willborn, The Statistics of Discrimination Using Statistical Evidence in Discrimination Cases, §§ 4.02-4.04 (Oct.2002). In *Hemmings v. Tidyman's, Inc.*, for example, the Ninth Circuit recently affirmed using feeder pools where the defendant fills its higher management positions through internal promotions. 285 F.3d at 1185-86 (finding that "the potential applicant pool—and thus the appropriate comparison pool—for promotions to upper and middle management jobs at Tidyman's is comprised of the current employees in lower management positions").[37]

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[37] Similarly, in *Stender*, 803 F. Supp. at 333-34, the court accepted the same type of feeder pool methodology used by plaintiffs here. In fact, the *Stender* plaintiffs employed Dr. Drogin, and the defendant employed Dr. Haworth. The court found that the defendant's bid data was incomplete, and that it was therefore appropriate for Dr. Drogin to take into account the historical pattern of movement between jobs at Lucky Stores by constructing feeder pools for each target job. *Id.* at 295-96. Specifically, in *Stender*, Dr. Drogin compared the movement of male and female employees out of low-level clerk positions and

Notably, Wal-Mart fails to cite any authority that would *require* Dr. Drogin to rely solely on extrapolations from grossly incomplete actual applicant flow data. Defendant cites to *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997) for the proposition that "[c]ourts permit extrapolation for the liability period from recent applicant flow data, absent proof

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into various mid-level apprentice positions, and found a shortfall of women for each set of promotions. *Id.* at 296. Dr. Drogin used the same control variables as in his Wal-Mart analysis, i.e. year of promotion, feeder job, and store (although the geographic variable in Wal-Mart is sometimes the district rather than store). *Id.* at 296 n.8. Dr. Haworth revised the feeder pool analysis by using a reference adjustment factor, based on defendant's analysis of gender differentials in interest levels, and found no evidence of discrimination. *Id.* at 313. Judge Patel credited Dr. Drogin's analysis and rejected Dr. Haworth's. *Id.*

In *Butler I*, 1996 WL 421436, the court granted class certification, finding that plaintiffs' statistical evidence created a common issue of law and fact. In a subsequent order denying defendant's motion for summary judgment, the court described plaintiffs' evidence as including expert testimony by Drs. Drogin and Bendick in which feeder pool analyses were used to measure gender disparities in promotion. *Butler v. Home Depot, Inc.*, (*Butler II*), 1997 WL 605754, at *8 (N.D. Cal. 1997). The court noted that Home Depot primarily promotes from within, and the court approved the use of the feeder pools, finding that they were of a kind and degree from which causation may reasonably be inferred. *Id.* *See also Pitre v. Western Elec. Co.*, 843 F.2d 1262 (10th Cir. 1988) (approving reliance on feeder pools); *Shidaker v. Tisch*, 833 F.2d 627, 631 (7th Cir. 1986) (same); *Paxton v. Union National Bank*, 688 F.2d 552, 563-65 (8th Cir. 1982) (same); *Smith v. Xerox Corp.*, 196 F.3d 358, 370-71 (2d Cir. 1999) (approving feeder pool methodology but requiring very careful construction of pools that compare co-workers who competed directly against each other to receive a benefit).

that the level of interest had materially changed." Def's Opp'n at 40 & n.25. *General Electric*, however, merely states the general proposition that experts commonly extrapolate from data, and it made this unremarkable statement in the context of a personal injury case in which the expert extrapolated cancer causality from studies on mice to causation in humans. 522 U.S. at 146.

Defendant's reliance on *Stout v. Potter*, 276 F.3d 1118, 1123 (9th Cir. 2002) and *Paige*, 291 F.3d at 1147, is equally misplaced. In Stout, an employment case, the court was presented with actual applicant flow data for the entire time period at issue, and therefore never had occasion to address the situation in which such data is incomplete. In *Paige*, the court had access to both internal and external applicant flow data, and it stated a preference, given the particular facts of the case, for the internal data. Significantly, *Paige* recognized that the preference for actual applicant flow holds true "only if there is not 'a characteristic of the challenged selection device that makes use of the actual pool of applicants or eligible employees inappropriate.'" 291 F.3d at 1145 (quoting *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 482 (9th Cir. 1983)). A widespread failure to use the "selection device" of job posting could certainly make the preference for applicant flow "inappropriate."[38]

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[38] Defendant also cites *Capacchione v. Charlotte-Mecklenburg Schools*, 57 F. Supp. 2d 228, 247 n.16 (W.D.N.C. 1999), *aff'd in part, rev'd in part, vacated in part, by Belk v. Charlotte-Mecklenburg Bd. Of Educ.*, 269 F.3d 305 (4th Cir. 2001), a school desegregation case in which the court was presented with over twenty years of complete enrollment data. The court approved an extrapolation from that data to estimate the en-

At bottom, Defendant fails to grapple with the basic fact that any approach—whether it is extrapolation from limited data (as Defendant prefers) or use of comparative data (as Plaintiffs prefer)—will have a degree of uncertainty given the admitted lack of actual data for most of the positions at issue due to

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rollment during a previous eight year period. *Id.* The use of extrapolation in that case was unchallenged and the court merely found it to be a reasonable method that was the best means available in the situation. *Id.*

In another case relied upon by Defendant, *United States v. County of Fairfax, Va.*, 629 F.2d 932, 940 (4th Cir. 1980), a decision regarding the merits of a discrimination action, the court held that actual applicant flow data could be used as a basis for extrapolation for years in which such data had been destroyed. However, in that case the court determined that the only alternative means of estimating applicant flow would be to use a zip code analysis (which is based on census information), and that the flaws in using that data outweighed the flaws inherent in the extrapolation method. *Id.* Indeed, the courts generally are highly suspect of census data for workplace comparison since applicant pools often are far narrower than the general population. Here, in contrast, Dr. Drogin's availability pools are drawn from *internal* data, and therefore do not suffer from the same problem as census data.

Finally, defendant again analogizes to *Donaldson*, 205 F.R.D. 558, but again the analogy fails. In *Donaldson*, the court found that "plaintiffs' own statistics belie the existence of [ ] a pattern [of discrimination]." *Id.* Indeed, the *Donaldson* plaintiffs' expert's initial study showed no pattern of discrimination in many significant areas. *Id.* at 567. Plaintiffs presented the court with an entirely new set of statistics in their reply materials, but they were based on the same raw data with different calculations. *Id.* Given these circumstances, it is no surprise that the court found that plaintiffs' statistical analysis deserved no weight. *Id.*

the company's wide-scale lack of job posting. Defendant's assertion that its approach is necessarily superior does not withstand scrutiny. Rather, Defendant's arguments, which go to the weight of the evidence, merely highlight the presence of a significant issue affecting all class members which supports, rather than defeats, granting class certification. Moreover, while a jury may or may not ultimately find Dr. Drogin's approach more probative than Dr. Haworth's, it is at least reasonable. As such, Dr. Drogin's method is sufficient to create an inference of discrimination for purposes of this motion.

(2) *External Benchmarking Data Analysis*

Plaintiffs also buttress their position that there is a common question regarding Defendant's alleged discriminatory policies toward the class with the benchmarking analysis of a labor economist, Dr. Marc Bendick. In contrast to Dr. Drogin and Dr. Haworth, who analyzed internal Wal-Mart data to determine whether promotion disparities exist and, if so, whether they are attributable to gender discrimination, Dr. Bendick looked outside of Wal-Mart to other large retailers for his data source. Specifically, Dr. Bendick compared, or "benchmarked," Wal-Mart against twenty other large general merchandise retailers by comparing workforce data provided by the companies to the Equal Employment Opportunity Commission ("EEOC"). The practice of benchmarking one company's performance against its competitors is a standard management technique used throughout the private sector and by Wal-Mart itself. *See* Bendick Decl. ¶ 14 (citing Peterson Depo.).

The type of benchmarking applied here addresses the issue of labor supply, i.e. the availability of female employees who are qualified and interested in management positions. The purpose of this analysis is to determine the extent to which women in the relevant market sought promotion, so that an inference could be made that roughly the same percentage of women would have applied at Wal-Mart if given the opportunity. As Dr. Bendick explains: "The logic in benchmarking is that, if retail chains comparable to Wal-Mart are successfully employing women at some rate, then women are presumably available, interested, and qualified to hold comparable positions at Wal-Mart at a similar rate." *Id.* at ¶ 16.

Dr. Bendick used data from the EEOC to compare Wal-Mart against twenty large nation-wide retailers.[39] He found that a short-fall in female managers was present in 79.5 percent of all Wal-Mart stores. *Id.* at ¶ 43. He concluded that "[w]ith a shortfall present in four out of five stores, it is virtually impossible for the pattern to be geographically localized." *Id.* He further concluded that while the in-store managerial workforce at the comparison stores was 56.5 percent female, it was only 34.5 percent female at Wal-Mart. Dr. Bendick determined that this differential is highly statistically significant (47 standard deviations).

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[39] The data is compiled by the EEOC from a mandatory survey of the nation's largest private firms, and the results are contained in EEO-1 reports, which essentially form a census of the workers at those firms. Dr. Bendick selected the comparator firms by looking for similar large retail companies in the EEO-1 reports. He used two criteria: (1) the firm was in a retail industry focusing on building material and garden supplies, general merchandise, food store, automotive, apparel, furniture, and miscellaneous retail, excluding eating and drinking places; (2) the firm had at least 100 separately reporting establishments with at least 100 employees each. Twenty firms met his criteria. *See* Bendick Decl. ¶ 21. The identities of these companies in the EEO-1 reports are anonymous, but based on the limited number of companies of such large size in the country, Dr. Bendick was able to surmise that the list of twenty includes Target, Costco, K-Mart, and others. *Id.* at ¶ 23.

Defendant argues that Dr. Bendick was biased in conducting his benchmarking analysis by "cherry-picking" the comparator companies. However, his criteria for selecting the comparators appears to be reasonable, and there is no evidence that he left out companies that fit his criteria.[40] Defendant also points to its own alternative benchmarking analysis, which adjusted the criteria to include small and medium sized companies. Defendant will be free to present this alternative model to the jury. It fails to demonstrate, however, that Dr. Bendick's approach is so flawed as to lack probative value. Again, the question of which approach should ultimately prevail is for the jury, and Defendant's attempt to litigate this issue now is premature.

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[40] Defendant also argues that Dr. Bendick's analysis is methodologically flawed. It contends that Dr. Bendick's sample size is too small, in that he excludes all small employers. However, the analysis covers twenty firms with over 1.8 million workers in nearly 10,000 establishments nation-wide. *See* Bendick Rebuttal Decl. ¶ 12. Furthermore, if Dr. Bendick had compared Wal-Mart to small employers, he would have been subject to criticism for comparing apples to oranges.

In a similar vein, Defendant argues that Dr. Bendick excluded approximately 96 percent of the workforce holding management jobs in the retail sales field. However, in the four percent he did include there are over 170,000 managers. Moreover, these are the most applicable comparators in that they are managers of large retail firms. In other words, Dr. Bendick's selection is consistent with the reasonable approach of comparing Wal-Mart to "other large chain[s] of large stores selling a large range of goods." Bendick Rebuttal Decl. ¶ 14.

Based on his determination that Wal-Mart has a shortfall of women being promoted to in-store management positions, Dr. Bendick also concludes that the shortfall cannot be explained in terms of lack of qualifications, interest, or availability among female employees. This conclusion appears to follow logically from the analysis of the data. While it is not for the Court at this stage to find whether or not the analysis and conclusion are correct, the inference is appropriately raised. Accordingly, the Court finds that Dr. Bendick's analysis further supports Plaintiffs' showing of commonality by providing additional evidence which is sufficient, for purposes of this motion, to raise an inference of class-wide discrimination.

3. *Anecdotal Evidence of Discrimination*

Circumstantial and anecdotal evidence of discrimination is commonly used in Title VII pattern and practice cases to bolster the statistical proof by bringing "the cold numbers convincingly to life." *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 (1977); *Rudebusch v. Hughes*, 313 F.3d 506, 517 (9th Cir. 2002). Here, plaintiffs have submitted declarations from each of the class representatives, as well as 114 declarations from class members around the country. The women testify to being paid less than similarly situated men, being denied promotion or being delayed in promotion in a disproportionate manner compared with similarly situated men, working in an atmosphere with a strong corporate culture, and being subjected to various individual sexist acts. *See, e.g.*, Scott Decl. ¶¶ 8, 9, 12 (male Store Manager told declarant that "[m]en are here to make a career and women aren't. Retail is for housewives who just need to earn extra money"); S. Hall Decl. ¶ 2 (after seeking transfer to Hardware, male Support Manager stated: "We need you in toys . . . you're a girl, why do you want to be in Hardware?"); Page Decl. ¶ 10 (Store Manager gave sporting goods department manager position to male because she "needed a man in the job"). This anecdotal evidence, in combination with the other evidence previously discussed, further supports an inference that Defendant's policies and procedures have the effect of discriminating against Plaintiffs in a common manner.

4. *Conclusion re Commonality*

In sum, Plaintiffs have exceeded the permissive and minimal burden of establishing commonality by providing: (1) significant evidence of company-wide corporate practices and policies, which include (a) excessive subjectivity in personnel decisions, (b) gender stereotyping, and (c) maintenance of a strong corporate culture; (2) statistical evidence of gender disparities caused by discrimination; and (3) anecdotal evidence of gender bias. Together, this evidence raises an inference that Wal-Mart engages in discriminatory practices in compensation and promotion that affect all plaintiffs in a common manner. While Defendant raises numerous challenges to this evidence, they are insufficient to defeat Plaintiffs' showing of commonality; rather, the objections are predominantly of the type that go to the weight of the evidence, and thus should properly be addressed by a jury considering the merits.

C. *Typicality*

Typicality requires that the named plaintiffs be members of the class they represent and "'possess the same interest and suffer the same injury'" as class members. *Falcon*, 457 U.S. at 156 (citation omitted).[41] The named plaintiffs' claims need not be identical to the claims of the class to satisfy typicality; rather, the claims are typical if they are "reasonably co-extensive with those of absent class members." *Staton*, 327 F.3d at 957, *quoting Hanlon*, 150 F.3d at 1020. It is sufficient for plaintiffs' claims to "arise from the same remedial and legal theories" as the class claims. *Arnold*, 158 F.R.D. at 449 (citations omitted); *see also McClain v. Lufkin Indus., Inc.*, 187 F.R.D. 267, 281 (E.D. Tex. 1999) (*quoting Lightbourn v. County of El Paso, Texas*, 118 F.3d 421, 426 (5th Cir. 1997)) (typicality is met where "[i]n the event the class members in this case were to proceed in a parallel action, they would advance legal and remedial theories similar, if not identical, to those advanced by the named plaintiffs"). The Ninth Circuit interprets typicality, like it does commonality, permissively. *Staton*, 327 F.3d at 957; *Hanlon*, 150 F.3d at 1020.

Defendant contends that the named plaintiffs are not sufficiently "typical" for two reasons: (1) the named plaintiffs have not worked in the upper levels of in-store management and therefore cannot represent those managers, and (2) each of the plaintiffs' claims is too individual-specific.

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[41] Just as commonality and typicality tend to merge, so do typicality and adequacy of representation. *See* Newberg, Vol. I at 411-12. The adequacy test is broader, however, in that a representative may have typical claims but otherwise have an irreconcilable conflict with the class. *Id.*

1. *Whether the Named Plaintiffs Can Represent All In-Store Managers*

There is no dispute that the named plaintiffs are reasonably co-extensive with the hourly class members since almost all of the named plaintiffs hold hourly positions. Defendant, argues, however, that the named plaintiffs are not typical of all female in-store managers because only one named plaintiff—Christine Kwapnoski—holds a salaried management position, and it is a lower level position at a Sam's Club. As such, Defendant emphasizes, "[n]o Plaintiff ever occupied a salaried position at a Wal-Mart Discount Store, Neighborhood Market or Supercenter." Def.'s Opp'n at 9.[42] As discussed earlier, however, the management structure at Sam's Club is very similar to the structure at the other Wal-Mart divisions. Therefore, there is very little practical import to this argument.

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[42] After the hearing on the Motion for Class Certification, Defendant filed two separate *ex parte* applications further challenging plaintiff Kwapnoski's status as a class representative for female in-store managers. *See* Defendant's *Ex Parte* Applications filed January 5 and March 25, 2004. In both Applications, defendant points out that Ms. Kwapnoski participated as a claimant in a separate lawsuit filed in state court challenging Wal-Mart and Sam's Club's overtime policies. In the context of the state suit, she filed a claimant response form indicating that in both of her managerial positions she spent "more than one-half of [her] time performing the same type of non-managerial tasks as [her] hourly subordinates." Keane Decl. in Support of Defendant's Ex Parte Application, Exh. A at 4. The Court finds that this statement does not undermine or limit Ms. Kwapnoski's representative status. Whether Wal-Mart chose to have plaintiff (and other managers) performing hourly tasks is of no import to the typicality analysis, regardless of its relevance to a wage and hour analysis. The single relevant fact here is that during the span of this action, Ms. Kwapnoski held jobs that Wal-Mart itself designated as salaried managerial positions. Further, Wal-Mart's recent re-designation of plaintiff's positions as non-exempt does not alter, and cannot erase, this

Moreover, there is no requirement that plaintiffs have a class representative for each management category that they seek to represent. *See Taylor v. Union Carbide Corp.*, 93 F.R.D. 1, 6 (S.D. W. Va.1980). It is sufficient that one of the named plaintiffs is a manager, even if her position is lower than the top rung. *See Hartman*, 19 F.3d at 1471 (employee can challenge discrimination in "different job categories where the primary practices used to discriminate in the different categories are themselves similar. While it may be prudent to have the class divided into sub-classes represented by a named plaintiff from each of the differing job categories, it would not be necessary to the validity of the class certification to do so."); *Meyer v. Macmillan Publ'g Co.*, 95 F.R.D. 411, 414 (S.D.N.Y. 1982) ("[T]he fact that the jobs performed by the named plaintiffs are, in some sense, unique, is not a bar to their being class representatives. If it were, no class of professional employees could ever be certified."); *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 562 (8th Cir. 1982) (holding that "[t]ypicality is not defeated because of the varied promotional opportunities at issue, or the differing qualifications of plaintiffs and class members."). Furthermore, the class representatives include several women who claim that they were denied positions into management. If Plaintiffs

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[Footnote continued from previous page]

historical fact. Thus, Defendant's *ex parte* applications are denied.

sought to represent *all* levels of management, including high-level managers in the Home Office, there would be greater cause for concern. However, since the range of managers in the class is limited to those working in the stores, it is not a very broad class and a named plaintiff occupying a lower level salaried in-store management position is sufficient to satisfy the "permissive" typicality requirement. *Staton*, 327 F.3d at 957.

2. *Degree of Individual Specificity for Each Claim*

Defendant also argues that the named representatives' claims are not typical of the class because each claim in this case is too "individual-specific." To support this contention, Defendant cites various class member declarations to show the fact-specific nature of each of their claims. *See* Def.'s Opp'n at 7 n.9. Some degree of individualized specificity must be expected in all cases, however, and it does not necessarily defeat typicality. *See Staton*, 327 F.3d at 957 ("representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical."); *Adams v. Pinole Point Steel Co.*, 1994 WL 515347, at *7 (N.D. Cal. May 18, 1994); *Wofford v. Safeway Stores Inc.*, 78 F.R.D. 460, 488 (N.D. Cal. 1978). Rather, the court must consider whether the named plaintiffs suffered injury from a specific discriminatory practice of the employer in the same manner that the members of the proposed class did, and whether the named plaintiffs and the class members were injured in the same fashion by a general policy of employment discrimination. *Staton*, 327 F.3d at 957. Thus, even where individual employees in different stores with different managers received different levels of pay and were denied promotion or promoted at different rates, so long as the discrimination they allegedly suffered occurred through an alleged common practice—e.g. excessively subjective decision-making in a corporate culture of uniformity and gender stereotyping—their claims are sufficiently typical to satisfy Rule 23(a)(3).[43]

D. *Adequacy of Representation*

The fourth and final Rule 23(a) requirement—adequacy—requires (1) that the proposed representatives do not have conflicts of interest with the proposed class and (2) that plaintiffs are represented by qualified counsel. *Hanlon*, 150 F.3d at 1020. The adequacy of representation requirement serves two functions. Like the commonality and typicality requirements, it assures that shared interests between the representative plaintiffs and the class as a whole are present, but it also functions to ensure the absence of conflicts. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997). To serve as representatives, the named plaintiffs must have common interests with class members and a lack of interests adverse to class members. They must also vigorously prosecute the interests of the class through qualified counsel. *East Texas Motor Freight System Inc. v. Rodriguez*, 431 U.S. 395, 403-05 (1977). This standard requires similarity, not identity, of interests. Nor does it preclude some unique interests; it only precludes adverse interests.

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[43] Another approach to this issue is to ask whether the adjudication of the class representatives' claims will necessarily involve the determination of common questions affecting the class. *See* Newberg, Vol. 1 at 387. Here, while the particular disparities in levels of pay and denial or delay in promotion will be specific to each class representative, each one will have to link those disparities to discrimination. The linkage for each and every plaintiff is the common theory of excessive subjectivity affected by a biased corporate culture and the common statistical data showing a pattern and practice of discrimination. The Court finds that the legal claims made by the representative plaintiffs are not idiosyncratic; rather, they are typical of the claims available to all class members.

1. *Conflicts of Interest*

Defendant argues that certification should be denied because there is a conflict of interest among female in-store managers who are both plaintiff class members and decision-making agents of the Defendant. As the Ninth Circuit made clear in *Staton*, however, courts need not deny certification of an employment class simply because it may include both supervisory and non-supervisory employees. In *Staton*, objectors to a classwide settlement similarly argued that a conflict arose from the fact that "the class cuts across the levels of authority of [the company] employees and that, in particular, some class members supervise some of their fellow class members." 327 F.3d at 958. The court rejected a per se rule, noting that the issue must be resolved in the context of the particular case and circumstances. *Id.* The court then concluded there was no conflict in that case given that (1) the objectors had failed to identify a "substantive issue for which there is a conflict of interest between two or more sets of employees," (2) the named plaintiffs included both supervisors and non-supervisors, and (3) the requested relief applied throughout the class. *Id.* at 958-59.

Here, as in *Staton*, the named plaintiffs include persons who have worked as both supervisory and non-supervisory employees, and the requested injunctive and lost pay relief applies throughout the class. Further, the alleged discriminatory policies affect supervisory and non-supervisory employees alike. Accordingly, the Court is not persuaded that there are any substantive conflicts between supervisory and non-supervisory employees that would preclude certification. *See also Shores*, 1996 WL 407850, *8 (finding no inherent conflict where class included supervisory and non-supervisory employees since "there is nothing to suggest that the elimination of sex discrimination for non-managerial employees would adversely affect managerial employees and vice versa"); *Butler I*, 1996 WL 421436, at *4 (noting that any potential conflict created by supervisors and non-supervisors being members of the same class is cured by bifurcating the trial into liability and remedial phases).

Wal-Mart also conjures a scenario where "at trial we [would] have the very real specter of class counsel cross-examining a woman *he represents*, trying to rebut her testimony that her subordinates were fairly compensated, attacking her credibility." Def.'s Opp'n at 31 (emphasis in original). It is unlikely, however, that many, if any, such scenarios would occur given that the liability phase of the trial properly focuses on the existence of a general pattern and practice of discrimination, not individual employment decisions. *See* section II.B.1. Defendant's speculation on this point does not warrant a finding that the named plaintiffs can not adequately represent the class.

More fundamentally, the fact that some individual female managers may disagree with the allegations in Plaintiffs' complaint, and testify in favor of Wal-Mart, does not create any significant conflict between supervisory and non-supervisory employees. Rather, it just reflects the fact that in any employment class there may be individuals that support the employer's position. Such individual predilections, however, do not create a substantive conflict between supervisory and non-supervisory employees as a group.[44]

Finally, Defendant points to *Wagner v. Taylor*, 836 F.2d 578, 595 (D.C. Cir. 1987), a Title VII case in which the court found inadequate representation because the named plaintiff, who was a supervisor, purported to represent a broad class that included non-supervisory employees. In *Staton*, the Ninth Circuit distinguished *Wagner* because "Wagner was both a senior executive and the *only* representative of an attempted class of all grade GS-9 and above African-American employees of, and applicants to, the Interstate Commerce Commission." *Staton*, 327 F.3d at 958. Thus, while *Wagner* cautions against having a single senior executive representing a broad range of supervisory *and* non-supervisory employees, the multiple named plaintiffs here provide significantly broader representation for the class.

2. *Qualified Counsel*

Plaintiffs have submitted declarations that sufficiently establish their counsel's abilities to handle a case of this nature and magnitude. Defendant does not contest the adequacy of class counsel. Based on the vigorous and skilled prosecution of this action thus far, as well as counsel's past experience with complex employment litigation, the Court finds that Plaintiffs' counsel have demonstrated their willingness, capacity, and dedication to pursuing these claims. Pursuant to the recently added subsection (g)(1)(C)(I) to Rule 23 (effective December 1, 2003), the Court also specifically finds as follows: (1) Plaintiffs' counsel have been diligent in identifying and investigating all potential claims in this litigation; (2) Plaintiffs' counsel individually and collectively have a wealth of extensive experience in handling class actions and other complex civil rights litigation; (3) plaintiffs' counsel have proved themselves to have an excellent grasp of employment discrimination and class action law; and (4) Plaintiffs' counsel have the resources to commit to fully representing the class throughout this litigation.

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[44] The Court is aware of a few district court decisions in which class actions have been rejected or narrowed on the ground of a conflict of interest where the class included supervisors who might have made discriminatory decisions. However, none of these cases provide a persuasive analysis of how this conflict would cause a problem in actuality. *See Donaldson*, 205 F.R.D. at 568 (class action denied in part because of an "insurmountable" conflict between supervisor class representatives who made the decisions and the other members); *Abram*, 200 F.R.D. at 433 (in denial of class certification, court mentioned that three of the named plaintiffs were promoted to central managers and had a stake in proving they do not discriminate).

E. *Conclusion*

Without making any findings on the merits, the Court concludes, having reviewed the voluminous evidence provided by the parties, that Plaintiffs have come forth with sufficient evidence to satisfy the requirements of numerosity, commonality, typicality, and adequacy of representation, as set forth in Rule 23(a). Accordingly, the Court now considers whether plaintiffs can also satisfy the elements of Rule 23(b).

II. Maintainability Under Rule 23(b)

In addition to satisfying the prerequisites of Rule 23(a), Plaintiffs must also demonstrate that their proposed class is maintainable under one of the subsections of Rule 23(b). In this case, Plaintiffs rely on subsection (b)(2), which applies if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

As noted in the introduction, Congress added subsection (b)(2) in 1966 "'primarily to facilitate the bringing of class actions in the civil rights area.'" *In re Monumental Life*, 365 F.3d at 417 n.16 (citation omitted). Indeed, this provision was written with employment discrimination specifically in mind. "[T]he drafters of Rule 23 specifically contemplated that suits against discriminatory hiring and promotion policies would be appropriately maintained under Rule 23(b)(2)." *Domingo v. New England Fish Co.* (*Domingo II*), 727 F.2d 1429, 1443 n.11 (9th Cir. 1984); *see also Coley v. Clinton*, 635 F.2d 1364, 1378 (8th Cir. 1980); *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239, 250 (3rd Cir. 1975).

Here, Plaintiffs allege that Wal-Mart has acted or refused to act—through its discriminatory practices—on grounds generally applicable to the proposed class, which Plaintiffs seek to remedy through injunctive relief and the recovery of lost pay and punitive damages. Wal-Mart does not dispute that the claims for injunctive relief and lost pay readily fall within the ambit of a (b)(2) class action. Indeed, it is well established that lost pay is recoverable as an equitable, make-whole remedy in employment class actions notwithstanding its monetary nature. *See, e.g.*, *Gotthardt v. Nat'l R.R. Passenger Corp.*, 191 F.3d 1148, 1152-55 (9th Cir. 1999); *Eubanks v. Billington*, 110 F.3d 87, 92 (D.C. Cir. 1997) ("[I]t is not uncommon in employment discrimination [(b)(2)] cases for the class also to seek monetary relief in the form of back pay or front pay."); *Salinas v. Roadway Express*, 735 F.2d 1574, 1576 (5th Cir. 1984).

Defendant argues, however, that inclusion of the claim for punitive damages renders this case unsuitable for certification under section (b)(2). Defendant further contends that this case is not maintainable as a class action under (b)(2)—or any other subsection—because the size of the class makes the case wholly unmanageable. Each of these issues is addressed in turn.

A. *Inclusion of Claim for Punitive Damages*

In 1991, Congress amended Title VII to permit plaintiffs to recover punitive damages in certain circumstances. Specifically, such damages are recoverable in cases of intentional discrimination if the plaintiff proves that the employer "engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1).

While plaintiffs have foregone compensatory damages in this case, they do seek punitive damages to punish Wal-Mart for its allegedly "reckless disregard of the rights of its women employees to equal employment opportunity, and to deter similar misconduct by Wal-Mart and other large retailers in the future." Pls.' Mot. at 44. Defendant argues, however, that Plaintiffs' claim for punitive damages is incompatible with a(b)(2) action because such damages are not incidental to, and would in fact overwhelm, Plaintiffs' claims for injunctive relief.

Resolution of this issue is governed by *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003), which holds that (b)(2) class actions can include claims for monetary damages so long as such damages are not the "predominant" relief sought, but instead are "secondary to the primary claim for injunctive or declaratory relief." *Id.* at 947, 950; *see also Probe v. State Teachers' Ret. Sys.*, 780 F.2d 776, 780 (9th Cir. 1986). In making this determination, courts should examine the "specific facts and circumstances of each case," and attempt to ascertain the "intent of the plaintiffs in bringing suit." *Molski*, 318 F.3d at 950. In *Molski*, the injunctive relief "appeared to be the primary goal in the litigation," and thus the district court properly found that injunctive relief was the predominant remedy sought by the class. *Id.*

Notably, *Molski* expressly rejects using a bright line distinction between incidental[45] and non-incidental damages to determine if monetary relief predominates, reasoning that such an approach would "nullify the discretion vested in the district courts through Rule 23." *Id.* Rather, it endorses the case-by-case approach described above. *Id.* Accordingly, Defendant's contention that this case cannot be certified under (b)(2) because the punitive damages sought are not "incidental" is misplaced. As *Molski* also makes clear, the predominance test turns on the primary goal of the litigation, not the potential size of a punitive damage award. *Id.* Accordingly, Defendant's focus on the possible size of a such an award is also misplaced. Indeed, focusing on the potential size of a punitive damage award would have the perverse effect of making it more difficult to certify a class the more egregious the defendant's conduct or the larger the defendant. Such a result hardly squares with the remedial purposes of Title VII.

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[45] Incidental damages are defined as damages that "'flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief.'" *Molski*, 318 F.3d at 949 (emphasis in original) (citation omitted).

This Court has little difficulty concluding that here the equitable relief sought predominates over the claim for punitive damages. Plaintiffs' claims for injunctive and declaratory relief, if successful, would achieve very significant long-term relief in the form of fundamental changes to the manner in which Wal-Mart makes its pay and promotions decisions nationwide that would benefit not only current class members, but all future female employees as well. These benefits would be both monetary—in the form of increased class-wide remuneration—and non-monetary—in terms of increased job opportunities. *See Young v. Pierce*, 544 F. Supp. 1010, 1028 (E.D. Tex. 1982) ("[W]hen the relief sought is injunctive relief, the benefits . . . would inure not only to known class, but also to a future class of indefinite size."). Recovery of lost pay for all injured class members would result in additional substantial equitable relief to the class. Against this backdrop, Plaintiffs' claim for punitive damages—which, by its nature, is subject to more demanding proof requirements, and thus inherently more speculative—appears secondary in nature.

The named class representatives also affirm that their central motivation for participating in this action is to improve opportunities for women at Wal-Mart. Betty Dukes, for example, states that "[m]y primary goal [in this litigation] is to ensure that the employment practices at Wal-Mart which hinder the progress of women wishing to enter management be changed to ensure fair and equitable treatment of female employees, and to ensure women receive equal pay." Dukes Decl. ¶ 20. Edith Arana similarly avers that [m]y main concern is to end all those employment practices at Wal-Mart that have prevented women from obtaining management positions and to ensure equal pay for comparable work and equal access to the training and mentoring necessary to advance in the Company." Arana Decl. ¶ 3. *See also* Surgeson Decl. ¶ 13; Gunter Decl. ¶ 3; Kwapnoski Decl. ¶ 23.

Given all of the above, the Court is satisfied that Plaintiffs' claim for punitive damages is secondary to their primary goal of achieving broad equitable relief. Accordingly, inclusion of this claim does not preclude certification of this case under Rule 23(b)(2). *Molski*, 318 F.3d at 947-50. *See also Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 164 (2nd Cir. 2001) (district court may certify class under (b)(2) if it finds in its discretion that the positive weight or value of the injunctive relief sought is predominant even though punitive damages are claimed); *Butler I*, 1996 WL 421436, *1, *5 (rejecting defendant's argument that punitive damage claim would "overwhelm" claims for injunctive relief as conclusory and speculative); *Barefield v. Chevron*, 1988 WL 188433, *3 (N.D. Cal. 1988) (class claim for punitive damages did not render monetary aspect of case predominant where the injunctive and declaratory relief sought was the heart of the action).

The Court further notes that a claim for punitive damages does not detract from the homogeneity or cohesiveness of the class. Rather, it is "consistent with the notion that the focus of a (b)(2) action is the defendant's conduct toward persons sharing a common characteristic." *Barefield*, 1988 WL 188433, *3. Indeed, since the purpose of punitive damages is not to compensate the victim, but to punish and deter the defendant, a punitive damage claim focuses "not on facts unique to each class member, but on the defendant's conduct toward the class as a whole." *Id.*, *citing Jenkins v. Raymark Industries*, 782 F.2d 468, 474 (5th Cir. 1986), *reh'g denied*, 785 F.2d 1034 (1986); *see also Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 536 (1999) (focus of punitive damage claim is on defendant's conduct). Accordingly, the "cohesive core of the (b)(2) action is . . . maintained." *Barefield*, 1988 WL 188433, *3.

Wal-Mart also argues that Plaintiffs' class claim for punitive damages is foreclosed by the Supreme Court's recent decision in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). Nothing in *State Farm*, however, supports this supposition. In *State Farm* the Court held that a punitive damage award in an individual action improperly punished the defendant for conduct that "bore no relation to the [plaintiff's] harm." *Id.* at 422. Specifically, it found that the jury improperly considered conduct by *State Farm* that occurred in other states and did not directly affect the plaintiff. *Id.* at 422-23. As such, it underscored the basic proposition that a "defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *Id.* at 423. Such a principle is not, as Wal-Mart suggests, incompatible with the recovery of punitive damages in a class action.

First, courts can ensure that any award of punitive damages to the class is based solely on evidence of conduct that was directed toward the class. Second, as Plaintiffs propose here, courts can limit recovery of any punitive damages to those class members who actually recover an award of lost pay, and thus can demonstrate that they were in fact personally harmed by the defendant's conduct. Finally, courts also can ensure that any punitive damage award is allocated among the lost pay class in reasonable proportion to individual lost pay awards. Accordingly, this Court is satisfied that procedures exist that permit Plaintiffs' punitive damage claim to be managed in a manner fully consistent with the principles of *State Farm*.[46]

While plaintiffs' claim for punitive damages does not preclude certifying this case under Rule 23(b)(2), minimum due process requirements do apply where the monetary relief sought, albeit not "predominant," is nonetheless "substantial." *Molski*, 318 F.3d at 947-48. Recognizing the Supreme Court's "growing concerns regarding the certification of mandatory classes when monetary damages are involved," the *Molski* court held that "notice and the right to opt-out [ ] must be provided to bind absent class members when substantial monetary damages are involved." *Id.* at 948. The Court further indicated that any claim for punitive damages is "substantial." *Id.* at 951 ("Because the statutory damages . . . provide for treble [i.e. punitive] damages, the remedy must be considered substantial"); *cf. In re Monumental*

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[46] In *Jenkins*, 782 F.2d at 474-75, for example, the Fifth Circuit affirmed a district court's certification of a punitive damage claim in a 23(b)(3) class action, noting that the jury could determine the defendants' liability to the class for punitive damages in one phase while still ensuring that only class members who are harmed recover such damages. "While no plaintiff [class member] may receive an award of punitive damages without proving that he suffered actual damages . . . . the allocation need not be made concurrently with an evaluation of the defendant's conduct." *Id.* at 474 (internal citations omitted). Rather, such determinations could be handled in later proceedings. *Id.* The court further suggested that jurors "could be allowed to award an amount of money that each class member should receive for each dollar of actual damages awarded." *Id.*

Life, 365 F.3d at 416-17 (due process requires provision of notice where Rule 23(b)(2) class seeks monetary damages, while provision of opt-out rights is optional).[47]

Molski further notes that notice and the opportunity to opt-out can be provided in a(b)(2) class action. 318 F.3d at 951 n.16. Indeed, the district court's discretion in this regard is well established. *See, e.g.*, *In re Monumental Life*, 365 F.3d at 417 (district courts have discretion to order notice and opt-out rights when certifying a Rule 23(b)(2) class); *Robinson*, 267 F.3d at 165-67 (notice and opt out can be afforded (b)(2) class members with respect to non-incidental damage claims); *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 898-99 (7th Cir. 1999) (same); Eubanks, 110 F.3d at 94. Accordingly, notice and an opportunity to opt-out shall be provided to the plaintiff class with respect to Plaintiffs' claim for punitive damages.

B. *Manageability of Liability and Remedy Stages*

A critical issue raised by Plaintiffs' motion is whether a class action of the size proposed—which is huge both in sheer numbers of class members and in its nationwide geographic scope—is manageable. While Rule 23(b)(2) does not expressly refer to manageability—in contrast to Rule 23(b)(3)—such a requirement is implicit in any type of class certification. *See, e.g.*, *Robinson*, 267 F.3d at 164 (District court may allow (b)(2) certification if "class treatment would be efficient and manageable, thereby achieving an appreciable measure of judicial economy."); *Piva v. Xerox Corp.*, 70 F.R.D. 378, 388 (N.D. Cal. 1975) (noting that proposed 23(b)(2) class of employees in Western Region "directly involves important considerations of *manageability*"). Certainly, no court would certify a class unless it believed that the case could proceed in a manageable fashion.

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[47] The type of notice utilized in a (b)(2) action, however, need not always be "equivalent to that required in (b)(3) actions." *Johnson v. Gen. Motors Corp.*, 598 F.2d 432, 438 (5th Cir. 1979).

Defendant contends that this case would be completely unmanageable in both the liability and remedial phases. Indeed, as Defendant repeatedly emphasizes, no court has ever confronted a motion for class certification in an employment discrimination case of this size—or anything close to it. This fact alone, however, does not preclude the Court from acting. Nonetheless, the Court agrees that it must very carefully assess the manageability issues presented by this unique case. While courts possess wide discretion to flexibly respond to manageability issues that may arise during the course of a class action, *see, e.g.*, *Blackie v. Barrack*, 524 F.2d 891, 906 n.22 (9th Cir. 1975), this Court must be confident that such issues will not be of such a magnitude as to defy its ability to oversee this case in a responsible and reasonable manner.

Having given these matters considerable thought and deliberation, this Court is satisfied, for the reasons expressed below, that the liability stage of this case is not rendered unmanageable by the size of the proposed class. With respect to the remedial phase of this case, this Court also is amply satisfied that the size of the class would not present undue obstacles to managing Plaintiffs' requests for injunctive relief on both their unequal pay and promotion claims. The Court similarly finds that fashioning a lost pay remedy for Plaintiffs' unequal pay claim would be manageable. Finally, with respect to Plaintiffs' promotion claim, the Court concludes that a lost pay remedy would be manageable only for a portion of the class. The manageability of each of these aspects of this case is discussed in turn below.

1. *Manageability of Liability Stage*

The standard approach in Rule 23(b)(2) employment discrimination class actions is to bifurcate the case into two stages: liability and remedy. *Robinson*, 267 F.3d at 158, *Arnold*, 158 F.R.D. at 458-59. In the Stage I liability proceeding, plaintiffs are required to prove that the defendant engaged in a pattern and practice of discrimination against the class. *Robinson*, 267 F.3d at 158. If punitive damages are at issue, plaintiffs also must prove liability for such damages by showing that the pattern and practice of discrimination was undertaken maliciously or recklessly in the face of a perceived risk that defendant's actions would violate federal law. *See Kolstad*, 527 U.S at 535 (1991); *Butler I*, 1996 WL 421436, *1. Finally, defendant's liability for the class representatives' individual claims usually is determined in Stage I as well.

Defendant argues that determining its liability for the alleged pattern and practice of discrimination against the class would be unmanageable because "due process" would necessarily require 3,244 individual mini-trials, including testimony from 3,244 Store Managers, to determine whether each individual Wal-Mart store discriminated against class members employed at that store. Defendant cites no authority for this argument. *See* Def.'s Opp'n at 45. Nor is it persuasive since it is inconsistent with the fundamental character of the class action proceeding.

As courts have long recognized, the Stage I liability determination in a systemic disparate treatment case focuses on the existence (or not) of a company-wide pattern or practice of discrimination against the class. While some acts of discrimination against individual class members are usually introduced as anecdotal evidence to bring statistical evidence "convincingly to life," *Teamsters*, 431 U.S. at 339, the class is not required to prove that each member suffered discrimination. *Id.* at 360. Indeed such an approach would defeat the very efficiencies that the class action device is designed to achieve. Instead, it is plaintiffs' burden to prove that "discrimination was the company's standard operating procedure." *Id.* at 336.

As such, the evidence introduced during Stage I should properly focus on matters relevant to the class as a whole, such as statistical analysis and evidence of system-wide policies and practices. "[T]he stress at Stage I is upon demonstration of the defendant's broad employment policies and practices . . . ." *United States v. United States Steel Corp.*, 520 F.2d 1043, 1053 (5th Cir. 1975); *see also Cooper v. Fed. Reserve Bank*, 467 U.S. 867, 876 (1984); *Teamsters*, 431 U.S. at 339-40 (statistics are valid tool for proving policy of employment discrimination); *Robinson*, 267 F.3d at 158-59; *Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095, 1106 (10th Cir. 2001). Likewise, defendants are expected to respond to plaintiffs' pattern and practice claim on a class-wide basis. *Teamsters*, 431 U.S. at 360 n.46; *Thiessen*, 267 F.3d at 1107 ("common defenses" not "individualized defenses" were relevant at liability stage). "The point is that at the liability stage of a pattern-or-practice trial the focus often will *not* be on individual hiring decisions, but on a *pattern* of discriminatory decision-making." *Teamsters*, 431 U.S. at 360 n.46 (emphasis added). In short, once the court determines that there are sufficient common questions to justify proceeding as a class, the liability phase properly focuses on evidence that affects the class generally—not on individuals or other minor segments of the class.

Given that the scope of the instant class is company-wide, Defendant is no more entitled to 3,244 individual store-by-store trials than it would be entitled to try each class member's individual claim in a case of smaller scope. Notably, *Teamsters* involved "nationwide operations" at 51 terminals in 26 states, 431 U.S. at 328, 329 n.2; yet, the Court nowhere suggests that the employer in that case was entitled to defend itself on a terminal-by-terminal basis. Wal-Mart of course can defend against Plaintiffs' claim of a nationwide pattern and practice by arguing that its more decentralized store sub-unit by store sub-unit statistical analysis refutes the existence of any company-wide policy of discrimination. It also can introduce evidence to rebut any evidence Plaintiffs present of centralized, nationwide policies regarding Defendant's corporate culture, personnel policies or gender stereotyping. It is not, however, entitled to circumvent or defeat the class nature of the proceeding by litigating whether every individual store discriminated against individual class members.

A Stage 1 liability trial in this case would be of course a substantial undertaking—albeit no more, and probably less, so than some other complex litigation, such as certain anti-trust or patent cases. Defendant's contention that it would necessarily be unmanageable, however, is simply not persuasive.

2. *Manageability of Remedy Phase*

In the event that a plaintiff class establishes liability in Stage I, and the case advances to the remedy phase, courts will first "proceed to fashion class-wide injunctive relief." *Robinson*, 267 F.3d at 159. Defendant does not argue that this aspect of the case would present any manageability issues. Second, the court must address the remedy of lost pay (backpay and/or front pay), which usually is awarded "in order to effectuate the statutory goal [of Title VII] of compensating the victimized employee and placing him in as good a position as he would have been had he not been subject to discrimination," as well as to deter recalcitrant employers. *Stewart v. General Motors Corp.*, 542 F.2d 445, 451 (7th Cir. 1976). Finally, if liability to the class for punitive damages has been established, this issue must be addressed as well.

As previously noted, Wal-Mart contends that any attempt to provide a lost pay remedy to a class of the size proposed here would mire the Court in a completely unmanageable endeavor. Plaintiffs respond that such problems can be avoided by employing a formula approach to streamline the process. Wal-Mart replies that formula approaches are discredited, and moreover, such an approach would still leave the Court with severe manageability issues.

In advancing their respective positions, both parties lump together Plaintiffs' promotion and equal pay claims. Consequently, both neglect to address the fact that the remedial challenges each claim presents are actually quite distinct. Having evaluated each claim separately, this Court concludes that while a formula approach is still a perfectly valid remedial tool in the appropriate case, it would not resolve all of the manageability problems presented by the promotion claim. The Court is convinced that a lost pay remedy with respect to the promotion claim can be effectively managed for only a limited subset of class members, as defined below. With respect to Plaintiffs' pay discrimination claim, the Court is well satisfied that, should Plaintiffs prevail, a process for awarding lost pay can be devised that is entirely manageable for all class members, albeit without reliance on a formula approach. Each claim is discussed in turn below. In addition, the Court addresses Defendant's contention that both the promotion and equal pay claims are rendered unmanageable by the Civil Rights Act of 1991.

a. *Promotions Claim*

(1) *Overview of Traditional and Formula Approach to Backpay Remedy*

As a general matter, courts do not begin the remedy stage on a blank slate. "'[T]he force of [the proof from the liability phase] does not dissipate.' *Teamsters*, 431 U.S. at 361. Rather, all class members benefit from a presumption in their favor "that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy." *Id.* at 362; *see also Robinson*, 267 F.3d at 159; *Domingo II*, 727 F.2d at 1444-45 ("'proof of a discriminatory pattern and practice creates a rebuttable presumption in favor of relief'" for individual class members) (citation omitted).

While proof of a pattern of discrimination establishes a presumption in favor of class members, it does not in and of itself entitle each class member to back (or front) pay. *Pettway v. Am. Cast Iron Pipe Co.* (*Pettway III*), 494 F.2d 211, 259 (5th Cir. 1974).

Rather, only those class members who can make a showing that they were either actually harmed by the discriminatory policy or were at least "a potential victim of the proved discrimination" are eligible to recover an award of lost pay. *Teamsters*, 431 U.S. at 362; *Robinson*, 267 F.3d at 159. Thus, courts awarding lost pay face two primary tasks at the remedy stage: (1) identifying the specific class members that were either actually, or at least potentially, harmed by the employer's discriminatory policies, and (2) determining the specific amount of back or front pay each such person is owed.

In cases involving hiring or promotions, such determinations are usually made during the course of additional proceedings. In *Teamsters*, for example—a hiring and promotions case—the Court explained that "a district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief." *Id.* at 361. These proceedings typically consist of mini-hearings presided over by a special master or the court. While the burden on individual class members at this point is minimal, they must at least identify themselves and make some showing (less than a prima facie case) that they suffered an adverse employment decision. *Robinson*, 267 F.3d at 159. The burden then shifts to the employer to prove that the class member was denied the job or promotion for lawful reasons. *Teamsters*, 431 U.S. at 362; *Robinson*, 267 F.3d at 159-60. The advantages of such an approach are obvious. It protects both the defendant and the class by ensuring that each victim, or at least potential victim, of the employer's discriminatory policy is correctly identified, and that each such victim is paid the correct amount to make him or her whole.[48]

As Plaintiffs implicitly concede, holding individual hearings for the number of women potentially entitled to backpay in this case is impractical on its face, and thus the traditional *Teamsters* mini-hearing approach is not feasible here. Plaintiffs contend, however, that a lost pay remedy can manageably be afforded the class through the use of a formula approach that obviates the need for individualized Teamster hearings for each class member. *See* Pls.' Mot. at 49 ("The lost wages due to the class can be determined by formula").

As Plaintiffs correctly point out, courts have, in certain circumstances, employed a formula to calculate a lump sum amount that represents the employer's total liability for backpay to the class. In *Domingo II*, 727 F.2d at 1443, for example, the Ninth Circuit held that departure from the preferred *Teamsters* approach is justified when subjective employment practices, including lack of objective hiring criteria and word-of-mouth recruitment, "make[ ] it difficult to determine precisely which of the claimants would have been given a better job absent discrimination, but it is clear that many should have." *Domingo II*, 727 F.2d at 1444. As the court further explained:

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[48] *See Stewart*, 542 F.2d at 452 (Backpay awards should be made on an individualized basis whenever possible "because it will best compensate the victims of discrimination without unfairly penalizing the employer."); *United States v. United States Steel Corp.*, 520 F.2d at 1055-1056 ("Apart from protecting the defendant, this method has the virtue of distributing the recovery to the victims who, by the greater likelihood, are entitled to it . . . . [W]e reemphasize that alternative methods possessed of superior certainty should be exhausted before the court resorts to racially drawn classwide comparisons . . . ."); *Smith v. Union Oil Co.*, 1977 WL 77 (N.D. Cal. Aug.22, 1977), *decision supplemented by*, 1978 WL 13884 (N.D. Cal. June 15, 1978) (in most cases and where feasible, there should be a separate determination on an individual basis as to who is entitled to recover and the amount of such recovery).

> "[W]hen the class size or the ambiguity of promotion or hiring practices or the illegal practices continued over an extended period of time calls forth [a] quagmire of hypothetical judgment . . . a class-wide approach to the measure of back-pay is necessitated."

Id., *quoting Pettway III*, 494 F.2d at 261 (alterations in original); *see also EEOC v. O & G Spring & Wire Forms Spec. Co.*, 38 F.3d 872, 879-880 & n.9 (7th Cir. 1994) (approving district court's use of formula approach); *Hameed v. Int'l Ass'n of Bridge Workers, Local 396*, 637 F.2d 506, 520, 521 & n.18 (8th Cir. 1980) (same) (and cases cited therein); *Stewart*, 542 F.2d at 452-53 (7th Cir. 1976) (same) (and cases cited therein); *EEOC v. Chicago Miniature Lamp Works*, 668 F. Supp. 1150, 1151-52 (N.D. Ill. 1987); *Green v. United States Steel Corp.*, 640 F. Supp. 1521, 1525-26 (E.D. Pa.1986), *aff'd in part and vacated in part on other grounds*, 843 F.2d 1511 (3rd Cir. 1988), *vacated in part on other grounds*, 490 U.S. 1103 (1989).

In short, while a formula approach is certainly not the norm, it is a potential option where the employer uses largely subjective criteria for hiring or promotion decisions, objective requirements are minimal, and many more class members qualified for the positions than would have been hired or promoted even absent discrimination. Because it is virtually impossible in such cases to determine which class members would actually have been hired or promoted (and thus which class members were the actual victims of the defendant's discriminatory policy), there is little point in going through the exercise of individual hearings. As the Seventh Circuit explained in *Stewart*:

> In determining the appropriate award to be made to black employees who were unfairly denied promotions to salaried positions . . . the utilization of an individualized method of calculation is impossible. Because General Motors had no objective standards by which to measure whether a given employee deserved a promotion, deciding in individual cases whether a particular person would have been promoted but for racial discrimination would lead the district court into a "quagmire of hypothetical judgments," in which any supposed accuracy in result would be purely imaginary.

542 F.2d at 452 (internal citation omitted); *see also Pettway III*, 494 F.2d at 261 (In cases such as those described above, it is "not a choice between one approach more precise than another. Any method is simply a process of conjectures.").

Even in those circumstances, however, where the court properly employs a formula to calculate a lump sum backpay award to the class, it still must undertake the additional steps of determining which individual class members are eligible to share in the lump sum award and allocating the award among those eligible members. Given that the actual victims cannot be identified, courts have focused instead on ascertaining which class members were at least *potentially* victimized by the employer's discriminatory policy. In a promotion case, this would include any class member who met the minimum qualifications for the job and was interested in a promotion, and either applied for (and was denied) a promotion, was deterred from applying, or was unable to apply because of lack of application procedures.

The cases acknowledge that awarding backpay to all potential victims of the employer's policy (as opposed to just the actual victims) has the effect of generating a "windfall for some employees who would have never been promoted had vacancies been filled on a [non-discriminatory] basis and under-compensat[ing] the genuine victims of discrimination by forcing them to share the award with their undeserving brethren." *Stewart*, 542 F.2d at 452-453. For example, in *O & G Spring & Wire Forms*, backpay for 17 positions that would have gone to class members absent discrimination was spread over 450 persons who identified themselves as having applied (or having been deterred from applying) for the positions at issue, 38 F.3d at 879 & n.9; in *Hameed*, backpay for 45 apprentice positions was spread over a much larger group of "potential discriminatees," 637 F.2d at 519-20. The cases conclude, however, that this "rough justice" is better than the alternative of no remedy at all for any class member. *Stewart*, 542 F.2d at 453 ("Given a choice between no compensation for black employees who have been illegally denied promotion and an approximate measure of damages, we choose the latter"); *see also Hameed*, 637 F.2d at 521 n.19; *Segar v. Smith*, 738 F.2d 1249, 1291 (D.C. Cir. 1984) ("Though [Title VII] generally does not allow for backpay to those whom discrimination has not injured, this section should not be read as requiring effective denial of backpay to the large numbers of agents whom [defendant's] discrimination has injured in order to account for the risk that a small number of undeserving individuals might receive backpay.")

Defendant attempts to dismiss *Domingo* and other formula cases as inconsistent with *Teamsters*. Yet *Domingo*, *O & G Spring & Wire Forms*, *Hameed*, *Chicago Miniature Lamp Works*, and *Green* all post-date *Teamsters*. As these cases implicitly recognize, nothing in *Teamsters* precludes calculating a total backpay award that is allocated among potential victims, where the actual victims cannot realistically be identified even were the court to undertake individual hearings. On the contrary, *Teamsters* supports the notion that class members who can demonstrate that they have potentially been discriminated against are eligible to receive backpay. *See Teamsters*, 431 U.S. at 362 ("The Government need only show that an alleged individual discriminatee . . . was a potential victim of the proved discrimination"); *see also Robinson*, 267 F.3d at 159 ("a class member at the remedial stage of a pattern-or-practice claim need only show that he or she suffered an adverse employment decision 'and therefore was a potential victim of the proved [class-wide] discrimination'"), *quoting Teamsters*, 431 U.S. at 362; *McKenzie v. Sawyer*, 684 F.2d 62, 75 (D.C. Cir. 1982), *abrogated on other grounds by Berger v. Iron Workers Reinforced Rodmen, Local 201*, 170 F.3d 1111, 1125 (D.C. Cir. 1999) (To share in relief, class members "must make some showing that they were potential victims of the discriminatory employment practices"). Accordingly, this Court rejects Defendant's contention that *Domingo* and the other formula cases cited above lack weight. Indeed, *Domingo* is binding precedent on this Court.

Furthermore, this case presents the type of situation a formula approach was intended to address. As discussed above in section I.B.1.a(2), Wal-Mart uses largely subjective criteria for its in-store promotion decisions, and objective requirements are minimal. Furthermore, it is likely that many more class members would qualify for the challenged positions than would have been promoted absent any proven discrimination, making it virtually impossible to determine which class members were actual victims. In short, the subjectivity built into Wal-Mart's promotion system would simply call forth the "quagmire of hypothetical judgments" warned of in *Domingo*. In addition, the class size is large and the alleged practices have "continued over an extended period of time." *Domingo II*, 727 F.2d at 1444. As such, this is precisely the kind of case in which "'a class-wide approach to the measure of back-pay is necessitated.'" *Id.*

Nonetheless, the Court still must have confidence that a formula approach can be applied in a manageable manner in this particular case. Here, Plaintiffs have suggested that it is unnecessary at this early juncture to either determine the specifics of the formula that would be used to calculate Defendant's backpay liability to the class or detail how the Court would identify the potential victims of Defendant's alleged discriminatory promotion policy. Indeed, Plaintiffs' briefs only discuss the formula process in the most conclusory terms. While a detailed blueprint certainly is not required, the general contours should be sufficiently defined, particularly in a case of this unique magnitude, such that the Court has confidence that it is not being called upon to embark upon a process that will ultimately prove unmanageable. It is to these issues the Court turns next.

(2) *Application of Class-Wide Formula Approach*

(a) *Using a Formula to Calculate a Lump Sum Backpay Award*

While the methods for constructing back-pay formulas vary, most involve the following three steps: (1) identifying the number of positions that would have gone to class members absent discrimination, (2) estimating the total amount of earnings that would have accrued to class members in those positions, and finally (3) subtracting a mitigation amount that represents what the class members earned or would have earned during the period in question in any event. *See, e.g.*, *Domingo II*, 727 F.2d at 1445 ("Determination of the [formula] award could proceed along any of several avenues, all of which are designed to estimate the difference between what non-whites actually earned and what they would have earned but for the discrimination"); *O & G Spring & Wire Forms*, 38 F.3d at 880, n.9 (detailing actual formula); *Hameed*, 637 F.2d at 520 (same); *Stewart*, 542 F.2d at 454; *Pettway III*, 494 F.2d at 262-63; Green, 640 F. Supp at 1526.

While the development of a formula in this case plainly would be a complex undertaking, Defendant does *not* argue that it would be unmanageable (rather, Defendant focuses on the manageability of the eligibility issues discussed below). Moreover, courts may enlist the assistance of an expert or special master under Federal Rule of Civil Procedure 53. *See, e.g.*, *Pettway v. Am. Cast Iron Pipe Co.* (*Pettway V*), 681 F.2d at 1261 (11th Cir. 1982) (formula could be decided by special master after a hearing and guidance from the court). At least at this stage of the litigation, the Court is satisfied that a formula for calculating Defendant's lump sum backpay liability to the class could be developed in a manageable manner given the Court's limitations on eligibility set forth below.[49]

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[49] The Court also notes that where a defendant's total backpay liability to the class is set by formula in the form of a lump sum award, there is no need for the defendant to participate further in the issue of which class members are eligible to share in the award. Although *Domingo* cites *Teamsters* for the proposition that "the employer has the burden of proving that the applicant was unqualified or showing some other valid reason why the claimant was not, or would not have been, acceptable," 727 F.2d at 1445, it appears to have simply imported this procedure from *Teamsters* without considering whether it is necessary in a formula case. Clearly, in a traditional *Teamsters* model, the employer has a strong interest in contesting each individual claimant's qualifications and expressed interest in a promotion since the fewer the number of persons found to be victims of the employer's discriminatory policy, the less backpay the employer will owe. Thus, *Teamsters* logically provides that the employer has the opportunity to demonstrate that each claimant seeking backpay was not in fact discriminated against but rather was denied the position for lawful reasons. 431 U.S. at 362.

In a formula case, however, the employer's total backpay liability is set as a lump sum. As such, the *employer* does not appear to have any significant, legitimate interest in which class members share in the formula award and which do not. Indeed, Defendant has failed to clearly articulate such an interest here. This general point was acknowledged by the Ninth Circuit in *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996), which supports the general principle that a defendant does not necessarily have a protectable interest in contesting the validity of individual claims in a formula case, assuming the court has confidence that the formula reliably and accurately captures defendant's total liability to the class. *Id.* at 786. *See also Pettway V*, 681 F.2d at 1266 (defendant had no

(b) *Determining Individual Eligibility*

As noted above, even where a "formula approach" such as that endorsed in *Domingo* is invoked, the formula only advances the backpay remedy to the point of calculating the defendant's total backpay liability to the class. Courts still face the "eligibility phase"—*i.e.* the practical problem of identifying which class members were at least potential victims of the employer's discriminatory policy and thus are eligible to share in the lump sum backpay award. In a promotion case, such potential victims consist of those class members who were both (1) qualified for, and (2) interested in, a promotion but were denied that opportunity. These are two distinct factors that must be analyzed separately for manageability purposes. A class member who was qualified for, but not interested in, a promotion, would by definition not have been even *potentially* injured by defendant's discriminatory promotion policies, and thus would not be eligible to participate in the backpay award.

These potential victims typically constitute some subset of the class, since courts generally will not presume that every class member is both qualified for, and interested in, every promotional opportunity. *See, e.g., Teamsters*, 431 U.S. at 369, 370 n.55 ("the

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basis for objecting to a formula approach on due process grounds so long as the "amount found due the class does not exceed the amount which all members of the class together would have been entitled to receive under a correct hypothesis, which we must assume the trial court would adopt"). The Court also notes that neither *O & G Spring*, 38 F.3d 872, nor *Hameed*, 637 F.2d 506, indicate that the employer participated in eligibility determinations.

desirability of the [promotion positions] is not so self-evident as to warrant a conclusion that all employees would prefer [the promotion] if given a free choice"). *McKenzie*, 684 F.2d at 76 ("The benefits illegally denied to the plaintiffs as a class were opportunities neither automatically sought nor automatically bestowed . . . . [It is not] reasonable to assume that all journeymen would wish to assume supervisory responsibilities.").

In the promotion formula cases relied upon by Plaintiffs, courts typically resolve the eligibility issue through additional proceedings wherein class members come forward, self identify, and provide some minimum information regarding their (1) qualifications for, and (2) interest in the job promotions at issue. For example, in *Domingo*, the Ninth Circuit stated as follows:

> In order to be eligible for back-pay [from the formula-derived lump sum fund], claimants need only prove they applied for a position or would have applied if not for Nefco's discriminatory practices. They may be required to show what their qualifications were, but do not have the burden of proving they were qualified for the position sought . . . . In determining whether claimants applied or were deterred from applying for a better position, the district court should not put an unrealistic burden on claimants . . . . All uncertainties should be resolved against the employer.

727 F.2d at 1445; *see also Stewart*, 542 F.2d at 453; *Pettway V*, 681 F.2d at 1266 (employee need only come forth with statement of employment history, jobs denied, and qualifications, not conclusive proof of such matters).

As Plaintiffs concede, such additional proceedings would be unmanageable in this case. They argue, however, that these eligibility determinations could be handled solely by reference to objective data contained in corporate records, which would eliminate the need for additional, individualized eligibility proceedings. "The determination *of which* class members would be entitled to backpay . . . could be drawn from the economic models that each side's experts create" which account for factors such as performance evaluation scores, tenure, and positions held. *See* Pls.' Reply at 23-24.

The Court agrees that the objective data from Wal-Mart eliminates the need for individualized hearings with respect to the *qualifications* component of the eligibility determination. As Plaintiffs assert, and Defendant does not dispute, Wal-Mart maintains an extraordinarily sophisticated information technology system. *See* Pls.' Opp. at 8; Bielby Decl. ¶¶ 16. A significant part of this system is Wal-Mart's "PeopleSoft" database, which is one of the most extensive data collection systems in the country. The database contains information on each employee individually with respect to job history, seniority, job review ratings, and many other factors, thereby enabling a sophisticated user to create detailed reports of individual work histories and qualifications. *Id.; see also* Drogin Decl. ¶¶ 6-8, 10 (describing PeopleSoft database as including (1) identifying information including name, employee ID, social security number, and gender, (2) complete job histories including all jobs held and at which stores, salary changes, promotions, transfers, etc., and (3) performance review information for all employees during class period); Cynn Decl. (discussing detailed job history and payroll data derived from Peoplesoft database for a sample of fifty employees). As such, it is plain that ample corporate data exists that would permit the Court to objectively determine which class members were minimally qualified for a given promotion. Accordingly, this aspect of the promotion backpay process is also manageable.[50]

With respect to the *interest* component of the eligibility determination, however, the Court faces a more complex situation. The objective data relied on by Plaintiffs—performance evaluation scores, tenure, and positions held—goes only to the issue of *qualification*, not interest in a position. As such, the Court finds that they are insufficient proxies for interest. Moreover, the objective data that would document interest—i.e. past applications for positions—is simply not available for many class members because, as discussed in section I.B.1.a.(2)(b), Wal-Mart did not utilize a system of posting and accepting applications for many positions during the class period. Indeed, without this data it is difficult to discern how the Court could identify which class members were interested in unposted promotions absent some type of individualized proceedings, whether it be by declaration or otherwise.

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[50] The Court could instruct the parties to complete the task of deriving qualification related information from the database, especially since the experts already have mined the database in constructing their analyses, or it may appoint a special master and/or expert. *See Labor/Community Strategy Center v. Los Angeles County Metro. Transp. Auth.*, 263 F.3d 1041, 1049-50 (9th Cir. 2001) (approving district court's appointment of special master with broad powers to resolve issues for purpose of enforcing court's remedial order).

Plaintiffs respond by urging the Court to dispense with the "interest" factor altogether in this case. Specifically, Plaintiffs argue that individual interest in a promotion should be irrelevant to the remedy phase because at Wal-Mart expression of interest was not a requirement for promotion in the first place. Rather, Wal-Mart operated largely under a "tap on the shoulder" method, as discussed above. Given the wide-scale absence of application procedures, Plaintiffs conclude, eligible class members should simply consist of all qualified women in the relevant "feeder pools" (i.e. all qualified women in a job category and geographical location from which promotional candidates are drawn), all of whom are identifiable from the corporate records.

While expanding eligibility to include all qualified women in the relevant feeder pools, regardless of interest, would solve the manageability issue for unposted promotional opportunities, the Court is not convinced that such an approach is justified by either the facts or current law. First, the fact that an expression of interest is not a requirement for promotion does not mean that interest is irrelevant to determining eligibility. The fact that no expression of interest is *required* for promotion goes to the question of which employees were *qualified* for promotion. Thus, a female employee need not show she expressed interest in a promotion in order to establish that she was qualified for a promotion. This fact has no logical bearing, however, on the question of whether the employee was potentially victimized by the employer's discriminatory policies because the employee was interested in (but denied) a promotion.

Second, while courts commonly rely on feeder pools in making *liability* determinations,[51] Plaintiffs have not pointed to any precedent that would permit this Court to rely on feeder pools to determine *eligibility* for a backpay award. On the contrary, *Teamsters* raises serious questions as to the propriety of this approach. There, the Court rejected the argument that the group of "deterred employees" eligible for make-whole relief should automatically include all employees in the "feeder pool" (i.e. all employees who were qualified to apply for a better "line-driving" job) without the need for any individualized showing that each employee was actually interested in a promotion. 431 U.S. at 368-369. The Court made this holding even though the district court found that line-driver jobs are generally considered the most desirable driving job, and that applying for the job would have been a futile act.

> While the scope and duration of the company's discriminatory policy can leave little doubt that the futility of seeking line-driver jobs was communicated to the company's minority employees, that in itself is insufficient. The known prospect of discriminatory rejection shows only that employees who wanted line-driving jobs may have been deterred from applying for them. It does not show which of the nonapplicants actually wanted such jobs . . . . [T]he desirability of the [line-driving jobs] is not so self-evident as to war-

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[51] *See, e.g., Hemmings*, 285 F.3d at 1185-86; *Shidaker*, 833 F.2d at 631; *Stender*, 803 F. Supp. at 326; *Butler II*, 1997 WL 605754.

> rant a conclusion that all employees would prefer to be line drivers if given a free choice.

431 U.S. at 369. Similarly, it is not self-evident here that every (or nearly every) class member in every feeder pool desired a promotion, particularly given the relatively large feeder pools that would be at issue for many positions in this case.[52] This Court acknowledges that the eligibility issues in *Teamsters* raised particularly sensitive concerns because the make-whole relief included adjustments to seniority. *See id.* at 347-348. Nonetheless, it remains instructive on this issue.[53]

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[52] Even if the pool of potential discrimination victims were narrowed to a particular job classification and the store or district in which each respective promotion occurs, in a company where most of the stores at issue have between 150 to 500 employees, and 6 to 8 stores per district, the size of many of the pools would likely be substantial. *See* Def.'s Opp. at 13 (and citations therein); Drogin Decl. ¶ 49 (constructing availability pools for each challenged promotion by including only employees in "the same job and geographic area [district or store] as the person promoted"). The Court also notes that while it is theoretically possible that in some cases a plaintiff class could prove at trial that virtually every class member in every feeder pool was interested in a promotion, this possibility appears so remote on its face in this case, given the sheer size of the class, that the Court finds that it is not a sufficient basis for certifying the entire class for promotion backpay in this instance.

[53] Plaintiffs also argue that class members should not be required to show interest in a promotion because the evidence will show that Wal-Mart's discriminatory policies discouraged women from showing interest in, or developing interest in, management positions. Oral Arg. Tr. at 79-80. This, however, is essentially an argument that interest should be irrelevant to eligibility in cases where applicants are deterred from applying or seeking promotion due to discriminatory policies. Courts, however, have routinely required deterred class members to

Finally, Plaintiffs' attempt to factually distinguish *Domingo* is not persuasive. Plaintiffs argue that in *Domingo*, the employer utilized an informal application process, see *Domingo II*, 727 F.2d at 1445, and therefore it was reasonable to require class members to demonstrate their earlier interest on a *post hoc* basis, since an objective manifestation of such interest—rejected applications—was available. The employer in *Domingo*, however, did not in fact advertise job openings or post vacancies. *Domingo v. New England Fish Co.* (*Domingo I*), 445 F. Supp. 421, 435 (W.D. Wash. 1977). Rather, "[m]ost positions [were] filled by word-of-mouth recruitment." *Id.* In fact, the informal application procedures referred to in the *Domingo* appellate opinion appear to have been targeted toward non-class members through "[w]ord-of mouth recruitment, directed along racial lines, [which] made it especially difficult for [class members] to become aware of openings as they occurred." *Domingo II*, 727 F.2d at 1445. Significantly, despite the lack of job posting, *Domingo* still required some, albeit minimal, showing that the

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demonstrate interest *post hoc* in some manner before recovering backpay. *See e.g. Teamsters*, 431 U.S. at 371 n.58 (with respect to deterred class members, "the District Court may find evidence of any employee's informal inquiry, expression of interest, or even unexpressed desire credible and convincing"), *Domingo II*, 727 F.2d at 1445 (although employer's discriminatory practices made it difficult to prove deterrence, minority employees were still required to provide some indication of their interest in a position), *Hameed*, 637 F.2d at 519-20 (class members who can show they were deterred from applying because of defendants' discriminatory policies are among group of "potential discriminatees" and thus eligible to recover from formula backpay fund).

class member had desired a promotion before being eligible to participate in the backpay award to the class. *Id.* (noting for example that "any request for a better position" would suffice, and that "[a]ll uncertainties should be resolved against the employer").

The Court acknowledges that backpay is a significant aspect of any make-whole remedy that should be granted whenever possible. *See, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421-422 (1975). Nonetheless, the Court concludes that this aspect of the remedy can not be reasonably managed on a class basis in this particular case for promotions that were not posted, such that no objective applicant data exists. Plaintiffs have not persuaded the Court that it can properly identify which class members are eligible for backpay solely by reliance on feeder pools or other objective corporate data serving as a proxy for interest. As Plaintiffs have not proposed any other manageable alternative in this case, the Court declines to certify a claim for lost pay with respect to the portion of Plaintiffs' promotion claim where no objective applicant data exist. *See Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 929 (9th Cir. 1982) (trial judge has discretion to limit issues in class action to "'those parts of a lawsuit which lend themselves to convenient use of the class action motif'") (citations omitted); *Morgan*, 169 F.R.D. at 358 (limiting certification to liability and request for injunctive relief); Fed. R. Civ. P. 23(c)(4).

Where, however, promotional opportunities *were posted*, Wal-Mart's advanced personnel system does contain objective applicant data documenting which class members were interested in each such promotion. In particular, two corporate electronic databases—known as Job Posting Data for hourly job vacancies, and Management Career Selection (MCS) for salaried vacancies—contain the identities of the individual applicants for posted positions. *See* Drogin Decl. ¶¶ 8, 44-45; Haworth Decl. ¶¶ 72, 78, 118. Thus, with respect to all posted positions, the Court finds that it can readily identify through objective data those class members who were both qualified *and* interested in promotional opportunities—and thus were potential victims of any proven discriminatory policy. Accordingly, for this subset of the class, the Court is confident that it could manageably determine which class members would be eligible to share in a formula-derived, lump sum backpay award to the class.[54]

The ability to identify the specific class members who are both qualified *and* interested would also permit the Court to calculate through a formula Defendant's total backpay liability to this subset of the class. As discussed above, most formulas involve (1) identifying the number of positions that would have gone to class members absent discrimination, (2) estimating the total earnings that would have accrued to class members in those positions, and (3) some method to account for mitigation. There are, of course, various ways to approach these steps, and the Court does not intend to limit any options at this juncture. With the data discussed above, however, the Court would be able to determine if the percentage of women selected for certain positions was commensurate with, or fell short of, the percentage of qualified women who actually applied for such positions. In the event the percentage selected falls short, this information could be used to identify the number of "shortfall" positions—i.e., the number of positions that would have gone to class members absent discrimination. This number of shortfall positions could then be used for the second step of the formula, which would involve estimating the total earnings that would have accrued to class members in those shortfall positions (based, for example, on the earnings of men in the shortfall positions). Finally, the Court would deduct an amount to account for mitigation.

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[54] While the Court does not, and need not, at this time attempt to identify precisely which challenged positions were in fact posted, it notes that this subset of positions covers a sizeable raw number of promotions. For example, from 1998 to 2002, well over 3,000 Store Manager openings were posted and applicants were tracked in the database. *See* Haworth Decl. ¶ 120 (see Jobs 2 and 6 in chart entitled "Analysis of Selections from Management Job postings by Job"); Drogin Decl. ¶ 46 & Table 21. Haworth Decl. ¶¶ 72, 118 ("Wal-Mart has systematically retained records of about 580,000 actual applications received for hourly promotions and about 56,000 electronic expressions of interest in promotion to salaried management jobs since 1997"; additionally, the 2003 Assistant Manager Trainee postings generated over 40,000 applicants for promotion); Bielby Decl. ¶¶ 43-44.

In sum, the Court rejects Defendant's contention that a lost pay remedy on Plaintiffs' promotion claim is entirely unmanageable. First, the Court finds that this is the type of case in which a formula approach may be appropriate. Second, the Court concludes that a formula-based remedy would be manageable, however, only with respect to those positions for which objective applicant data is available to document class member interest. In such cases, the Court would have sufficient data to identify those class members who would be eligible to participate in a lump sum backpay award, and to fashion a formula to calculate such an award. Where no such objective data exists, however, manageability concerns preclude a lost pay remedy in this class action. Accordingly, any lost pay remedy on Plaintiffs' promotion claim would be limited to that subset of the class for whom objective applicant data exists. *See Williams*, 665 F.2d at 929; *Morgan*, 169 F.R.D. at 358; Fed. R. Civ. P. 23(c)(4)

b. *Equal Pay Claim*

As indicated above, Plaintiffs' equal pay claim presents issues that are quite distinct from plaintiffs' promotion claim. Having considered these issues, the Court concludes that, should plaintiffs prevail on the merits, a lost pay remedy for the class would be manageable. As previously discussed, Plaintiffs would enter the remedy phase with a presumption in their favor that any unequal pay was due to Defendant's discriminatory policy and practice. *See Teamsters*, 431 U.S. at 361. In order to award lost pay, however, the Court still must be able to (1) identify which class members were actually, or at least potentially, victimized by the employer's discriminatory pay policies, and (2) calculate the specific amount of lost pay that each such person is owed. As discussed below, the Court is well satisfied that it could accomplish both tasks in a manageable fashion and without resort to a formula approach.

(1) *Identification of victimized class members*

With respect to the first task, the primary manageability obstacle posed by the promotion claim simply is not present here. As discussed above, courts are not generally willing to assume, for purposes of granting make-whole relief, that all employees are uniformly interested in every promotional opportunity, given the various considerations that go into such a decision. This necessitates some examination of the interest levels of individual class members, as discussed above in terms of identifying objective information from the promotion databases. In contrast, courts can safely assume that all employees uniformly desire equal pay for equal work. Indeed, equal pay for equal work is a benefit that automatically flows to all employees. Thus, there is simply no need to assess individual interest levels with respect to equal pay claims. Rather, virtually all of the potential victims of an employer's discriminatory pay policy—i.e. those class members who were paid less than male employees for comparable work—can be identified by reference to objective criteria such as pay rates and job positions held.

It is also clear that identifying these potential victims would be a manageable task in this particular case. As discussed above, Defendant's PeopleSoft database contains a wide range of personnel and payroll data enabling a sophisticated user to create detailed reports of individual work and earnings histories as well as comparisons between workers. In addition, Wal-Mart maintains computerized bi-weekly payroll information for each and every employee working in the United States. *See* Drogin Decl. ¶ 7 (noting that the payroll data is capable of being merged into the PeopleSoft database for the creation of earnings reports). Thus, the objective data necessary to identify potential equal pay victims is readily available in this case.

Moreover, there is sufficient objective data available to identify not only the *potential* victims but also the *actual* victims of any proven discriminatory pay policy—i.e. those class members who not only were paid less for comparable work but who also were at least equally qualified as their male counterparts. This requires a more sophisticated use of the data because determining qualifications requires an analysis of additional factors. Again, however, Wal-

Mart's database contains the critical information necessary to perform such an analysis for each employee individually, including job history, seniority, job review ratings, weeks worked, full-time versus part-time status, regular-time versus over-time, and store location. *See* Drogin Decl. ¶¶ 67, 69, 71; Cynn Decl.

It would be premature of course for the Court to determine at this juncture precisely which factors should be relied upon to compare qualifications. Nor is it necessary to account for every possible factor that might be relevant to qualifications. As the case law repeatedly emphasizes, when calculating back-pay awards "unrealistic exactitude is not required, and [ ] uncertainties in determining what an employee would have earned but for the discrimination should be resolved against the discriminating employer." *Shipes*, 987 F.2d at 317 (citations omitted); *see also Teamsters*, 431 U.S. at 372; *McKenzie*, 684 F.2d at 77; *EEOC v. Chicago Miniature Lamp Works*, 640 F. Supp. 1291, 1298-99 (N.D. Ill. 1986) (accepting lack of precision at remedy phase due to subjectivity in defendant's hiring method). The Court thus flatly rejects Defendant's argument that any comparison of male and female employees would be impossible because the available data does not include dozens of factors identified in a survey of Store Managers as being relevant to pay decisions. Oral Arg. Tr. at 105, 125-26.[55] Rather, the Court is satisfied that it will have access to sufficient data to meaningfully compare the qualifications of female and male employees doing comparable work for purposes of calculating lost pay. *See National Treasury Employees Union v. United States*, 54 Fed. Cl. 791, 795, 800 (2002) (in computing backpay for class of 210,000 employees court relied on "data concerning the class member's agency, occupation, geographic location, and grade," along with the use of "a few simplifying rules and assumptions to allow for the computation[ ] to be completed with reasonable accuracy, and in a reasonable amount of time").

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[55] As noted previously, the Court has stricken references to Defendant's Store Manager survey in Dr. Haworth's declaration for failure to satisfy the standards of Fed. R. Evid. 702 and 703. *See* Order re Motions to Strike. Moreover, even this survey indicates that the most important factors identified by the Store Managers declarations actually *are* in Defendant's database.

[Footnote continued from previous page]

e.g., "minimum pay established for the job classification by Wal-Mart's pay guidelines," and performance. *See* Haworth Decl., Appendix Vol. 2, Tab 16 (chart entitled "Store Manager Declarations: Percentage of Decisions in Which Factors Play a Role in Determining Starting Hourly Pay"); *see also* Drogin Reply Decl., Ex. 2 (Wal-Mart "Field Associate Compensation Guidelines"). While the data does not capture pre-Wal-Mart experience, the Court concludes that this one factor does not prevent it from making sufficient comparisons between class members and male employees for purposes of calculating lost pay. *Segar*, 738 F.2d at 1274-76 (affirming trial court's finding that plaintiffs' evidence was sufficient for backpay award despite failure to account for aspects of prior experience, especially where the past experience at issue was not used by defendant as a minimum objective qualification, and where it was defined subjectively and amorphously). Other factors noted by defense counsel at oral argument, such as willingness to work weekends or rotating shifts, or live cricket experience, are not significant, even according to Defendant's own data. *See* Haworth Decl. ¶ 187.

(2) *Calculation of individual backpay awards*

Once the actual victims of a proven discriminatory pay policy have been identified, Defendant's PeopleSoft data system also can facilitate the calculation of individualized damage awards. Since the database contains payroll information, it could be used to calculate the differential between each individual victim and the comparable male pay rate. Again, the Court need not decide at this time exactly how such calculations would be made. Rather, suffice it to say that the Court is confident that a fair and manageable method can be devised. *See Albemarle Paper Co.*, 422 U.S. at 419, 421 (Congress' purpose in vesting discretionary powers in the courts to provide relief under Title VII was "to make possible the 'fashion[ing][of] the most complete relief possible'") (citation omitted).

The Court's approach here—with respect to both the identification and calculation issues—is similar to that taken by the Fifth Circuit in *Shipes*, 987 F.2d 311. In *Shipes*, the plaintiff class of African-American workers alleged, similar to this case, that the employer used "entirely subjective personnel processes" to set discriminatory pay rates. *Id.* at 316. After the plaintiffs proved class-wide liability, the employer urged the Court to employ a *Domingo*-type formula approach to awarding backpay. The district court declined and instead appointed an expert to determine the amount of backpay, if any, due each class member. The expert developed a model for assessing backpay by comparing the starting pay of class members and white employees with similar qualifications, and then awarding the differential amount to those class members who suffered an actual loss. *Id.* at 319. The district court's individualized procedure was affirmed on appeal. *Id.* at 315-19 ("The fact that a class is large does not mean that *pro rata* [formula] relief should automatically be ordered. . . . [T]here should be, if possible, a determination on an individual basis as to which class members are entitled to damages and the amount of such recovery.").

Notably, *Shipes* makes no mention of any need for *Teamsters* hearings or any kind of employer participation in the process of determining which employees are entitled to backpay, instead relying exclusively on corporate records. *Shipes*, 987 F.2d at 317-19. This is consistent with the fact that *Teamsters* was not an equal pay (nor a formula) case, but a hiring/promotion case that required determinations that could not be capably captured in that case by objective data. Indeed, where, as here, the actual victims of any discriminatory pay policy, and the amount of lost pay due, can be determined based on objective data, a remedy-phase *Teamsters* mini-hearing is simply unnecessary. *See also Liberles v. County of Cook*, 709 F.2d 1122, 1127, 1136 (7th Cir. 1983) (where backpay is awarded for salary discrimination alone, and where evidence of pay rates and comparative qualifications exists, "individualized hearings are unnecessary").

In sum, the Court is satisfied that the actual victims of a proven discriminatory pay policy can be sufficiently identified and compensated through reference to corporate records, and that this can be done on an individualized basis without resort to a *Domingo*-type formula and without the need for *Team-*

sters hearings.[56] Accordingly, the Court rejects Defendant's contention that a manageable remedial process for awarding backpay as compensation for equal pay violations cannot be fashioned in this case.[57]

c. *The 1991 Civil Rights Act*

In a final attempt to demonstrate the unmanageability of Plaintiffs' promotion and equal pay claims, Defendant invokes the Civil Rights Act of 1991, Pub.L. No. 102-166, 105 Stat. 1071 (1991); 42 U.S.C. § 2000e. Specifically, Defendant argues that this Act entitles it to present a "mixed-motive" defense with respect to each class member, which would necessitate individualized hearings. *See* 42 U.S.C. § 2000e-5(g)(2)(B). While neither party has cited cases applying the "mixed motive" defense in a class action context, Defendant's argument completely lacks merit since, in any event, Plaintiffs have elected "to pursue their claims *solely* under [a 42 U.S.C.] § 2000e-2(a) [single-motive theory]." Plaintiffs' Reply at 25 (emphasis in original).

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[56] While Plaintiffs in their briefing assumed the use of a formula to calculate backpay for both promotion and equal pay claims, at oral argument Plaintiffs' counsel was "fully supportive" of the approach taken herein. Oral Arg. Tr. at 70.

[57] Defendant notes that it took the *Shipes* expert several years to complete the process for a much smaller class, and suggests that such a process would therefore be unmanageable in a case of this scope. *See Shipes*, 987 F.2d at 315. While the reason for the length of time in *Shipes* is not apparent, this Court is confident that advances in technology since the *Shipes* decision in 1993, combined with the sophistication of Defendant's database, will allow for a backpay award process to proceed at a manageable pace in this case.

Title VII makes it an "unlawful employment practice for an employer . . . to discriminate against any individual . . . *because of* such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). Courts commonly view the causation issue in employment discrimination cases by separating them into two categories. In "single-motive" cases, causation is seen as a binary question where the true basis for the adverse employment action is either legal or illegal. *See Costa v. Desert Palace, Inc.* (*Costa II*), 299 F.3d 838, 856 (9th Cir. 2002), *aff'd*, 539 U.S. 90 (2003). In "mixed-motive" cases, the factfinder concludes that the adverse action was the result of a combination of both legal and illegal factors. *Id.*

In *Price Waterhouse*, the Supreme Court held that a finding of mixed-motives would provide a complete defense. 490 U.S. at 244, 261. In response, Congress amended Title VII in 1991, allowing plaintiffs to prevail in a mixed motive case. *See* 42 U.S.C. § 2000e-2(m). Congress further provided, however, that in such cases, the employer can limit the plaintiff's remedies to declaratory relief, certain types of injunctive relief, and attorney's fees and costs, if the employer successfully demonstrates that it would have taken the same action in the absence of the impermissible motivating factor. 42 U.S.C. § 2000e-5(g)(2)(B). This defense is generally referred to as the "same decision affirmative defense." *See, e.g.*, *Costa II*, 299 F.3d at 857.

Nothing in the "mixed-motive" provisions of the 1991 Civil Rights Act—which were enacted to strengthen and expand employee rights under Title

VII[58]—or the governing case law, create any manageability concerns in this case. First, in practical terms, the 1991 amendments do not affect the presentation of evidence at the liability phase. As the Ninth Circuit explained in *Costa II*:

> [W]e emphasize that there are not two fundamentally different types of Title VII cases. In some cases, the employer may be entitled to the "same decision" affirmative defense instruction. In others, it may not. The employee's ultimate burden of proof in all cases remains the same: to show by a preponderance of the evidence that the challenged employment decision was "because of" discrimination.

Costa II, 299 F.3d at 857. Thus, at trial both parties will present evidence on the issue of whether any disparities between male and female employees with respect to pay and promotion are the result of a pattern and practice of intentional gender discrimination or legitimate factors. As discussed above, the liability phase of the case focuses on the class as a whole, not individualized employment decisions. Thus, the "same decision" defense with respect to individual class members will play no role in the liability phase of this case.

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[58] "The Civil Rights Act of 1991 . . . was enacted to restore civil rights limited by then-recent Supreme Court decisions and to 'strengthen existing protections and remedies available under federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination.'" *E.E.O.C. v. Luce, Forward, Hamilton & Scripps* ("*Luce*"), 345 F.3d 742, 747 (9th Cir. 2003), quoting H.R. Rep. No. 102-40(II), at 1 (1991), *reprinted in* 1991 U.S.S.C.A.N. 549; *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1192 (9th Cir. 1998), *overruled on other grounds by Luce*, 345 F.3d 742 ("The purpose of the Act was uniformly to *expand* employees' rights and 'to *increase* the possible remedies available to civil rights plaintiffs.'") (citation omitted) (emphasis in original).

If a jury finds, in the liability phase, that Plaintiffs have proven a pattern of intentional gender discrimination, and that Wal-Mart's evidence has failed to show that one or more legitimate motives accounted in part for that discrimination, then Plaintiffs will prevail on their single motive theory. In that event, the Act would provide no basis for the assertion of a "same decision" defense at the remedy stage since, by the explicit statutory language, such defense applies only where the illegal conduct was the result of mixed-motives. *See* 42 U.S.C.2000e-5(g)(2)(B) (limiting "same decision" defense to "claim[s] in which an individual proves a violation under section 2000e-2(m) [the mixed-motive provision]"); *Desert Palace, Inc. v. Costa (Costa I)*, 539 U.S. 90 (2003).

If the jury finds that the challenged conduct results either from entirely legitimate factors or a mix of legitimate factors and illegal discrimination, then the claims for lost pay and punitive damages will conclude in Defendant's favor, given Plaintiffs' election to forego seeking the full panoply of remedies that would require adjudication of a "same-decision" defense. Thus, Plaintiffs are not attempting to unilaterally manipulate the trial proceedings, as Defendant suggests; rather, they simply have elected to forego a certain potential remedies to which they might otherwise be entitled. Given all of the above, it is clear that the "same decision" defense—which only pertains to the scope of the remedy—will not be an issue in this case regardless of whether Plaintiffs or Defendant prevails at the liability phase. Accordingly, the Court rejects Defendant's argument that the 1991 Civil Rights Act prevents certification of a class in this case.

CONCLUSION

For all of the foregoing reasons, this Court finds that Plaintiffs' motion for class certification should be granted in part, and denied in part, consistent with this decision and as set forth below. This Court retains, of course, the discretion to revisit this certification should unexpected circumstances arise. As the Ninth Circuit has explained, "[b]ecause class actions vary so widely in their circumstances, the trial judge is vested with broad discretionary control over the conduct of such actions enabling the presiding judge to respond fluidly to the varying needs of particular cases." *Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615, 633 (9th Cir. 1982). Indeed, district courts have the inherent discretion to review class certification decisions at any time. *Armstrong*, 275 F.3d at 872, n.28; *Barefield*, 1988 WL 188433 (N.D. Cal. 1988) (class certification orders are "inherently tentative and may be modified as circumstances require").

Based on the current record, however, the Court is well satisfied that Plaintiffs have met their burden of demonstrating that each of the Fed. R. Civ. Proc. 23(a) requirements are satisfied, as follows:

1. *Numerosity*: This factor is not contested, and the Court finds joinder would be impracticable in this case.

2. *Commonality*: Plaintiffs have satisfied their burden of showing the existence of significant legal and factual issues concerning Defendant's alleged company-wide discriminatory pay and promotion

policies that are common to the entire class. In particular, Plaintiffs have provided:

> (a) evidence of common company policies and practices, including subjective decision-making, a culture of corporate uniformity, and gender stereotyping;
>
> (b) expert opinion establishing statistical evidence of gender disparities which support an inference of company-wide discrimination in both pay and promotions; and
>
> (c) anecdotal evidence from class members of discriminatory attitudes held or tolerated by management.

3. *Typicality*: Plaintiffs have satisfactorily shown that the claims of the named plaintiffs are reasonably co-extensive with those of the class as a whole.

4. *Adequacy*: Plaintiffs have satisfactorily shown that the interests of the class representatives do not conflict with those of the class members. Class counsel are qualified to conduct this litigation.

Plaintiffs also have met their burden of demonstrating that the requirements of Fed. R. Civ. Proc. 23(b)(2) are satisfied here in that Defendant "has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." As discussed above, however, the class shall be afforded notice and an opportunity to opt-out in order to satisfy due process considerations.

The Court further concludes that Plaintiffs' claim for equal pay is manageable with respect to issues of liability and all forms of requested relief. Finally, the Court finds that Plaintiffs' promotion claim is manageable with respect to issues of liability and injunctive and declaratory relief. The Court finds, however, that with respect to the remedy of lost pay, it is manageable only with respect to those challenged promotions where objective data is available to document class member interest in the respective challenged promotion. Thus, the Court denies certification, on grounds of unmanageability, with respect to Plaintiffs' promotion claims for lost pay (and hence punitive damages) as to those class members for whom no such data is available.

Accordingly, and good cause appearing, it is HEREBY ORDERED as follows:

1. Plaintiffs' Motion for Class Certification is GRANTED IN PART and DENIED IN PART consistent with this decision.

2. The Court certifies the following class for purposes of liability, injunctive and declaratory relief, punitive damages,[59] and lost pay, *except that* class members for whom there is no available objective data documenting their interest in challenged promotions shall be limited to injunctive and de-

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[59] The Court emphasizes that in the event Plaintiffs are able to establish liability, punitive damages would not flow automatically from such a finding. Rather, only those class members who establish that they are entitled to an award of lost pay, and thus demonstrate individual harm from Defendant's conduct, would be eligible to receive such damages. *See* section II.A. The Court further notes that the fact that this subset of the class is not identifiable now does not preclude class notice at this juncture. Class action notices are typically sent to all class members who *may* be entitled to recover, not to those whose right to recover has already been established.

claratory relief with respect to plaintiffs' promotion claim:

> All women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal-Mart's challenged pay and management track promotions policies and practices.

3. This action shall be bifurcated into separate liability and remedy phases.

4. The individual racial discrimination claims asserted by named plaintiffs Betty Dukes and Cleo Page shall be severed from the class case.

5. The parties shall appear on Wednesday, July 28, 2004 at 2:00 p.m. for a status conference to discuss the issue of notice to the class, and other scheduling and case management issues. A Joint Status Statement shall be filed no later than 10 days in advance of the status conference.

IT IS SO ORDERED.

APPENDIX C

FILED

FEB 13 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BETTY DUKES; PATRICIA SURGESON; CLEO PAGE; DEBORAH GUNTER; KAREN WILLIAMSON; CHRISTINE KWAPNOSKI; EDITH ARANA, Plaintiffs – Appellees v. **WAL-MART, INC.,** Defendant – Appellant.	No. 04-16688 D.C. No. CV-01-02252-MJJ **ORDER**
BETTY DUKES; PATRICIA SURGESON; CLEO PAGE; DEBORAH GUNTER; KAREN WILLIAMSON; CHRISTINE KWAPNOSKI; EDITH ARANA,	No. 04-16720 D.C. No. CV-01-02252-MJJ

Plaintiffs – Appellants,

WAL-MART, INC.,

Defendant – Appellee.

KOZINSKI, Chief Judge:

Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit.

Judges McKeown, Rawlinson and Bybee did not participate in the deliberations or vote in this case.

APPENDIX D

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28 U.S.C. § 2072 provides:

§ 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

42 U.S.C. § 1981 provides:

§ 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981a provides:

§ 1981a. Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5, 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [42 U.S.C. 2000e-2, 2000e-3, 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(2) Disability

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5, 2000e-16] (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of title 29 and the regulations implementing section 791 of title 29, or who violated the requirements of section 791 of title 29 or the regulations implementing section 791 of title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(3) Reasonable accommodation and good faith effort

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 [42 U.S.C. 12112(b)(5)] or regulations implementing section 791 of title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5(g)].

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

(4) Construction

Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title.

(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section—

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.

(d) Definitions

As used in this section:

(1) Complaining party

The term "complaining party" means—

(A) in the case of a person seeking to bring an action under subsection (a)(1) of this section, the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

(B) in the case of a person seeking to bring an action under subsection (a)(2) of this section, the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under section 794a(a)(1) of title 29, or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 [42 U.S.C. 12111 et seq.].

(2) Discriminatory practice

The term "discriminatory practice" means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a) of this section.

42 U.S.C. § 2000e-2 provides in relevant part:

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C. 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

* * *

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

* * *

42 U.S.C. § 2000e-5 provides in relevant part:

§ 2000e-5. Enforcement provisions

* * *

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

* * *

Federal Rule of Civil Procedure 23 provides:

Rule 23. Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) ***Certification Order.***

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment.

(2) ***Notice.***

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) ***Judgment.*** Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) ***Particular Issues.*** When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) ***Subclasses.*** When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) ***In General.*** In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require--to protect class members and fairly conduct the action--giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) ***Combining and Amending Orders.*** An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) ***Appointing Class Counsel.*** Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) ***Standard for Appointing Class Counsel.*** When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) ***Interim Counsel.*** The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) ***Duty of Class Counsel.*** Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

OPPOSITION
BRIEF

173 ⑪

No. 10-277

In The
Supreme Court of the United States

◆

WAL-MART STORES, INC.,

Petitioner,

v.

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA,
KAREN WILLIAMSON, DEBORAH GUNTER,
CHRISTINE KWAPNOSKI, CLEO PAGE, on behalf of
themselves and all others similarly situated,

Respondents.

◆

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

◆

BRIEF IN OPPOSITION OF RESPONDENTS

◆

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INTRODUCTION

The Petition seeks review of an interlocutory class certification order that the appeals court affirmed in part, reversed in part, and remanded for reconsideration on two issues central to the questions presented by Petitioner. Class certification orders are inherently provisional, but the two issues still to be resolved render this order particularly ill-suited for certiorari review at this time. As a result, the Petition raises questions that this case does not present – and may never present. The request for review is, thus, premature. There are additional reasons why it should be denied.

The First Question posits the existence of a circuit split as to whether and how "monetary relief" claims may be certified in a Rule 23(b)(2) injunctive class action. While the circuits have treated claims for *legal damages* under Rule 23(b)(2) somewhat differently, there is no circuit split presented by the *en banc* ruling, as the only form of monetary relief that the Ninth Circuit allowed to proceed collectively was *equitable back pay*. All the circuits that have addressed the issue agree that equitable back pay may properly be certified in a Rule 23(b)(2) class action.

The Second Question – an amalgam of purported errors, large and small, based on a host of legal doctrines – makes little pretense of meeting this Court's requirements for certiorari. No circuit split exists as to any of these issues. Instead, the Petition exhorts this Court to second-guess the case-specific findings of the district court or to adopt, in the first instance, legal theories never accepted by any appellate court.

Petitioner returns repeatedly to the refrain that the certified class is very large, a fact that is indisputably true but legally irrelevant. The class is large because Wal-Mart is the nation's largest employer and manages its operations and employment practices in a highly uniform and centralized manner. The district court was keenly aware of the implications of the class size but ultimately concluded that "Title VII . . . contains no special exception for large employers." App. 165a. The certification decision was firmly grounded in this Court's Title VII class action jurisprudence and "[c]ertification does not become an abuse of discretion merely because the class has 500,000 members." App. 112a (Graber, J., concurring).

◆

STATEMENT OF THE CASE

This class action alleges that Petitioner Wal-Mart Stores discriminates against its female retail store employees with respect to corporate-wide pay and promotion policies and practices. As a consequence, women employed by Wal-Mart "are paid less than men in comparable positions, despite having higher performance ratings and greater seniority" and "receive fewer – and wait longer for – promotions to in-store management positions than men." App. 5a.

Plaintiffs contend that these policies and practices violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), *et seq.* Plaintiffs challenge those national practices under theories of disparate treatment and disparate impact discrimination. The complaint seeks injunctive relief, back pay, and punitive damages; it does not seek compensatory damages or retroactive promotions.

After a year and a half of discovery, including more than 175 lay and expert depositions and production of over one million pages of documents, Plaintiffs sought certification of the class under Federal Rules of Civil Procedure 23(b)(2) and 23(b)(3). In support of their certification motion, plaintiffs submitted substantial evidence demonstrating that hourly and salaried retail female employees receive significantly lower pay and fewer advancement opportunities than do their male counterparts; that Wal-Mart has a uniform personnel and management structure across its stores; that Wal-Mart maintains company-wide policies governing pay and promotion decisions within the stores; that these policies uniformly delegate substantial discretion to store and regional managers to make personnel decisions for store employees; and that its Home Office exercises extensive oversight of the stores. The evidence further revealed that these policies, exercised within a strong, centralized corporate culture, adversely affected female employees in every one of the company's 41 domestic regions. The disparate outcomes for men and women were highly statistically significant such that they were extremely unlikely to result from chance.

The evidence also demonstrated that Wal-Mart senior officials closely monitored pay and promotions in the stores and were aware of the adverse impact of Wal-Mart's policies on female employees, but failed to take steps to eliminate these discriminatory barriers. The Executive Vice President for People regularly reported that Wal-Mart lagged behind its competitors in the advancement of women into management. Several years before this action was filed, he warned that the company was "behind the rest of the world," a conclusion confirmed by plaintiffs' labor economist. District Court Record ("DCR") Webber Decl., Ex. 11; App. 223a-224a.

Plaintiffs presented evidence that Wal-Mart's system fosters gender stereotyping, and scores of class members gave powerful examples of it. App. 193a-194a, 225a-226a. At Sam's Club Home Office executive meetings, senior management often referred to female store associates as "little Janie Qs" and "girls." DCR Webber Decl., Ex. 36. Wal-Mart's Executive Vice President for People saw nothing wrong with a district manager holding his management meetings at Hooters restaurants. *Id.*, Ex. 89. In 1998, a consultant retained by Wal-Mart advised the company that a "glass ceiling is perceived by many women" at Wal-Mart and "some [district managers] . . . do not seem personally comfortable with women in leadership roles." *Id.*, Ex. 88. One former Wal-Mart Vice President described the company's diversity efforts as "lip service," App. 195a, a conclusion confirmed by a detailed analysis of Wal-Mart's diversity programs. App. 194a-195a.

In an 84-page order, Judge Martin J. Jenkins granted in part and denied in part plaintiffs' class certification motion. The court fully certified the claims for injunctive relief and back pay under Rule 23(b)(2), but limited the promotion class to those class members with objective evidence to confirm their interest in promotion. The court also exercised its discretion to provide notice and an opportunity to opt out to class members for the punitive damages claim. App. 242a-243a.

The district court made extensive findings of fact to support its conclusion that Rule 23 requirements had been met. The Petition largely omits reference to these detailed findings.

Unequal Promotional Opportunities – The district court found that "roughly 65 percent of hourly employees are women, while roughly 33 percent of management employees are women." App. 176a. When Wal-Mart's representation of women in management was compared to that of its twenty largest competitors, there was a statistically significant shortfall at nearly 80% of the stores. App. 223a. The district court credited plaintiffs' proof of "a statistically significant shortfall of women being promoted into each of the in-store management classifications over the entire class period." This shortfall was "consistent in nearly every geographic region at Wal-Mart." App.

212a. Women also took longer than men to enter management positions. App. 198a. These observed differences existed even though female employees at Wal-Mart generally have more seniority and better performance ratings than do male employees. Appellate Excerpts of Record 173, 175-80.

Unequal Pay – Plaintiffs' statistical regressions for hourly and salaried employees showed that women were paid significantly less than men, and this pay gap increased each year. This pattern was consistent for all store classifications in all regions even when seniority, turnover, store, job performance, job position, part-time or full-time status, and other factors were taken into account. App. 200a, 209a. After careful consideration of the parties' competing analyses, the lower court concluded that plaintiffs' statistical analysis raises "an inference of company-wide discrimination in both pay and promotions." App. 281a.

Uniform Structure and Central Control – The district court found Wal-Mart stores are operated "with a high degree of store-to-store uniformity" and centralized control. App. 190a. "[T]he personnel structure within each store operates in a basically similar fashion using similar job categories, job descriptions and management hierarchies." App. 174a -175a. "[E]ach individual store is subject to oversight from the company's Home Office" that includes "a very advanced information technology system which allows managers in the Home Office to monitor the operations in each of its retail stores on a close and constant basis." App. 190a, 192a. Wal-Mart has a far higher concentration of its regional and senior management based in its Home Office than its competitors do, further confirming its unusually centralized nature. App. 191a, n.17.

Uniformity of Promotion Policies and Practices – Regional and district managers make promotion decisions for salaried store management positions. App. 181a-182a. The district court found that "[t]he subjectivity in promotion decisions occurs in two fundamental ways: (a) a largely subjective selection practice hindered by only minimal objective criteria, combined with (b) a failure to post a large proportion of promotional opportunities." App. 180a. There was no application process for the vast majority of openings for mid-level and higher level store management positions. As a result, "class members had no ability to apply for, or otherwise formally express their interest in, openings as they arose." App. 182a-183a. Because of Wal-Mart's decision not to post openings, "[m]anagers did not have to consider all interested and qualified candidates, thus further intensifying the subjective nature of the promotion process." App. 183a.

Uniformity of Compensation Policies and Practices – "All hourly employees at every Wal-Mart store are compensated pursuant to the same general pay structure." App. 176a. The Home Office establishes minimum starting rates for each hourly job in the retail stores. *Id.* While store managers are granted substantial discretion in making pay decisions for hourly employees, any pay increase above a certain percentage is automatically reported to higher management and requires special approval. App. 177a.

The compensation system for salaried in-store managers is set by common, company-wide policy. App. 178a. The Home Office sets base pay ranges for each in-store salaried position, and any departures from these pay levels are made "primarily by District Managers (the first level in the management hierarchy above Store Managers) and their superiors, the [Home Office-based] Regional Managers." App. 178a. For both hourly and salaried compensation policies and practices, the district court found that there "is significant uniformity across stores, and that Defendant's policies all contain a common feature of subjectivity." App. 180a. *See also* App. 124a, n.9 (dissenting opinion) ("it is undisputed that Wal-Mart maintains uniform company-wide policies. . . .").

Corporate Culture – The district court concluded that Wal-Mart's unique culture is an additional factor supporting commonality because "it promotes and sustains uniformity of operational and personnel practices" and "guide[s] managers in the exercise of their discretion." App. 188a, 192a. It found "no genuine dispute that Wal-Mart has carefully constructed and actively fosters a strong and distinctive, centrally controlled, corporate culture." App. 188a. The court noted that Wal-Mart trains its employees each week, beginning with orientation, in lessons on Wal-Mart culture ("the Wal-Mart Way") and that culture is an integral part of all management training programs.

App. 188a-189a. Wal-Mart's practice of "promoting from within" means that "the culture lessons learned by junior-level employees contribute to building a foundation of common understanding and practice among the management team." App. 189a. Further, the company regularly moves store-level managers across stores, districts, regions, states, and divisions, which "could only be efficient in a company with a high degree of store-to-store uniformity" and "ensure[s] that a uniform Wal-Mart Way culture operates consistently throughout all stores." App. 189a-190a.

* * *

In summary, the district court found that plaintiffs provided "significant evidence of company-wide practices and policies" that "raises an inference that Wal-Mart engages in discriminatory practices in compensation and promotion that affect all plaintiffs in a common manner." App. 226a.

Scope of Injunctive Relief Sought – The district court also noted that the broad prospective relief sought would "achieve very significant long-term relief in the form of fundamental changes to the manner in which Wal-Mart makes its pay and promotions decisions nationwide" that would benefit current and future female employees. App. 239a.

Back Pay Procedures – The district court found that, if class liability were established, individual hearings would not be required to determine back pay for eligible class members. App. 243a-276a. For the claims of unequal pay, it found there was ample objective data in Wal-Mart's electronic employee database from which a determination of individual qualifications and lost back pay could be made without individual hearings. App. 261a-262a, 270a-272a. For promotions claims, however, it found there was insufficient data available to determine lost back pay because, for many class members, objective data was not available to document an interest in promotion. App. 267a. Accordingly, it limited the back pay remedy for promotion claims to a subset of the class for which objective data of interest existed. App. 267a-268a. For pay claims, however, where there is no need to document an interest in equal pay, there was sufficient data available to identify "the *actual* victims of any proven discriminatory pay policy." App. 271a (emphasis in original).

Ruling on Expert Evidence – With the class certification order, the district court concurrently issued a separate 18-page order addressing the parties' motions regarding their respective expert witnesses. (That order was not included in the Certiorari Appendix nor discussed in the Petition, but is an Addendum to this Brief.) In that order, the district court addressed and rejected Wal-Mart's challenges to each of plaintiffs' three experts. Addendum at 4-15. The order also granted plaintiffs' motion to strike the foundation for Wal-Mart's expert pay analysis, finding that a survey of store managers conducted by defense counsel was wholly unreliable. Addendum at 17-23; App. 203a-204a.

Proceedings on Appeal – Wal-Mart appealed the class certification order; plaintiffs cross-appealed, challenging the decision to limit the promotion class to those class members with objective evidence of their interest in promotion. A Ninth Circuit panel affirmed the certification in its initial decision and in a modified opinion. Wal-Mart then sought *en banc* review. The Equal Employment Opportunity Commission filed an *amicus* brief urging the *en banc* court to affirm the district court's determination that Title VII did not mandate individual Stage II hearings.

The *en banc* court issued a mixed ruling, affirming the order in part and reversing in part. The court emphasized that district courts must conduct a "rigorous analysis" to ensure that the requisites of Rule 23 have been satisfied. It concurred with the holding of the Second Circuit in *In re Initial Public Offerings Secs. Litig.*, 471 F.3d 24, 40-41 (2d Cir. 2006), that this analysis may properly require the evaluation of evidence that overlaps with the merits. App. 14a, 31a, 39a-40a.

The *en banc* court then affirmed the certification of the pay claim and the limited certification of the promotion claim, rejecting plaintiffs' cross-appeal. It overruled its own prior decision in *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003), which had established a standard for certification under Rule 23(b)(2) focused primarily on the subjective intent of the named plaintiffs. It then remanded the issue of whether punitive damages claims can be certified under Rule 23(b)(2) or (b)(3). It also determined that class members not employed by Wal-Mart on the date that the complaint was filed could not be included in the Rule 23(b)(2) class because they lacked standing to seek injunctive relief. It remanded the issue of whether the claims of these former employees could be certified under Rule 23(b)(3).

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REASONS FOR DENYING THE WRIT

I. The Writ Should Be Denied Because the Decision is Interlocutory and Two Fundamental Issues Remain Unresolved

The Petition seeks review of an interlocutory class certification order. This Court does not typically review interlocutory orders, and for good reason. *See Virginia Military Inst. v. United States,* 508 U.S. 946, 946 (1993) (Scalia, J., concurring in the denial of the petition for writ of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."). Premature review risks wasting the Court's resources because legal issues may change or be mooted by the time of any final judgment. Class certification orders, which may be "altered or amended before final judgment," are especially fluid, further counseling against interlocutory review. Fed. R. Civ. P. 23(c)(1)(C). *See Coopers & Lybrand v. Livesay,* 437 U.S. 463, 469 (1978).

The order in this case is particularly ill-suited for review because even the scope of the class certification remains unsettled. The appeals court remanded:

1) the question of whether and how punitive damages should be certified; and 2) whether to certify the claims of the class members no longer employed when the complaint was filed under Rule 23(b)(3). App. 94a -102a.[1] Even after these remaining questions have been addressed, the scope of any class may be further modified by additional pre-trial proceedings.

Federal Rule of Civil Procedure 23(f) permits discretionary interlocutory appellate review as a safeguard to ensure that class certification orders do not function as a "death knell" to the litigation for either plaintiff or defendant. *Prado-Steiman ex rel. Prado v. Bush,* 221 F.3d 1266, 1274 (11th Cir. 2000). Rule 23(f) appeals are "generally disfavored" because they are "inherently 'disruptive, time-consuming, and expensive.'" *Id.* at 1276 (quoting *Waste Mgmt. Holdings, Inc. v. Mowbray,* 208 F.3d 288, 294 (1st Cir. 2000)). As a result of this discretionary appeal procedure, Wal-Mart has already been afforded the opportunity for review of the class certification by a three-judge panel and an 11-judge *en banc* court. The *en banc* court accepted some of Petitioner's arguments, rejected others, and limited the class in significant ways, fulfilling the purpose of Rule 23(f) interlocutory review. In the six years that this appeal has been pending (and the litigation stayed), Wal-Mart has never suggested that it will be obliged to settle the case as a result of the certification order. With over $400 billion in sales and $14 billion in profits last year, that is an argument that could not credibly be made. Petitioner offers no reason why the questions presented need additional review at this time, rather than waiting for further development of the record in the courts below.

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[1] On remand, these issues will be addressed by a different judge, as a result of the resignation of Judge Jenkins in 2008.

II. There is No Circuit Split on the First Question

The Petition conflates the treatment of different kinds of "monetary relief" under Rule 23(b)(2) in an attempt to cobble together a circuit split. In fact, no circuit split exists on the only monetary claim – equitable back pay – that may be pursued by the class at this time.

A. The Circuits Agree that the Title VII Back Pay Remedy is Consistent with Certification Under Rule 23(b)(2)

The only monetary remedy certified by the Ninth Circuit in this case is the equitable remedy of back pay.[5] There is no split in the circuits about whether

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[5] Back pay is an equitable remedy under Title VII, rather than a form of compensatory damages, and is awarded by the court. 42 U.S.C. § 2000e-5(g); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416-17 (1975). *See Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 423 n.19 (5th Cir. 1998) (back pay is an "equitable remed[y] to which no right to jury trial attaches.") When Congress amended Title VII in 1991 to add compensatory and

(Continued on following page)

back pay in a Title VII class action may properly be certified under Rule 23(b)(2) when it accompanies a claim for injunctive relief. All circuits that have addressed the question agree that back pay may be sought under Rule 23(b)(2). *See Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 650 (6th Cir. 2006); *Cooper v. S. Co.*, 390 F.3d 695, 720 (11th Cir. 2004), *overrruled on other grounds, Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 457 (2006) (per curiam); *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 169-170 (2d Cir. 2001); *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 896 (7th Cir. 1999); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415-16 (5th Cir. 1998); *Kirby v. Colony Furniture Co.*, 613 F.2d 696, 699-700 (8th Cir. 1980); *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 257-58 (5th Cir. 1974); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 802 (4th Cir. 1971). *See also* App. 90a-94a.

This Court has described "[c]ivil rights cases against parties charged with unlawful, class-based discrimination [as] prime examples" of Rule 23(b)(2) class actions. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). These actions invoke the equitable powers of the court to eradicate discriminatory

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punitive damage remedies, it left intact the equitable nature of back pay, explicitly excluding back pay from the definition of compensatory damages. *See* § 1981a(b)(2) ("Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under [42 U.S.C. § 2000e-5(g)].").

conditions in the workplace. Because back pay is an integral component of the Title VII remedial scheme, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-21 (1975), courts have routinely certified back pay claims as part of Rule 23(b)(2) injunctive class actions brought to combat systemic employment discrimination. *Jefferson*, 195 F.3d at 895.

Petitioner argues that this circuit consensus should be ignored where the amount of back pay for the class, collectively, could be a very large sum, although for the individual class member the average potential recovery would be a few thousand dollars a year.[3] Title VII places no cap on the equitable powers of the court to award back pay. Where the class is large, the back pay total may also be large. But, the aggregation of back pay resulting from class treatment does not alter the applicable legal principles. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, ___ U.S. ___, 130 S. Ct. 1431, 1443 (2010) (opinion of Scalia, J.). At this stage of the case, where the district court has found that the injunctive relief sought would be very significant, and the likely recovery for individual class members small, there is no basis for upsetting the trial court's finding that injunctive relief predominates. *See* App. 89a. Moreover, since it is entirely speculative how the district court will exercise its discretion to award back pay in the event of a liability finding, review at this juncture will put this Court in the position of drawing arbitrary lines about how much back pay precludes Rule 23(b)(2) certification.

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[3] The average pay for a full-time hourly position in 2001 was $18,000. App. 177a. Plaintiffs' expert calculated that female employees earned, on average, 5% to 15% less than their male counterparts. App. 200a.

The Petition, implicitly recognizing that no circuit split is presented on the current record, falls back on a far more radical position – that Rule 23(b)(2) prohibits the certification of *any* claim other than one for injunctive or declaratory relief. There is no split in the circuits on this point, as no court has ever adopted this view. "Rule 23(b)(2), by its own terms, does not preclude all claims for monetary relief." *Allison*, 151 F.3d at 415 (citing *Pettway*, 494 F.2d at 257). The contention also conflicts with the Advisory Committee's note, which expressly allows for certification under Rule 23(b)(2) unless "the appropriate final relief relates *exclusively or predominantly* to money damages." Advisory Committee Note (emphasis added).

Finally, the Petition suggests that injunctive relief nonetheless cannot predominate because "at least two-thirds of the class are former employees who lack standing to secure injunctive or declaratory relief." Pet. at 14-15. There is no evidence in the record to support this assertion. Moreover, Wal-Mart's predominance calculus simply ignores the district court's finding that the injunction sought would "achieve very significant long-term relief in the form of fundamental changes to the manner in which Wal-Mart makes its pay and promotion decisions." App.

239a. Most important, the Petition fails to identify a circuit split on this factually disputed claim of error.

B. This Case Does Not Present Petitioner's Circuit Conflict Because Plaintiffs Do Not Seek Compensatory Damages

Every appellate decision cited by Petitioner as evidence of a circuit split involved claims for compensatory damages. *Compare Robinson*, 267 F.3d at 155 *with Reeb*, 435 F.3d at 642; *Lemon v. Int'l Union of Operating Eng'rs, Local No. 139*, 216 F.3d 577, 579 (7th Cir. 2000); *Cooper*, 390 F.3d at 702; *Allison*, 151 F.3d at 407. Because compensatory damages typically require individualized proof from class members, they present the greatest tension with the presumption of "cohesiveness" underlying Rule 23(b)(2). *Lemon*, 216 F.3d at 580. This case does *not* present that issue, as plaintiffs have not sought compensatory damages. App. 5a.

C. Whether Punitive Damages May Be Certified Under Rule 23(b)(2) is Not Yet Presented in this Case

This case does not currently present the issue of whether punitive damages were properly certified under Rule 23(b)(2). In its detailed analysis, the *en banc* court *reversed* the district court's certification of punitive damages under Rule 23(b)(2) and overruled prior Ninth Circuit precedent that relied upon plaintiffs' subjective intent in determining whether (b)(2) certification was warranted. App. 85a-88a. It remanded for reconsideration the issue whether punitive damages may be awarded to a class certified under Rule 23(b)(2), requiring the district court to focus on the practical effect of the monetary relief on the litigation. App. 97a-100a. If the district court finds that punitive damages cannot be certified under Rule 23(b)(2), the appeals court directed that it should consider whether certification of punitive damages under Rule 23(b)(3) is appropriate, a hybrid approach first endorsed by the Seventh Circuit in *Jefferson*, 195 F.3d at 898.

While it "decline[d] to pre-judge" the issue, the *en banc* court identified three factors that would militate *against* certification of punitive damages under Rule 23(b)(2). App. 97a-99a. Thus, this case may *never* present the punitive damages issue framed by the Petition.

Notably, no court has yet applied these standards for Rule 23(b)(2) treatment of damages claims. App. 88a. How their application will vary, if at all, from the approach used by other circuits remains unknown. As such, the question falls far short of a mature circuit split.

Whether and how the district court certifies the punitive damages claims will also implicate the question of notice and opt-out rights. If a class is certified under Rule 23(b)(3), notice and opt-out rights will be mandatory. App. 99a-100a. If instead the district court certifies under Rule 23(b)(2), it may choose to order discretionary notice and opt-out rights under Rule 23(c)(2), as Judge Jenkins did. App. 242a-243a. *See In re Monumental Life Ins. Co.*, 365 F.3d 408, 417 (5th Cir. 2004); *Eubanks v. Billington*, 110 F.3d 87, 94 (D.C. Cir. 1997) (authorizing notice and opt-out rights under Rule 23(c)(2)). While the Petition advances the counter-intuitive proposition that Rule 23 forbids providing these additional due process protections to members of a Rule 23(b)(2) class – the same protections which this Court had held the Constitution requires states to provide in class actions for money damages, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) – there is no need to address that proposition now, as this case may never present that question.

The Petition argues that this case offers the opportunity for the Court to address an issue that it wanted to reach – but could not – in *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994) (certiorari dismissed as improvidently granted), and *Adams v. Robertson*, 520 U.S. 83 (1997) (same). Pet. at 10. *Ticor* and *Adams* involved collateral attacks on mandatory class action settlements of *damage* claims in which absent class members were *not* provided with notice and opportunity to opt out. By contrast, in this case, there are no damage claims currently certified and, with respect to the now-remanded punitive damages, the district court *did* require notice and opt-out rights. If anything, *Ticor* and *Adams* underscore that certiorari should not be granted for questions that are merely hypothetical. *See Ticor*, 511 U.S. at 118;

Adams, 520 U.S. at 92 n.6 ("by 'adher[ing] scrupulously to the customary limitations on our discretion' regardless of the significance of the underlying issue, 'we promote respect . . . for the Court's adjudicatory process.'") (quoting *Illinois v. Gates*, 462 U.S. 213, 224 (1983)).

III. The Writ Should be Denied Because the Second Question Does Not Meet this Court's Requirements for Certiorari

Wal-Mart uses its omnibus Second Question to raise, in scattershot fashion, at least a dozen separate objections to the district court's application of Rule 23 to the substantial evidentiary record. This Court is not the appropriate forum for the correction of claimed errors, particularly in a heavily fact-bound interlocutory order such as this. Supreme Court Rule 10. Petitioner urges this Court to delve into the very extensive and complex factual record in this case and conduct, in effect, a *de novo* review of the district court's factual determinations. *See Coopers*, 437 U.S. at 469; Sup. Ct. R. 10.

Although the number and variety of issues itself reveals the unsuitability of this case for review, Respondents nonetheless address briefly the major issues encompassed within Petitioner's Second Question.

A. Certiorari is Not Warranted to Review Petitioner's Objections to the Certification of a Challenge to Subjective Employment Practices

The Petition raises a laundry list of issues in an effort to challenge the determination below that plaintiffs established the presence of "common questions of law or fact" as required by Rule 23(a)(2). No circuit conflict is presented by these contentions. This Court has affirmed that subjective decision-making practices can be challenged under both disparate treatment and disparate impact analysis. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 989-91 (1988). Such practices, while not themselves unlawful, can "provide a ready mechanism for discrimination." *United States v. City of Northlake, Ill.*, 942 F.2d 1164, 1169 (7th Cir. 1991). Systemic challenges to subjective employment practices have been certified as class actions, where plaintiffs offer a sufficient factual record. *See, e.g.*, *McClain v. Lufkin Indus.*, 519 F.3d 264, 276-77 (5th Cir. 2008) (affirming class-wide liability for disparate impact based upon subjective practices); *Shipes v. Trinity Indus.*, 987 F.2d 311, 316 (5th Cir. 1993); *Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326, 333 (4th Cir. 1983).

Employment Policy – The Petition claims that plaintiffs failed to identify and challenge a specific employment policy as the cause of the statistically significant disparities in outcomes for female employees, characterizing the case as involving "millions of pay and promotion decisions made by tens of thousands of Wal-Mart managers." Pet. at 19. To the contrary, the district court found that Wal-Mart, a highly-centralized employer, operates through *common* pay and promotion policies that managers (many above the store level) implement. Those policies offer managers extensive discretion for some decisions, subject to a common system of oversight. *See supra* at pp. 6-9. *See Bazemore v. Friday*, 478 U.S. 385, 406 n.17 (1986) (Brennan, J., concurring, joined by all justices) (rejecting the claim that salaries paid in different counties across the state by an employer were reached "in any 'autonomous' fashion.").

Nor did the district court rely solely on "excessive subjectivity." Instead, it found that commonality was satisfied "where, as here, such subjectivity is part of a consistent corporate policy and supported by other evidence giving rise to an inference of discrimination." App. 184a. That a company like Wal-Mart operates with a set of related practices – rather than just a single written policy in a personnel manual – is entirely predictable. Significantly, however, the district court expressly found that the plaintiffs had established a sufficient nexus between the challenged practices and the adverse outcomes for women. App. at 186a; App. 77a-78a.

Falcon Footnote – The Petition asserts that a class action challenging subjective employment practices is subject to a heightened standard of proof, based on language in footnote 15 of *General Telephone of Southwest v. Falcon*, 457 U.S. 147, 159 n.15 (1982). Pet. at 20-22. The *en banc* court persuasively explained why that argument fails. App. 41a-47a. The *Falcon* footnote, read in context, sets forth a hypothetical scenario under which *applicants and employees* could be included within the same certified class. *See, e.g.*, *Griffin v. Dugger*, 823 F.2d 1476, 1487 (11th Cir. 1987) ("The situations the Supreme Court identified in footnote fifteen can be thought of as exceptions to the general rule that applicants and incumbent employees cannot share the same class."). The hypothetical was not intended to create a new requirement that plaintiffs *prove* intentional discrimination at the certification stage. App. 43a. Indeed, Petitioner's "heightened standard" for just one kind of employment practice is at odds with the central holding of *Falcon* that there are no special class certification rules for certain kinds of cases. *Falcon* at 161 ("a Title VII class action, *like any other class action*, may only be certified if . . . the prerequisites of Rule 23(a) have been satisfied.") (emphasis added).

More importantly, there is no split in the circuits on this issue. There is consensus among the circuits that district courts are required to conduct a "rigorous analysis" of compliance with Rule 23, even when it overlaps with the merits. App. 10a-40a. Petitioner's assertion that the Ninth Circuit opinion conflicts with those of other circuits because it failed to apply *Falcon*'s "significant proof" standard to claims of "excessive subjectivity" – an assertion that even the dissent in this case does not make – is unpersuasive. *See* Pet. at 20-21. Where the cases cited by Wal-Mart address *Falcon*'s footnote at all, they do so consistently with the *en banc* court's analysis, applying it to "across the board" or generalized claims where a plaintiff with one type of claim seeks to represent a class with different claims. *See, e.g., Griffin*, 823 F.2d at 1487 (employee asserts testing claims of non-employee applicants); *Reeb*, 435 F.3d at 644 (only generalized claim made, no evidence of what plaintiffs or class were seeking); *Goodman v. Lukens Steel Co.*, 777 F.2d 113, 122 (3d Cir. 1985) (across the board allegations); *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 598 (2d Cir. 1986) (plaintiff with transfer claim seeks to represent class with promotion and training claims). Other cases cited by the Petition in support of its contention that a conflict exists make no reference to the *Falcon* "significant proof" standard at all. *See Garcia v. Johanns*, 444 F.3d 625, 631-632 (D.C. Cir. 2006); *Love v. Johanns*, 439 F.3d 723, 729-30 (D.C. Cir. 2006); *Cooper*, 390 F.3d at 716.

Even if a heightened standard were required, it would not change the outcome here, because the record demonstrates that Petitioner's proposed "significant proof" standard was met. The district court expressly found, in more than 24 pages of findings, that plaintiffs had offered "significant evidence" that raised an inference of class-wide discriminatory pay and promotion practices. App. 226a. These findings are plainly sufficient to meet any heightened showing of "significant proof" of discrimination. App. 46a-47a.

Ultimately, whether a challenge to subjective decision-making presents common questions of law or fact for Rule 23(a)(3) is a fact-specific inquiry. That various circuits cited by Wal-Mart have reached different results based on differing factual records, or an insufficient statistical showing, does not constitute a circuit split. *See, e.g.*, *Reeb*, 435 F.3d at 644-45; *Garcia*, 444 F.3d at 634-35; *Love*, 439 F.3d at 729; *Cooper*, 390 F.3d at 716-17. Nor is review warranted because Petitioner and the dissent would appraise the evidence in this case differently than the trial court did. The trial court's class certification order and its factual findings are subject to review based upon an abuse of discretion standard. *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 480 (2d Cir. 2008).

The Petition also faults the decisions below on a series of related points, which individually and collectively fail to meet the prerequisites for a grant of certiorari.

Intent Element of Disparate Treatment – Wal-Mart criticizes the courts' failure to address the "intent" element of plaintiffs' disparate treatment claim, quoting this Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 624 (2007), an individual employment case litigated under the *McDonnell-Douglas* framework. Pet. at 23. Petitioner ignores the "crucial difference between an individual's claim of discrimination and a class action alleging a general pattern or practice of discrimination. . . ." *Cooper v. Federal Reserve Bank of*

Richmond, 467 U.S. 867, 876 (1984).[4] This Court's decision in *Teamsters* established that a "pattern or practice" case uses a different method of proof than the *McDonnell-Douglas* burden-shifting model for individual discrimination cases. Plaintiffs must demonstrate that the discrimination was the employer's "standard operating procedure." *Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 336 (1977). *Cooper*, 467 U.S. at 875-76, n.9 (stating *Teamsters* standards to private class actions).[5] The district court's decision includes an extensive analysis of the liability phase of plaintiffs' systemic disparate treatment claim. App. 245a-247a.

Multi-Facility Certification – Wal-Mart faults the certification of a multi-facility class challenging a policy of subjective decision-making, pointing to cases where other courts – based on different factual records – chose not to certify a class. Pet. at 23-24. The district court found that Wal-Mart's policies, administered through a highly centralized system, applied uniformly across all stores and regions. App. 192a. It found statistical patterns of discrimination were consistent across the 41 regions and that significant portions of the decision-making process occurred *above* the store level. App. 200a; 177a-178a; 181a.

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[4] Petitioner also ignores plaintiffs' adverse impact claim, which requires no proof of intent. *Lewis v. City of Chicago*, ___ U.S. ___, 130 S. Ct. 2191, 2199 (2010).

[5] Casting about for a circuit conflict, the Petition claims that the decision is inconsistent with *Hohider v. UPS, Inc.*, 574 F.3d 169, 184 (3d Cir. 2009). Pet. at 24. *Hohider* did not address the elements of a Title VII pattern-or-practice case. *Hohider,* a case brought under the Americans with Disabilities Act, addressed only the issue of whether individual class member qualifications must be proven to establish liability under the ADA. The decision expressly distinguished the requirements for proof of liability in an ADA pattern-or-practice case from those required for cases under Title VII. *Id.* at 184-85. Similarly off the mark is Petitioner's reliance on *McLaughlin v. Am. Tobacco Co.,* 522 F.3d 215, 223-26 (2d Cir. 2008), which addressed whether a civil RICO action could properly be certified under Rule 23(b)(3), where individual reliance was an element of liability.

Neither Title VII nor Rule 23 limits class certification to single facilities. *See, e.g.*, *Bazemore*, 478 U.S. at 389, 405-06 & n.17 (reversing failure to certify pay and promotion class of black employees of Extension Service with facilities in 100 counties); *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 291-92 (2d Cir. 1999), *overruled on other grounds by In re Initial Public Offering Sec. Litig.*, 471 F.3d 24, 39-42 (2d Cir. 2006) (certifying class of all African Americans employed throughout commuter railroad); *Velez v. Novartis Pharm. Corp.*, 244 F.R.D. 243, 262-63 (S.D.N.Y. 2007) (certifying class challenging subjective practices used to manage national sales force in multiple sales positions); *McReynolds v. Sodexho Marriot Servs., Inc.*, 208 F.R.D. 428, 431 (D.D.C. 2002) (certifying class of African Americans challenging managerial promotion process across company with six divisions nationally and 5000 worksites). Under Petitioner's approach, large companies would never be subject to class actions challenging company-wide pay or promotion practices since personnel policies must, at least to some degree, be implemented by local managers. *See, e.g., McReynolds*, 208 F.R.D. at 432 ("Sodexho is a corporate giant, and as a result, its personnel decisions are largely decentralized").

Finally, the Petition incorrectly refers to the class certified by the district court as an "across-the-board" class. Pet. at 26. As this Court explained in *Falcon*, an "across-the-board" class includes both applicants and employees and challenges a broad range of employment practices in one suit. *Falcon*, 457 U.S. at 151-52 (citing *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969)). In contrast, the instant class includes only incumbent retail employees and challenges only two practices (pay and promotion). *See* App. 166a, n.4.

Plaintiffs' Expert – Wal-Mart questions the admission of expert testimony on stereotyping, similar to the testimony approved by this Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235-36, 255-56 (1989). Pet. at 24-25. The district court conducted an extensive analysis of Wal-Mart's motions to exclude all of plaintiffs' expert evidence. Addendum at 4-15. The Ninth Circuit determined that it did not need to reach the question of whether *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592-93 (1993), applies at class certification because the district court made findings sufficient to satisfy *Daubert's* reliability and relevance benchmarks. App. 57a, n.22. (Addendum at 5-6). Again, the record here presents no question on which there is a circuit conflict.

Use of Regional Statistics – Wal-Mart criticizes the district court for permitting plaintiffs to use regional statistical data to demonstrate the presence of common questions of law or fact, rather than the highly disaggregated statistical methods used by its own expert. Pet. at 26. This contention, fully aired both at the district court and before the court of appeals, similarly presents no circuit split or legal issue worthy of review. Here, the district court made extensive findings that supported the use of regional statistics for class certification purposes. App. 202a-208a. In contrast, Wal-Mart's disaggregated statistical analysis was based on survey evidence that the district court struck as unreliable. App. 203a-204a.

B. Objections to the District Court's Tentative Trial Plan Do Not Warrant Granting Certiorari

The Petition also seeks certiorari on the question of whether the district court's *tentative* trial plan violates Wal-Mart's statutory and constitutional rights. Wal-Mart's novel argument is that it has the right to insist on individual adjudication of each class member's claim, a position no appellate court has ever adopted. Pet. at 27-33.

First, the record demonstrates that the district court carefully considered the appropriate parameters of the trial plan and fully evaluated Wal-Mart's arguments. App. 243a-280a. The *en banc* court declined to reach Petitioner's constitutional and statutory objections to the trial plan because of its tentative nature, but found that there was a "range of possibilities . . . that would allow this class action to proceed in a manner that is both manageable and in accordance with due process. . . ." App. 105a. Furthermore, the questions remanded by the *en banc* court may result in modifications to the trial plan, making premature a review of the tentative plan at this juncture.

Second, Petitioner's contentions rest on the novel proposition that Title VII and the Constitution guarantee Petitioner the substantive right to defend each class member's claim individually. Pet. at 28 ("An employer has a statutory, as well as a constitutional, right to an individualized defense."). The logical consequence of this argument, if accepted, is that no class of any kind larger than a few dozen class members would practicably be manageable. Petitioner cites no case authority to support the proposition, much less provide a basis to conclude a circuit split exists for this Court to resolve. In any event, the district court found that Wal-Mart's extensive electronic data could be used to identify and compensate the actual victims of Wal-Mart's discriminatory practices. App. 261a, 267a-268a, 271a-276a. *See In re Monumental Life*, 365 F.3d at 418 (back pay is a "remedy readily calculable on a class-wide basis").

Statutory Theories – Wal-Mart seeks first to locate "its right to an individualized defense" in language in Title VII that describes remedies available for an "individual." Pet. at 28. This Court has held that the use of the term "individual" in a statute does not preclude class treatment of claims. *Califano v. Yamasaki*, 442 U.S. 682, 698-701 (1979). Moreover, this Court has long approved Title VII pattern-or-practice actions despite the fact that Title VII uses the term "individual" and similar terms to describe theories of liability and remedies. *See* 42 U.S.C. 2000e-2(a) ("any individual"), 2000e-5(f)(1) ("person aggrieved"). *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 426 (1971); *Gen. Tel. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 324 (1980).

Petitioner also argues that Title VII guarantees it the right to present a "mixed motive" defense, even though this defense is not applicable to any claim in the case. Pet. at 28. Title VII provides distinct methods of proving discrimination: plaintiffs may establish intentional discrimination either by proof of disparate treatment or by the "mixed motive" provisions of Title VII, added by the Civil Rights Act of 1991. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 (2003). Plaintiffs may also avail themselves of the disparate impact theory to prove a violation of Title VII. 42 U.S.C. § 2000e-2(k). As this Court observed last Term, Title VII's methods of proof are not "coextensive." *Lewis*, 130 S. Ct. at 2199 (defense to disparate treatment claim inapplicable to disparate impact claim).

The D.C. Circuit has held that a mixed motive defense may not be used to rebut a single motive disparate treatment claim. *Fogg v. Gonzales*, 492 F.3d 447, 454 (D.C. Cir. 2007). No circuit has held otherwise.

See also Amicus Curiae Brief of the Equal Employment Opportunity Commission in Support of Plaintiffs on Rehearing En Banc, at 30 (statutory language of Title VII limits mixed motive defense to claims brought under a mixed motive theory; defense inapplicable to a pattern-or-practice case), App. Docket No. 251.

Petitioner also tethers its argument to language from *Teamsters*, in which this Court articulated the standards for bifurcated litigation of Title VII pattern-or-practice cases. *Teamsters* noted that, after a liability determination, "additional proceedings" will "usually" be conducted. 431 U.S. at 361. No court has read this language to *require* individualized hearings in *every* case. Instead, *Teamsters* vested trial courts with broad discretion to "fashion such relief as the particular circumstances of a case may require to effect restitution." *Id.* at 364 (quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 764 (1976)).

Seven circuits have concluded that individual Stage II remedies hearings may be unnecessary or even inappropriate when the employer's practices and recordkeeping make it difficult to replicate which claimants would have been selected absent discrimination.[8] No circuit has ruled to the contrary. If "the

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[8] *See McClain v. Lufkin Industries*, 519 F.3d 264, 281 (5th Cir. 2008); *Pitre v. W. Elec. Co.*, 843 F.2d 1262, 1274-75 (10th Cir. 1988); *Segar v. Smith*, 738 F.2d 1249, 1289-91 (D.C. Cir. 1984); *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1444-45 (9th Cir. 1984); *Pettway*, 494 F.2d at 261-263; *Pettway v. Am. Cast*

(Continued on following page)

class is large, the promotion or hiring practices are ambiguous, or the illegal practices continued over an extended period of time, a class wide approach to the measure of back pay may be necessary." *McClain*, 519 F.3d at 281 (citing *Pettway*, 494 F.2d at 261). Here, the district court made specific findings based on substantial evidence that supported its conclusion that individual hearings were not warranted. App. 256a-276a.

Constitutional Theories – The Petition rests its constitutional Due Process claim on a similarly insubstantial foundation. Pet. at 30. The Petition cites two cases for the general proposition that the Due Process Clause allows a party to present its "available defenses." *Id.*, *Lindsey v. Normet*, 405 U.S. 56, 64 (1972) (state statute requiring trial within six days in landlord-tenant actions does not violate Due Process Clause); *United States v. Armour & Co.*, 402 U.S. 673, 680-82 (1971) (Meatpackers Consent Decree of 1920 did not prohibit acquisition of company engaged in activities prohibited by decree). But this maxim does not create a constitutional right to present one's defense using *particular* forms and methods of proof. Such case management decisions lie within the discretion of the trial courts, subject to appellate review after final judgment. *See, e.g.*, Fed. R.

Iron Pipe Co., 681 F.2d 1259, 1266 (11th Cir. 1982); *Hameed v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers Local Union No.* 396, 637 F.2d 506, 520-21 (8th Cir. 1980); *Stewart v. GM Corp.*, 542 F.2d 445, 452-53 (7th Cir. 1976).

Civ. P. 16(c)(2) (listing range of pre-trial and trial management decisions for which trial court may "take appropriate action"); Manual for Complex Litigation (Fourth) § 11.64. No court has adopted Petitioner's overarching due process theory and, thus, no circuit conflict or conflict with this Court's decisions exists.

The Petition also asserts that the employer has the right to litigate punitive damages individual-by-individual. Pet. at 30-31. To the contrary, punitive damages are not intended to compensate the victim for her injuries (as are compensatory damages) but to "punish the defendant and deter future wrongdoing." *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). The focus of the punitive damages inquiry is defendant's state of mind and conduct. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 536 (1999) (Title VII). In this case, plaintiffs' claim for punitive damages would rest not on the actions of individual employees but instead on evidence involving top executives, evidence that is common to all class members. *See* App. 98a.

As punitive damages claims may never actually be certified in this case, certiorari is premature at best. *Nike Inc. v. Kasky*, 539 U.S. 654, 663 (2003) (Stevens, J., concurring in the dismissal of certiorari as improvidently granted, "the Court will not anticipate a question of constitutional law in advance of the necessity of deciding it") (citation omitted).

C. The Size of the Class and Similar Concerns Do Not Justify a Grant of Certiorari

Petitioner and its *amici* focus much attention on the size of the class, arguing that this alone justifies a grant of certiorari. Courts have certified larger classes than this one, including one in which Wal-Mart was itself the lead plaintiff. *In re VISA Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 145 (2d Cir. 2001), *overruled on other grounds by In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006). Rejecting the same "too big" argument raised by the defendant against certification of Wal-Mart's proposed class, then-Judge Sotomayor noted:

> The effect of certification on parties' leverage in settlement negotiations is a fact of life for class action litigants. While the sheer size of the class in this case may enhance this effect, this alone cannot defeat an otherwise proper certification . . . While both the district court and this Court have acknowledged that difficulties in managing this large class action may arise, these problems pale in

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The certified class for which Wal-Mart was the lead plaintiff included 8 million merchants, with an estimated $8 billion in damages. *Wal-Mart Stores, Inc. v. VISA U.S.A. Inc.*, 396 F.3d 96, 105 n.10 (2d Cir. 2005) and *In re VISA Check/MasterMoney Antitrust Litig.*, 192 F.R.D. 68, 89 (E.D.N.Y. 2000). *See also In re Diet Drugs*, 582 F.3d 524, 542 (3d Cir. 2009) (6 million class members); *In re Prudential Insurance Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 294-95 (3d Cir. 1998) (8 million class members).

> comparison to the burden on the courts that would result from trying the cases individually.

Id. at 145.

This Court has recognized that "the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion." *Califano*, 442 U.S. at 701. The greater the size of the proposed class, "the more likely a class action is to yield substantial economies in litigation," making class certification particularly appropriate. *See Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 660 (7th Cir. 2004). Here, class litigation may be the only means of obtaining the broad injunctive relief necessary to address the allegedly discriminatory policies challenged. *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 969 (11th Cir. 2008); *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 766 (4th Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999); *United States v. City of New York*, 631 F. Supp. 2d 419, 427 (S.D.N.Y. 2009). Moreover, aggregation of claims will be particularly important because the back pay awards will, in most cases, be far too small to justify individual federal lawsuits, especially against a corporate giant like Wal-Mart. The average Wal-Mart worker simply does not have the capacity to pursue a discrimination lawsuit against her employer.

Petitioner also raises the specter that, if the Petition is not granted, "virtually every employer in the land could be subject to a similar suit," Pet. at 33, all to be filed in the forum of choice, the Ninth Circuit. *Id.* at 17. In fact, in the nearly four years since the Ninth Circuit first affirmed *Dukes* in February 2007, not a single Title VII class action – small or large – has been certified within the Ninth Circuit. In the same four-year time period, nine Title VII class actions have been certified in the federal courts across the entire country – *about two cases a year.*[8] Only four of these cases involved private corporate employers. This threatened landslide of class action litigation has not materialized and cannot support the grant of certiorari.

The very small number of Title VII class action cases certified in the recent past underscores another important point regarding certiorari. It highlights how different Wal-Mart is from the typical employer. Wal-Mart is a uniquely large and unusually uniform and centralized company. Perhaps no other employer presents a factual predicate to support class certification similar to the record upon which the district court based its detailed and rigorous fact finding. This Court should be cautious about extending certiorari review to a defendant and a case that are, in many respects, *sui generis*.

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[8] *Duling v. Gristede's Operating Corp.*, 267 F.R.D. 86 (S.D.N.Y. 2010); *Easterling v. Connecticut*, 265 F.R.D. 45 (D. Conn. 2010); *United States (and Vulcan Society) v. City of New York*, 258 F.R.D. 47 (E.D.N.Y. 2009); *NAACP v. N. Hudson Reg'l Fire*, 255 F.R.D. 374 (D.N.J. 2009); *Walker v. East Allen Cty. Sch.*, 2008 WL 4367579 (N.D. Ind. Sept. 19, 2008); *Velez*, 244 F.R.D. 243; *Taylor v. D.C. Water & Sewer Auth.*, 241 F.R.D. 22 (D.D.C. 2007); *Nelson v. Wal-Mart Stores*, 245 F.R.D. 358 (E.D. Ark. 2007); *Olvera-Morales v. Int'l Labor Mgmt. Corp.*, 246 F.R.D. 250 (M.D.N.C. 2007). *See also Brown v. Nucor Corp.*, 576 F.3d 149, 160 (4th Cir. 2009) (appeals court reversed denial of class certification in race discrimination class action).

◆

CONCLUSION

Accordingly, Respondents respectfully request that the court deny the Petition.

Respectfully submitted,

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October 21, 2010

ADDENDUM

222 F.R.D. 189

United States District Court,
N.D. California.

Betty DUKES, Patricia Surgeson, Cleo Page, Deborah Gunter, Karen Williamson, Christine Kwapnoski, and Edith Arana, on behalf of themselves and all others similarly situated, et al., Plaintiffs,

v.

WAL-MART, INC., Defendant.

No. C01-02252 MJJ.

June 21, 2004.

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' AND DEFENDANT'S MOTIONS TO STRIKE EXPERT AND NON-EXPERT TESTIMONY

JENKINS, District Judge.

INTRODUCTION

In conjunction with the Motion for Class Certification, both parties have filed a number of motions to strike particular portions of the evidence. With respect to the expert testimony, Defendant moves to strike the declarations of William Bielby and Marc Bendick in their entirety, and a small portion of the declaration of Richard Drogin. Plaintiffs move to strike portions of the declaration of Joan Haworth. With respect to the non-expert testimony, Defendant moves to strike portions of the declarations of the named plaintiffs and designated class members while

Plaintiffs move to strike declarations filed by store managers. The Court discusses each motion in turn.

DISCUSSION

I. MOTIONS TO STRIKE EXPERT TESTIMONY

A. *Legal Standard*

As discussed in the Court's Order Granting in Part and Denying in Part Plaintiffs' Motion for Class Certification, filed simultaneously herewith ("Class Certification Order"), arguments on the merits are improper at this stage of the proceedings. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) ("We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action"); *Selzer v. Bd. of Educ. of City of New York*, 112 F.R.D. 176, 178 (S.D.N.Y. 1986) ("[a] motion for class certification is not the occasion for a mini-hearing on the merits"). Accordingly, courts should avoid resolving "the battle of the experts." *See Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 292-93 (2d Cir. 1999) (district court may not weigh conflicting expert evidence or engage in "statistical dueling" of experts). Indeed, courts should not even apply the full *Daubert* "gatekeeper" standard at this stage. *See Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579 (1993).[1] Rather, "[i]t is clear to the Court that a lower *Daubert* standard should be employed at this [class certification] stage of the proceedings." *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives and Composites, Inc.*, 209 F.R.D. 159, 162-63 (C.D. Cal. 2002); *see also O'Connor v. Boeing North American, Inc.*, 184 F.R.D. 311, 321 n.7 (C.D. Cal. 1998) (*Daubert* inquiry inappropriate at class certification stage).

This does not mean, however, that courts must uncritically accept all expert evidence that is offered in support of, or against, class certification. Rather, the question is whether the expert evidence is sufficiently probative to be useful in evaluating whether class certification requirements have been met. *See In re Polypropylene Carpet Antitrust Litigation*, 996 F.Supp. 18, 26 (N.D. Ga. 1997) (at class certification stage court only examined whether the expert's methodology will (a) comport with basic principles, (b) have any probative value, and (c) primarily use evidence that is common to all members of the proposed class); *Bacon v. Honda of America Mfg., Inc.*, 205 F.R.D. 466, 470-71 (S.D. Ohio 2001) ("'For common questions to exist, plaintiffs' statistical evidence must logically support the inference of discrimination against the class asserted.'") (citation omitted); *see also Dean v. The Boeing Co.*, 2003 U.S. Dist. LEXIS 8787 at *33-35 (D. Kansas) (at class certification stage, court should only determine whether expert testimony is so fatally flawed as to be inadmissible as a matter of law). It is with these principles in mind that the Court considers the parties' respective motions.

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[1] In *Daubert*, the Court charged trial judges with the responsibility of acting as gatekeepers at trial to "'ensure that any and all scientific testimony . . . is not only relevant, but reliable.'" 509 U.S. at 589 (citation omitted). In *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147-48 (1999), the Court clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science. As the Ninth Circuit has explained, the district court's role under *Daubert* is to separate inadmissible opinions based on "junk science" from those based on scientific method. *Lust v. Merrell Dow Pharmaceuticals, Inc.*, 89 F.3d 594, 597 (9th Cir. 1996).

B. *Defendant's Motion to Strike Declaration of William Bielby*

As discussed in the Class Certification Order, Dr. Bielby conducted a "social framework analysis" by combining an extensive review of documents and deposition testimony regarding Wal-Mart's culture and practices with his knowledge of the professional research and literature in the field. This is an acceptable social science methodology. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235-36, 255 (1989) (considering similar evidence by an expert social psychologist); Fed. R. Evid. 702 (referring to "scientific, technical, or other specialized knowledge"). Dr. Bielby's testimony on sex stereotyping also has been admitted in prior cases in this district. *See Butler v. Home Depot, Inc.*, 984 F. Supp. 1257, 1265

(N.D. Cal. 1997); *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259, 301-03, 327 (N.D. Cal. 1992).[2]

Defendant raises a plethora of challenges to Dr. Bielby's opinions. Having reviewed them, the Court concludes that they are of the type that go to the weight, rather than the admissibility, of the evidence. The most significant criticism is that Dr. Bielby cannot determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart. At his deposition, for example, Dr. Bielby conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking. *See* Def.'s Mtn. to Strike re Bielby at 9 (citing Bielby Depo. at 87-88, 161-62, 370-71). While this could present a difficulty for Plaintiffs at trial, the question here is whether Dr. Bielby's opinion is so flawed that it lacks sufficient probative value to be considered in assessing commonality.

Plaintiffs concede that Dr. Bielby cannot quantify the degree of gender stereotyping at Wal-Mart, but argue that such quantification is not necessary.[3] *See*

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[2] Defendant does not challenge Dr. Bielby's qualifications as an expert.

[3] Plaintiffs further argue that the impact of even small decisions accumulates over the course of employees' careers. But this argument misses the mark. Defendant's point is that there may be a very small *total* number of decisions affected by sex stereotyping, not that there are numerous decisions that are qualitatively too insignificant to matter.

Pls.' Opp. re Motion to Strike re Bielby at 11. They point to *Price Waterhouse*, in which the trial court relied on a social psychologist's testimony that the defendant was "likely influenced by sex stereotyping," even though the expert "admitted that she could not say with certainty whether any particular comment was the result of stereotyping." *Price Waterhouse*, 490 U.S. at 235-36; *cf. Costa v. Desert Palace, Inc.*, 299 F.3d 838, 861 (9th Cir. 2002), *aff'd*, 539 U.S. 90 (2003) (recognizing relevance of lay testimony regarding gender stereotyping).

The Court is further guided by *Daubert v. Merrell Dow Pharm., Inc.* (*Daubert II*), 43 F.3d 1311, 1316 (9th Cir. 1995), in which the Ninth Circuit stated that scientific knowledge "does not mean absolute certainty," and that expert testimony should be admitted when "the proffered testimony is 'based on scientifically valid principles.'" *Id.*, quoting *Daubert I*, 509 U.S. 579. The Ninth Circuit continued: "Our task, then, is to analyze not what the experts say, but what basis they have for saying it." *Daubert II*, 43 F.3d at 1316. The Court is satisfied that Dr. Bielby's opinion – while subject to critique – is based on valid principles. Thus, it is sufficiently probative to assist the Court in evaluating the class certification requirements at issue in this case. Accordingly, Defendant's motion to strike Dr. Bielby's declaration is denied.

C. *Defendant's Motion to Strike Declaration of Marc Bendick*

Defendant moves to strike the entire declaration of Plaintiffs' expert labor economist, Dr. Marc Bendick on the grounds that (1) Plaintiffs should not be allowed to profit from Dr. Bendick's alleged misuse of Equal Employment Opportunity Commission ("EEOC") confidential material, and (2) Dr. Bendick's testimony should be rejected on the merits.

1. *Dr. Bendick's Use of EEO-1 Data*

As discussed in the Class Certification Order, Dr. Bendick performed a benchmarking analysis to compare Wal-Mart's female promotion rates into salaried in-store management positions with that of similarly situated companies. He derived the data on the comparator companies mostly from the EEOC in the form of "EEO-1" reports. Defendant contends that the EEO-1 data is confidential, that Dr. Bendick obtained it through false pretenses, that his use of the data in this litigation is a crime, and that Plaintiffs failed to fully produce the EEO-1 data in discovery. The Court concludes, after fully considering Defendant's objections, that there is no basis to strike the declaration.

a. *Whether Dr. Bendick Violated EEOC Regulations*

Under authority granted by Title VII, the EEOC collects statistics on the gender and racial composition of the workforce for all employers with 100 or more employees. 42 U.S.C. § 2000e-8(c)(3). Companies are required to submit this data – referred to as EEO-1 reports – on an annual basis. 29 C.F.R. § 1602.7; 41 C.F.R. § 60-1.7. The EEOC assembles this wealth of data and generally aggregates it into groupings of at least three responding entities per data set, without revealing the identities of the entities in order to preserve a level of confidentiality for the reporting companies. *See* 29 C.F.R. § 1610.18(a). EEOC officials are barred from breaching the confidentiality of reporting entities. 42 U.S.C. § 2000e-8(c)(3) & § 2000e-8(e). Notably, the regulations do not explicitly apply to anyone other than the EEOC.

Dr. Bendick received EEO-1 data in anonymous *disaggregated* form (i.e. the data is separately reported for each individual, albeit unidentified, company) from EEOC officials for research in connection with a foundation grant. EEOC staff have submitted declarations stating that they produced the EEO-1 data to Dr. Bendick in disaggregated form on the understanding that it would be used exclusively for research and not for litigation, and consider Dr. Bendick's use of the data in this case to be a breach of good faith. *See* Neckere Decl. ¶¶5, 12; Edwards Decl. Dr. Bendick, in contrast, has testified in deposition that he apprised the EEOC that he would use the data for more than just research. The Court need not resolve this credibility contest, because, as discussed below, defendant has failed to identify any law or regulation that would create a use-limitation duty for Dr. Bendick.

First, the applicable regulation, which provides that the EEOC routinely will make available aggregated EEO-1 data, does not bar the EEOC from ever releasing disaggregated data, just so long as confidentiality is protected. *See* 29 C.F.R. § 1610.18(a). Indeed, in this instance the EEOC officials presumably were following their own understanding of the law when providing Dr. Bendick with the information in the first place, and Mr. Neckere states that disaggregated, anonymous EEO-1 data has been provided to other individuals "a couple of other times in the past several years." *See* Neckere Decl. ¶10. Moreover, even if the regulation strictly forbade disclosure of all disaggregated data, it still does not appear to apply to private individuals, but rather governs only the EEOC's actions.

Second, while Defendant criticizes Dr. Bendick for figuring out the identities of some of the reporting companies in the EEO-1 reports, there does not appear to be any law or regulation prohibiting a private individual from making such assessments. Moreover, Dr. Bendick obtained Wal-Mart's EEO-1 reporting number legitimately through discovery in this litigation. He determined Target's EEO-1 identity because the company volunteered the information to Plaintiffs. For the other companies, Dr. Bendick has only determined that, taken as a group, the largest sets of data belong to well known large retailers (such as Costco and J.C. Penny) but he cannot (and does not) identify which company matches which particular data set. Bendick Decl. ¶¶21-23. Accordingly, Defendant has failed to establish that Dr. Bendick breached any confidentiality obligation. At worst, Dr. Bendick may have misled the EEOC with respect to the purposes for which the data would be used. But this interpretation of the facts is open to question. Regardless, the Court is not persuaded that legal or other grounds justify sanctioning Plaintiffs by striking Dr. Bendick's declaration.

b. *Production of the Full EEO-1 Data*

Defendant also complains that Plaintiffs produced in discovery only the EEO-1 data that Dr. Bendick *used* from the companies he selected, rather than producing the entire database received from the EEOC. *See* Def.'s Motion to Strike re Bendick at 8; Haworth Decl. ¶309. Thus, Defendant contends that it is limited in its ability to challenge Dr. Bendick's conclusions by analyzing the full data set in its own manner. Defendant presents this argument as "a matter of equity." Def.'s Motion at 8. However, it is clear that Defendant never properly requested the entire data file. Its deposition subpoena demanded "all of the data on which he [Dr. Bendick] relied for his opinions in this case." Defendant did not ask for the entire data set that Dr. Bendick received from the EEOC. It is telling that Defendant did not move to compel further production at the time, and it is far too late now to attempt the equivalent in the context of these proceedings.

Furthermore, it appears that the data produced by Dr. Bendick included all EEO-1 reports for all companies of all sizes in every industrial category comparable to Wal-Mart. Upon review of Dr. Haworth's analysis of the benchmarking issue, the Court observes that she had access to a wide range of data that goes well beyond just the twenty comparator companies that Dr. Bendick selected. In fact, she did an extensive analysis of all companies reporting to the EEOC in seven general industrial groupings, which was sufficient data for her to draw her own conclusion in opposition to Dr. Bendick. *See* Haworth Decl. ¶310. Thus, Defendant's argument that all it could do was to "check Bendick's math on his self-defined 20 'comparators'" is not supported by the record. *See* Def.'s Reply re Motion to Strike Bendick at 5. Further, while Defendant argues that it *might* have been able to find something in the full data set to support its position, it fails to show that there are any industry categories missing from the data that are comparable to Wal-Mart.

2. *Defendant's Arguments on the Merits*

Besides its evidentiary objections to the use of the EEO-1 data, defendant raises various challenges to Dr. Bendick's expert opinion on the merits, none of which justify striking the declaration under the standards set forth above. First, Defendant argues that Dr. Bendick's analysis is flawed because he did not base his analysis on Wal-Mart's limited internal applicant flow data. As discussed in the Class

Certification Order, however, this objection is an insufficient basis for striking Dr. Bendick's declaration. *See* Class Certification Order, section I.B.2.b(3). Rather, where, as here, actual applicant flow data is very limited, alternative means of determining whether a promotion shortfall exists for women are appropriate, including the benchmarking method. *Id.*

Second, Defendant argues that Dr. Bendick "'cherry-picked' his comparators from a few, narrow lines of business, such as traditional department and general discount stores, where managers historically are largely female." Def.'s Motion to Strike re Bendick at 14. Again, as explained in the Class Certification Order, the record does not support this contention. Further, Defendant's criticism of Dr. Bendick's benchmarking analysis is of the type that clearly goes to the weight, rather than the admissibility, of the evidence.

Third, Defendant contends that Dr. Bendick's choice of comparators is flawed because Wal-Mart, in contrast to other retailers, does not include its Department Managers (the lowest hourly management position), which are 75 percent female, in its EEO-1 managers category. Inclusion of this category would raise Wal-Mart's representation of women among all in-store managers from 34.5 percent to 63 percent, making their representation in management better rather than worse than the comparators. Defendant's argument, however, is based on speculation, and is not supported by any evidence in the record. Moreover, Dr. Bendick tested Wal-Mart's hypothesis in a number of ways and concluded that it was extremely unlikely that Wal-Mart and the comparators had significantly different managerial reporting protocols.[4] Although Defendant had the opportunity to respond to these tests, it failed even to mention them. Accordingly, the Court finds Dr. Bendick's opinion sufficiently probative to assist the Court in evaluating the class certification requirements at issue in this case, and therefore declines to strike Dr. Bendick's declaration.[5]

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[4] Dr. Bendick calculated the average number of managers per store in both Wal-Mart and the comparators, and he arrived at essentially the same number for both. He also did a more specific test by comparing the number of female managers at Wal-Mart with the number of female managers at the comparator firms with essentially the same number of managers per store. This refined comparison *increased* the disparity between Wal-Mart and the comparators in the proportion of women in management. Bendick Decl. ¶¶36-41.

[5] Defendant also notes that Dr. Bendick's testimony has been rejected by the Sixth and Eleventh Circuits. *See Middleton v. City of Flint*, 92 F.3d 396, 406 (6th Cir. 1996); *United States v. City of Miami*, 115 F.3d 870, 872 (11th Cir. 1997). However, those cases are readily distinguishable. In *Middleton*, Dr. Bendick used the city's general labor pool as the relevant population for comparison, and in *City of Miami* he used general census data. The courts generally are skeptical of using such generalized sources because census and general population data are likely to contain many people who would not be qualified or interested in the particular jobs at issue in a given case. Here, in contrast, Dr. Bendick corrected for that problem by using a far more narrowly focused source for comparison, i.e. female retail employees at large chain stores. This methodology comports with general benchmarking practices and is similar to comparisons that have been generally accepted by the courts. *See, e.g.*,

(Continued on following page)

D. *Defendant's Motion to Strike Portion of Declaration of Richard Drogin*

Defendant moves to strike a minor portion of the declaration of Plaintiffs' statistician, Dr. Richard Drogin, due to an error in one of his computations. This motion was filed after Plaintiffs' class certification reply brief was filed. While it would be appropriate for the Court to deny this motion as untimely, the Court exercises its discretion to address the merits of the motion. As discussed more fully in the Class Certification Order, Drs. Drogin and Haworth conducted separate regression analyses to determine whether Wal-Mart has engaged in gender discrimination with respect to pay. Each expert used different approaches – Dr. Drogin analyzed the data at the regional level, and Dr. Haworth analyzed the data at the store sub-unit level. After Dr. Haworth submitted her store sub-unit regression analyses, Dr. Drogin took all of Dr. Haworth's sub-unit analyses and aggregated the results. Based on this calculation, he reported that even Defendant's methodology shows an average pay shortfall for women of 12 cents per hour. Defendant subsequently pointed out that Dr. Drogin had double-counted certain data, and that the 12 cents differential should be reduced to nine cents,

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International Brotherhood of Teamsters v. U.S., 431 U.S. 324, 337 n.17 (1977). Furthermore, the Court notes that Dr. Bendick's testimony has been accepted by courts in well over a dozen cases. *See, e.g., Butler v. Home Depot,* 1997 WL 605754 at *5 (N.D. Cal. Aug. 29, 1997).

a point which Dr. Drogin concedes. Suppl. Drogin Decl. in Support of Plaintiffs' Reply re Motion for Class Certification ¶5. Accordingly, Defendant's motion is granted. The Court, notes, however, that this ruling does not affect the Court's determination of the class certification issues since this correction does not pertain to the inference of discrimination that arises from Dr. Drogin's own regression analyses.

E. *Plaintiffs' Motions to Strike Portions of Declaration of Joan Haworth*

1. *Motion to Strike re Regression Analyses*

Plaintiffs move to strike twelve separate portions of the declaration of Defendant's statistical expert, Dr. Joan Haworth, as a sanction under Federal Rule of Civil Procedure 37(c)(1) because Dr. Haworth did not timely disclose the full extent of her expert testimony pursuant to Federal Rule of Civil Procedure 26(a)(2).[6]

In order to exclude evidence under Rule 37(c)(1), the Court must find that the Rule 26(a) violation was both unjustified and prejudicial to plaintiffs:

> A party that *without substantial justification* fails to disclose information required by Rule

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[6] Federal Rule of Civil Procedure 26(a)(2) provides that parties must make an initial disclosure of each expert who may appear at trial, and that the disclosure must be accompanied by a written report containing a complete statement of all opinions to be expressed by the expert.

> 26(a) . . . is not, *unless such failure is harmless*, permitted to use as evidence . . . on a motion . . . information not so disclosed.

Fed. R. Civ. Proc. 37(c)(1) (emphasis added); *Salgado v. General Motors Corp.*, 150 F.3d 735, 742 (7th Cir. 1998).

The parties stipulated to an expert discovery schedule. *See* Stipulation and Order Regarding Discovery and Class Certification Deadlines and Other Matters, filed November 26, 2002. Dr. Haworth timely filed her report, then amended it three days before her deposition, and provided a new disk with back-up data supporting her analyses at her deposition. Subsequently, Dr. Haworth submitted a declaration in support of Defendant's opposition to class certification, which contains a number of changes from her original report. As one measure of the difference, her original report is 118 pages long, while her declaration is 178 pages long. The declaration substantively differs from the original report by responding to certain assertions in Dr. Drogin's rebuttal expert report, by summarizing information that was included in tables or in cursory fashion in the report, and by expanding on her earlier tests.

While Defendant's justifications for these changes vary, the Court need not address them in detail because Plaintiffs fail to establish sufficient prejudice. The only issue of prejudice worthy of discussion here is in regard to the "Chow" test. As discussed in the Class Certification Order, Defendant argues that

Dr. Drogin's approach is flawed because he failed to apply the Chow test prior to aggregating his data on the regional level. In her report, Dr. Haworth stated that she conducted a Chow test and "found that it was statistically inappropriate to pool all . . . hourly associates in one regression model" as Dr. Drogin did. Haworth Report at 106 (Suppl. Seligman Decl. re Motion to Strike Haworth, Ex. 3). Plaintiffs argue that the Chow test referenced in the report was conducted on her *own* model, and that she never said that she had conducted a Chow test on Dr. Drogin's model until submitting her declaration; thus, using the Chow test to directly attack Dr. Drogin is untimely. *See* Haworth Decl. ¶183. Neither party, however, has provided sufficient details of how the Chow test is actually performed to enable the Court to satisfactorily assess the import of whose model is subjected to the Chow test. Accordingly, Plaintiffs have not met their burden of demonstrating prejudice.

2. *Motion to Strike References to Store Manager Survey*

Dr. Haworth's declaration relies in part on a survey undertaken by Defendant of a number of its store managers. Plaintiffs contend that the survey is so inherently flawed and biased that it does not meet the standards of Federal Rules of Evidence ("FRE") 702 and 703. Accordingly, Plaintiffs move to strike those portions of her declaration which discuss the survey.

FRE 702 provides that an expert's testimony must be "the product of reliable principles and methods." FRE 703 provides that the facts or data relied upon by an expert need not be independently admissible so long as the evidence is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." The party proffering the expert has the burden of showing that the requirements for admissibility of the expert's testimony have been satisfied. *See Lust by and through Lust v. Merrill Dow Pharmaceuticals, Inc.*, 89 F.3d 594, 598 (9th Cir. 1996); *Bennett v. PRC Public Sector, Inc.*, 931 F. Supp. 484, 489-90 (S.D. Tex. 1996).

The survey at issue consists of declarations obtained from 239 Wal-Mart store managers randomly selected by Defendant. Each store manager was asked a series of identical questions about a number of issues, including the factors they use to set pay rates and make job placement decisions. The answers from each store manager were recorded in declaration form, the store manager signed the declarations, and the results were tallied. *See* Seligman Decl. in Support of Pls.' Motion to Strike Store Manager Declarations, Ex. 4 (sample declaration). Dr. Haworth relies on the survey results to (1) challenge Dr. Drogin's decision to aggregate and analyze data at the regional level, and (2) support her own decision to disaggregate and analyze data on a store sub-unit by sub-unit basis.

It is undisputed that Defendant's counsel and Defendant developed and prepared the survey instrument and administered the survey. *See, e.g.*, Haworth Depo. at 255:13-22 (Seligman Decl. Ex. 6). ("My understanding is the attorneys recorded the information that the store managers were giving them"). Indeed, Defendant refused to respond to Plaintiffs' discovery requests regarding the design and administration of the survey on grounds of attorney-client privilege. In addition, Defendant does not dispute that the surveyed managers knew that the surveys were being utilized in connection with this litigation. Dr. Haworth also is on record as stating that she told a least one lawyer for Defendant that having the attorneys conduct the survey was not a good idea because "typically it's difficult for an attorney to collect the information in a neutral environment so that they truly get a neutral set of information back." Haworth Depo. at 254:14-17.

The survey instrument in this case also is biased on its face. For example, instead of asking Store Managers opened-ended questions, such as "what factors do you rely upon in setting individual pay rates?" the survey provided Store Managers with a set list of over 100 suggestive factors, with the chance to add additional factors tacked on at the very end. *See* Seligman Decl., Ex. 4 at ¶13. The sex of the employee was never identified as a possible factor. Another question was based on the express assumption that the Store Manager encouraged women to apply for the management trainee program. *Id.* at ¶16.

In sum, the record demonstrates that the survey was designed and administered by counsel in the midst of litigation, the interviewees knew the survey was related to the litigation, and the survey instrument exhibits bias on its face. Taken together, these factors plainly demonstrate that the results from the survey are not the "product of reliable principles and methods," and therefore are not the type of evidence that would be "reasonably relied upon by experts." Fed. R. Evid. 702, 703. Even Dr. Haworth conceded, after Plaintiffs obtained an opinion from an expert in survey methods, that the declarations do not qualify as a valid survey because the data was not collected in "an anonymous and neutral setting." Haworth Decl. at 93, n.114; Seligman Decl., Ex. 7; Presser Decl. (expert opinion that "the survey of Wal-Mart managers does not meet generally accepted standards for the conduct and reporting of surveys").

Not surprisingly, courts have refused to allow surveys made under such circumstances, usually rejecting them on grounds of being unreliable hearsay. *See, e.g., Pittsburgh Press Club v. United States*, 579 F.2d 751, 756-57 (3rd Cir. 1978) (survey must be conducted independently of attorneys involved in the litigation and respondents should not be aware of purpose of the survey); *Yapp v. Union Pacific Railroad Co.*, 301 F.Supp.2d 1030, 1037 (E.D. Mo. 2004) (rejecting experts' survey where there was "heavy involvement of defense counsel in [its] design and conduct"); *Gibson v. County of Riverside*, 181 F. Supp. 2d 1057, 1067-68 (C.D. Cal. 2002) (same); *Delgado v. McTighe*, 91 F.R.D. 76, 80-81 (E.D. Pa. 1981) (same).[7]

Defendant responds that basic survey standards should not apply here because the declarations were never intended to be a "scientific survey;" rather, they are just a collection of declarations. Dr. Haworth repeatedly referred to and treated the 239 declarations as a "survey," in both her deposition and expert report. *See, e.g.*, Haworth Expert Report at 42-45 (Seligman Decl. Ex. 1); Haworth Depo. at 176, 238-243, 247-252 (Seligman Decl., Ex. 6). The Court flatly rejects Defendant's disingenuous effort to re-characterize the survey at the eleventh hour as simply a collection of declarations.[8]

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[7] It is also worth noting that the fact that questionnaire responses were collected in a declaration format does not assist Defendant. In both *Pittsburgh* and *Gibson*, cited above, the information also was obtained in declaration form. This did nothing to dissuade the courts from finding that the declarations constituted improperly conducted surveys.

[8] Indeed, given Haworth's consistent references to the Store Manager survey in her deposition and expert report, her sudden abandonment of this terminology in her declaration filed in opposition to plaintiffs' motion for class certification rings hollow. *See, e.g.*, Haworth Decl. ¶20 (referring instead to "declarations signed under oath by Store Managers who were randomly selected (according to scientifically accepted statistical methods)"). Nor can Defendant meet its Federal Rule of Evidence 703 burden simply by pointing to Dr. Haworth's wholly conclusory assertion that the store manager declarations "are an

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Defendant also argues that it is reasonable and customary for experts to rely on the statements of others, including the declarations of others. While this general proposition is true, it is only "reasonable" for an expert to rely on the statements of others if the statements or declarations were collected through methods calculated to elicit reliable information. Notably, the cases cited by Defendant involved instances in which *the expert* interviewed certain agents of the party, and the courts, after undertaking a Federal Rule of Evidence 702/703 analysis, concluded that it was reasonable for the experts to rely on the statements obtained under those circumstances. *See, e.g., Int'l Adhesive Coating Co. v. Bolton Emerson Int'l Inc.*, 851 F.2d 540, 545 (1st Cir. 1988); *United States v. Affleck*, 776 F.2d 1451, 1457 (10th Cir. 1985). None of Defendant's authorities permit an expert to rely on responses to questionnaires designed and administered by the party's counsel during litigation.

Accordingly, the Court grants Plaintiffs' motion and strikes references to the Store Manager survey from Dr. Haworth's declaration. The Court notes, however, that this ruling does not mean that Dr. Haworth's statistical analysis or results are excluded.

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appropriate source to support a regression model." Haworth Decl. ¶186, n.114. An expert's conclusory assertion that his or her testimony is based on a type of data upon which experts reasonably rely is not sufficient to survive a Rule 703 challenge. *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 747-48 (3rd Cir. 1994); *Yapp*, 301 F. Supp. 2d at 1035-36.

It only means that she cannot rely upon the survey of store managers to attack Dr. Drogin's aggregated analysis or as support for her decision to conduct a disaggregated analysis.[9]

II. MOTIONS TO STRIKE NON-EXPERT TESTIMONY

A. *Defendant's Motion to Strike Portions of the Declarations of the Named Plaintiffs and Designated Class Members*

In support of their Motion for Class Certification, Plaintiffs filed 114 declarations from the named plaintiffs and selected class members around the country. Defendant moves to strike portions of each declaration on various evidentiary grounds. All told, defendant has raised hundreds, if not thousands, of objections.

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[9] The Court further notes that granting this motion does not have a material impact on the class certification decision. At most, the survey results, if admitted, would merely support Dr. Haworth's disaggregated analysis as *one* possible way of analyzing the data. The survey would not provide sufficient additional weight to Defendant's challenge to Dr. Drogin's analysis to sway the Court from its conclusion that his testimony supports an inference of discrimination, and thus the existence of substantial questions common to the class. *See* Order re Class Certification, section I.B.2.a.(2)(a) (discussing Dr. Drogin's statistical analysis); *see also* Haworth Decl., Appendix Vol. 2, Tab 16 (tabulation of survey results showing that the majority of the pay rate factors were only considered by a very small percentage of Store Managers).

Defendant fails, however, to *discuss* any of the objections individually. Rather, defendant merely highlights multiple portions of each declaration (each portion ranging from a few isolated words to over a paragraph) using six different colors to correspond to different generic objections (e.g. blue for hearsay, gray for best evidence rule, yellow for relevance) and asserts that "[n]early all objections are obvious on their face." Def.'s Reply to Mtn to Strike Declarations of Named Plaintiffs at 1; Berry Decl., Vols. I - IV.

First, one of the colors used (pink) can apply to any one of five objections (lack of personal knowledge, no foundation, conclusory, speculative or inadmissible opinion). Thus, Defendant has failed even to identify the generic objection at issue in many cases. Second, it is not obvious why many objections have been asserted and it is not the Court's role to divine Defendant's arguments. Third, Defendant appears to have made indiscriminate blanket objections. For example, Defendant appears to object to virtually all out-of-court statements as hearsay without making any effort to assess whether the statement is submitted for the truth of the matter asserted or whether the statement falls within a hearsay exception.[10]

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[10] The Court also notes that Defendant wrongly asserts that any testimony regarding events that occurred prior to the class period (i.e. pre-dating October 1997) is irrelevant. Even though such incidents are not independently actionable, such evidence still may be admitted as relevant background evidence supporting Plaintiffs' claims. *See Nat'l R.R. Passenger Corp. v. Morgan*,

(Continued on following page)

As Plaintiffs correctly object, Defendant's attempt to assert these objections without providing any individualized discussion is procedurally defective. The objections therefore merit summary denial on the ground that they are unduly vague. Indeed, Defendant's grossly overbroad approach is more suggestive of an intent to harass than a good faith effort to address genuine objections. Additionally, the Court's review of a portion of the objections indicates that they are largely without merit.[11] Finally, even were the Court to exclude some limited portion of some class declarations, the Court is satisfied that it would have no bearing on the outcome of Plaintiffs' motion for class certification. Accordingly, Defendant's motion is denied.

B. *Plaintiffs' Motion to Strike Store Manager Declarations*

As discussed above, the Court grants Plaintiffs' motion to strike references to the store manager survey from Dr. Haworth's declaration. Defendant has, as a separate matter, also individually filed each of the 239 store manager declarations as anecdotal, percipient witness evidence. Plaintiffs move to strike

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536 U.S. 101, 113 (2002); *Bouman v. Block*, 940 F.2d 1211, 1218 (9th Cir. 1991).

[11] The Court, for example, has reviewed the objections to the named plaintiffs' declarations and concludes that the objections typically overreach and at best go to the weight of the evidence rather than its admissibility.

these declarations as a sanction under Federal Rule of Civil Procedure 37(c)(1) because Defendant did not timely disclose 215 of the 239 store managers pursuant to Rule 26(a)(1).[12] Plaintiffs also seek to recover their fees and expenses incurred in bringing this motion. Defendant responds that Plaintiffs have failed to meet the standard for demonstrating that the declarations should be excluded under Rule 37(c)(1).

As discussed above, in order to exclude evidence under Rule 37(c)(1), the court must find that the Rule 26(a) violation was both unjustified *and* prejudicial to plaintiffs. *See* Rule 37(c)(1); *Salgado*, 150 F.3d at 742. Defendant does not advance any grounds justifying its failure to disclose the information. Plaintiffs, however, fail to establish sufficient prejudice. In Plaintiffs' opening brief they did not even assert that they suffered actual prejudice from the violation. In Plaintiffs' reply, they argue that they were prejudiced because they were prohibited, under the Court's Case Management Order, from taking the depositions of any store managers (other than those who supervised the named plaintiffs); they do not indicate, however, that they would have actually deposed any of the 215 managers even if given the opportunity. Nor do they explain how the inability to depose the store managers has harmed them. Since the Court does not find both lack of justification and prejudice, Plaintiffs' motion is denied.

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[12] Fed. R. Civ. Proc. 26(a)(1) provides that parties must make an initial disclosure of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses.

CONCLUSION

For the reasons set forth above, and good cause appearing, it is HEREBY ORDERED as follows consistent with the above:

Plaintiffs' Motions

1. Motion to Strike Portions of Declaration of Joan Haworth for Failure to Comply with Fed. R. Civ. P. 26(a)(2) is DENIED.

2. Motion to Strike Portions of Declaration of Joan Haworth (Re Store Manager Survey) is GRANTED. The following portions of Dr. Haworth's Declaration shall be stricken (references are to pages and lines): 12:7-17; 14:11-12; 29:10-14; 36:17-18 & n.42; 83:9-12 & n.98; 83:20 to 84:1 & n.100; 93:3 to 99:4; 141:14-16 & n.246; 142:16-17 & n.249; 174:20 to 175:2.

3. Motion to Strike Store Manager Declarations is DENIED.

Defendant's Motions

1. Motion to Strike Declaration, Opinion, and Testimony of Plaintiffs' Expert William T. Bielby is DENIED.

2. Motion to Strike Declaration of Mark Bendick is DENIED.

3. Motion to Strike Portions of Declaration of Richard Drogin is GRANTED.

4. Motion to Strike Portions of the Declarations of Named Plaintiffs and Designated Class Members is DENIED.[13]

IT IS SO ORDERED.

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[13] For the record, the Court notes that at a July 25, 2003 status conference, this Court also denied Plaintiffs' Motion to Strike Declarations of 10 Undisclosed Witnesses. It also granted Defendants' motion for leave to file a surreply in opposition to the Plaintiff's Motion for Class Certification given that Defendant had already filed the surreply. The Court noted, however, that the filing of the surreply was not justified and deserved little or no weight.

REPLY
BRIEF

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No. 10-277

OCT 29 2010
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IN THE

Supreme Court of the United States

WAL-MART STORES, INC.,

Petitioner,

v.

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, KAREN WILLIAMSON, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, on behalf of themselves and all others similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

Plaintiffs inexplicably state that "there is no circuit split presented by the *en banc* ruling." Opp. 1. But the majority *itself* acknowledged creating a three-way circuit split on the standard for certifying monetary claims under Rule 23(b)(2)—Wal-Mart's first question presented. App. 85a–88a; *id.* at 154a n.25 (Ikuta, J., dissenting). And the decision below conflicts with cases from this Court and numerous circuits on other important and recurring issues in class-action law, detailed in Wal-Mart's second question presented and in *four* dissenting opinions and *nine* amicus briefs (all of which plaintiffs ignore). There are myriad reasons to grant certiorari. *See* Richard A. Nagareda, *Common Answers for Class Certification*, 64 Vand. L. Rev. En Banc (forthcoming 2010) (manuscript at 19) ("By correcting the misstep in *Dukes*, the Supreme Court can lend much-needed clarity and consistency to the law of class certification").

I. THE CLASS CERTIFICATION ORDER WARRANTS IMMEDIATE REVIEW

Plaintiffs argue that certiorari should be denied because the class certification order is "interlocutory." Opp. 12–14. But there are compelling reasons why review is appropriate now.

First, this Court regularly grants review of interlocutory decisions that, like this one, raise important issues with widespread impact on other cases. *See, e.g.*, *Rent-A-Center, West, Inc.* v. *Jackson*, 130 S. Ct. 2772, 2775–76 (2010); *Kawasaki Kisen Kaisha Ltd.* v. *Regal-Beloit Corp.*, 130 S. Ct. 2433, 2440 (2010). Few, if any, of these prior decisions could be said to have raised issues with such far-reaching importance as this case, which has "broad implications for a variety of class actions against a host of industries, from antitrust cases to product liability actions to medical-monitoring claims." U.S. Chamber Br. 15; *see* 18 Leading Companies Br. 14; DRI Br. 1–2.

Second, it would be a tremendous waste of resources to force the parties and the district court to conduct full-blown discovery and an expensive, time-consuming trial under a plainly unlawful and unconstitutional procedure, only to have the judgment and class certification reversed when this case returns to this Court. *See* Eugene Gressman et al., *Supreme Court Practice* 282 (9th ed. 2007). The Ninth Circuit divided 6-5, and the vigorous dissents by Chief Judge Kozinski and Judges Ikuta and Kleinfeld demonstrate the importance of the issues.

Third, this Court has determined that certification orders, though by definition interlocutory, often warrant immediate appellate review because certification issues might otherwise be insulated from review. *See* Fed. R. Civ. P. 23(f); *see also* 18 Leading Companies Br. 5, 17–18; Intel Br. 7–8; DRI Br. 7–8. Rule 23(f) appeals are appropriate not only where the certification order is a "death knell" (Opp. 13), but whenever the order presents an unsettled and fundamental issue of law. *See, e.g.*, *Szabo* v. *Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001). Many of the leading cases fall into this category. *See, e.g.*, *Hohider* v. *United Parcel Serv., Inc.*, 574 F.3d 169 (3d Cir. 2009); *In re IPO Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006).

Fourth, this case is not, as plaintiffs suggest, "*sui generis*." Opp. 39. As shown in the petition and amicus briefs, the issues here recur in class actions of all kinds. Reflecting its sweeping ramifications, no class action since the modern Rule 23 was adopted has attracted as much attention—from interest groups, academics, lawyers, judges, the media, and others—as this one. *See* App. 160a (Ikuta, J., dissenting); 18 Leading Companies Br. 2–6, 15–17; U.S. Chamber Br. 4; DRI Br. 19–20; RLC Br. 1–4. While plaintiffs imply that few similar cases exist (Opp. 38–39), "other class actions . . . have been on hold while the appellate court considered the Wal-Mart certification question." John Roemer, *Impact Fund Gets Executive Director*, Daily J., July 8, 2010 (quoting plaintiffs' lead counsel). Now that the Ninth Circuit has ruled, courts are invoking the ruling to certify (b)(2) class actions seeking monetary relief. *See, e.g.*, *Wang* v. *Chinese Daily News, Inc.*, __ F.3d __, 2010 WL 3733568, at *6 (9th Cir. Sept. 27, 2010).

Finally, plaintiffs contend that review is "premature" because the Ninth Circuit labeled any trial plan "tentative." Opp. 31. But *both* the district court's formula approach and the statistical sampling method used in *Hilao* v. *Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996)—and endorsed by the en banc majority—would violate the Rules Enabling Act (28 U.S.C. § 2072(b)) and due process. *See* App. 105a–110a. In fact, there is *no* way fairly and constitutionally to adjudicate the kaleidoscope of inherently individualized claims. *See id.* at 161a (Kozinski, C.J., dissenting).

In short, the questions presented are important, recurring, squarely presented on a sufficient record, and ripe for immediate review.

II. THE THREE-WAY CONFLICT REGARDING RULE 23(B)(2) WARRANTS REVIEW

The en banc majority explicitly created a "three-way circuit split" regarding Rule 23(b)(2)'s applicability to monetary claims. App. 154a n.25 (Ikuta, J., dissenting); *see Hohider*, 574 F.3d at 198 ("our sister circuits are split on [this] question"). It held that the majority rule—the "incidental damages" test exemplified by *Allison* v. *Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998)—"usurps the district court's authority" and that the minority rule—the "subjective intent test" announced in *Robinson* v. *Metro-North Commuter Railroad*, 267 F.3d 147, 164 (2d Cir. 2001), and adopted in *Molski* v. *Gleich*, 318 F.3d 937, 949–50 (9th Cir. 2003)—is "fatally flawed." App. 86a–87a (quotation omitted). The majority rejected both rules and adopted a third of its own making: the "superior-in-strength" test. *Id.* at 85a–88a. Plaintiffs do not pretend that this new standard can be reconciled with the plain language of Rule 23(b)(2). *See* Opp. 17.

Plaintiffs do not dispute that "[t]his case could not have been certified under the 'incidental damages' standard." Pet. 16–17. Yet, applying its new standard (App. 88a), the majority held that "Plaintiffs' request for back pay does *not* predominate over their request for the injunctive and declaratory relief." *Id.* at 91a n.40 (emphasis added). The choice of test therefore was outcome-determinative.

Plaintiffs try to escape this acknowledged three-way split by claiming that "no circuit split exists" regarding certification of backpay claims under Rule 23(b)(2). Opp. 14. This is false: The circuits are deeply divided on this very question. The court below held that "a request for back pay in a Title VII case is fully consistent with the certification of a Rule 23(b)(2) class action." App. 92a. But numerous other circuits hold that backpay weighs *against* (b)(2) certification because it is monetary relief. *See Hohider*, 574 F.3d at 202 ("it [is] necessary . . . to determine whether plaintiffs' back-pay request actually conforms with the requirements of Rule 23, including Rule 23(b)(2)'s monetary-predominance standard"); *Thorn* v. *Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 331–32 (4th Cir. 2006); *Robinson*, 267 F.3d at 161; *Eubanks* v. *Billington*, 110 F.3d 87, 95 (D.C. Cir. 1997); *Marshall* v. *Kirkland*, 602 F.2d 1282, 1295 (8th Cir. 1979). The original panel in this case agreed. *See* 509 F.3d at 1187 ("Plaintiffs' request for back pay weighs *against* certification under Rule 23(b)(2)"). By contrast, the en banc majority held that backpay claims "conflict[ ] in no way" with Rule 23(b)(2) due to their equitable nature, thereby exacerbating this express conflict. App. 91a (quotation omitted).

Plaintiffs assert that backpay is always available under Rule 23(b)(2) because it is an "equitable" remedy, and the "[c]ivil rights cases" invoking equitable powers are "prime examples" of (b)(2) classes. Opp. 15 (quoting *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 614 (1997)). But the antecedent civil rights cases involved de jure segregation claims for injunctive relief. App. 149a n.22 (Ikuta, J., dissenting). Moreover, as this Court explained, "Rule 23(b)(2) permits class actions for *declaratory or injunctive relief*"—not any available equitable remedies. *Amchem*, 521 U.S. at 614 (emphasis added); *accord Thorn*, 445 F.3d at 331 ("if the Rule's drafters had intended [23(b)(2)] to extend to all forms of equitable relief, the text of the Rule would say so").

Backpay claims—like compensatory damages claims—rarely rest "on grounds that apply generally to the class" (Fed. R. Civ. P. 23(b)(2)) because they require "separate hearings for each individual" to determine "that they were denied employment opportunities and the extent of their loss." *Allison*, 151

F.3d at 409. Here, backpay will *not* follow mechanically from an injunction, but will require extensive additional proceedings. *See Lemon* v. *Int'l Union of Operating Eng'rs*, 216 F.3d 577, 581 (7th Cir. 2000); *Eubanks*, 110 F.3d at 95.

This Court has limited the mandatory provisions of Rule 23 to the historical antecedents identified in 1966. *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 842–47, 862 (1999); DRI Br. 5–7. Plaintiffs do not even mention—let alone grapple with—*Ortiz*, which articulates the framework for applying Rule 23(b)'s mandatory provisions. Nor do they have an answer to *Amchem*, which holds that tort claims should generally be channeled through Rule 23(b)(3), with its greater procedural protections for both defendants and absent class members. *See* 521 U.S. at 614–15. Together, these two cases hold that innovative lawsuits (such as this one) "counsel . . . caution" (*id.* at 625), and *must* proceed through (b)(3) to avoid the very due process problems that plague the certification order in this case.

Under the Ninth Circuit's decision, a single named plaintiff could, using Rule 23(b)(2), hijack and extinguish the rights of millions of absent class members without even telling them about it simply because the monetary relief sought is labeled backpay, not damages. *See* App. 99a–100a. Accordingly, this case squarely presents the question whether due process permits certification of a mandatory, no-notice, no-opt-out class seeking monetary relief. *See Adams* v. *Robertson*, 520 U.S. 83 (1997) (per curiam); *Ticor Title Ins. Co.* v. *Brown*, 511 U.S. 117 (1994) (per curiam).

III. THIS CERTIFICATION ORDER VIOLATES DUE PROCESS AND THE RULES ENABLING ACT BY ELIMINATING WAL-MART'S RIGHT TO ASSERT DEFENSES

Review is also warranted because certification of this sprawling class violates Title VII, the Rules Enabling Act, and due process. Tellingly, plaintiffs do not mention the Rules Enabling Act– nor was it applied *anywhere* in the en banc majority's opinion. This Court's precedents, however, require that *every* certification order be scrutinized through that lens. *Ortiz*, 527 U.S. at 845; *Amchem*, 521 U.S. at 613.

Plaintiffs deride Wal-Mart for making the purportedly "novel argument" that "it has the right to insist on individual adjudication of each class member's claim." Opp. 30. But Title VII authorizes recovery by "*individual[s]*" (42 U.S.C. § 2000e-2(a)(1) (emphasis added)) and explicitly provides that "[n]o . . . court shall" afford relief where the defendant proves that an "individual . . . was refused employment or advancement . . . for any reason other than discrimination." *Id.* § 2000e-5(g)(2)(A). The district court rejected Wal-Mart's statutory right to assert this and other defenses solely to facilitate certification of this class action. According to the district court, Wal-Mart "is not . . . entitled to . . . litigat[e] whether every individual store discriminated against individual class members." App. 247a.

Plaintiffs assert that, under *Califano* v. *Yamasaki*, 442 U.S. 682, 698–701 (1979), "the use of the term 'individual' in a statute does not preclude class treatment." Opp. 32. But Wal-Mart is not arguing that *no* Title VII class could ever be certified against it. Wal-Mart *is* arguing that any class must be sufficiently circumscribed to enable it to exercise the statutory right to prove that its pay and promotion decisions were "for [a] reason other than discrimination on account of . . . sex." 42 U.S.C. § 2000e-5(g)(2)(A). As the district court recognized, that is simply "not feasible here" given the nature of the claims and scope of the class. App. 251a. Where it is "not feasible" for a defendant to raise its statutory defenses in a class action, the appropriate solution is to decertify the class (or certify a manageable class)—not to eliminate defenses.

Plaintiffs do not dispute that uninjured class members would be allowed to recover under both the district court's and the Ninth Circuit's approach. Indeed, the Ninth Circuit expressly acknowledged that "nonvictims might also benefit from the relief" (App. 110a n.57 (quotation omitted)), and the district court recognized that this "rough justice" approach would "generat[e] a windfall for some employees . . . and undercompensat[e]" others. *Id.* at 254a (quotation omitted). Moreover, as plaintiffs admit, the certification order also relieves them of their obligation to prove the statutory element of intent. Opp. 26–27. The Ninth Circuit's elimination of Wal-Mart's right to assert statutory defenses—and plaintiffs' burden to prove intent—squarely conflicts with decisions from other circuits holding that a court may not modify the elements of a claim or a statutorily prescribed defense to facilitate certification. *See Hohider*, 574 F.3d at 184; *McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 223–25 (2d Cir. 2008).

The Ninth Circuit also departed sharply from this Court's decisions recognizing the due process right to "present every available defense." *Am. Sur. Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932). While plaintiffs deem that precedent "insubstantial" (Opp. 34), this bedrock constitutional principle has been frequently reaffirmed. *See, e.g., Philip Morris USA* v. *Williams*, 549 U.S. 346, 353 (2007); *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972).

It is beyond dispute that whether "individual plaintiffs who could not recover had they sued separately *can* recover only because their claims were aggregated with others' through the procedural device of the class action" raises important due process questions. *Philip Morris USA Inc.* v. *Scott*, __ U.S. __, No. 10A273, slip op. at 3 (Sept. 24, 2010) (Scalia, Circuit Justice); *see also ibid.* (granting stay where lower court "eliminated any need for plaintiffs to prove, and denied any opportunity for applicants to contest," the reliance element of plaintiffs' claim). The courts below ruled that an enormous and amorphous collection of claimants can seek billions of dollars, while simultaneously preventing the defendant from asserting defenses guaranteed by statute and the Constitution. Such a fundamentally unfair proceeding has no place in our civil justice system.

IV. THE EXPRESS REJECTION OF *FALCON'S* "SIGNIFICANT PROOF" STANDARD EXACERBATES A MATURE CONFLICT

Plaintiffs attempt to obscure the clear conflict on whether class actions alleging employment discrimination premised on "excess subjectivity" must meet the "significant proof" standard articulated in *General Telephone Co. of the Southwest* v. *Falcon*, 457 U.S. 147, 159 n.15 (1982). *See* Opp. 24–26. The Ninth Circuit declined to follow what it called "a hypothetical in clear dicta" (App. 42a n.15), without even acknowledging the numerous other courts of appeals that faithfully adhere to *Falcon*'s "significant proof" requirement. Pet. 20–21 (citing cases). This well-developed conflict—which has been percolating for over two decades—is by now mature and ready for this Court's review. *See* Note, *Certifying Classes & Subclasses in Title VII Suits*, 99 Harv. L. Rev. 619, 630–31 (1986); RLC Br. 9–10.

Plaintiffs' outright denial that this acknowledged split exists—and their attempt to distinguish the bevy of conflicting cases on their facts—is unpersuasive. *See* Opp. 24–26. Other circuits expressly require "significant proof" of a class-wide discriminatory policy before certifying a class, and these cases squarely conflict with the Ninth Circuit's decision. *See, e.g.*, *Garcia* v. *Johanns*, 444 F.3d 625, 631–32 (D.C. Cir. 2006) ("Following *Falcon*, we have required a plaintiff seeking to certify a disparate treatment class under Title VII to make a significant showing . . . that members of the class suffered from a common policy of discrimination that pervaded all of the employer's challenged employment decisions." (quotation omitted)); *Reeb* v. *Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 644 (6th Cir. 2006). *But see Shipes* v. *Trinity Indus.*, 987 F.2d 311, 316 (5th Cir. 1993).

Like the Ninth Circuit, plaintiffs attempt to dismiss this Court's "significant proof" standard as a "hypothetical." Opp. 24. But as plaintiffs themselves acknowledge, simple allegations of excess subjectivity—the only allegedly discriminatory "policy" in this case—will not suffice because this Court has held that subjectivity is not an unlawful employment policy. *Id.* at 22–23; *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988); *see also Engquist* v. *Or. Dep't of Agric.*, 553 U.S. 591, 604 (2008) ("employment decisions are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify"). Significant proof of an unlawful policy is therefore necessary at class certification to establish commonality under Rule 23(a) in a Title VII excess subjectivity case because the plaintiff must "bridge the 'wide gap'" between her own discrimination and "the existence of a class that has suffered the same injury . . . as a result of a company-wide discriminatory policy." App. 119a (Ikuta, J., dissenting) (quoting *Falcon*, 457 F.3d at 157). Such proof is especially necessary where, as here, the official company-wide policy bars discrimination based on gender. *See* App. 195a; 18 Leading Companies Br. 14–15, 20–21. Thus, while the Ninth Circuit *also* failed to conduct a sufficiently rigorous analysis of the requirements of Rule 23 before certifying the class (Pet. 22–23), it committed a separate legal error when it expressly rejected *Falcon*'s "significant proof" requirement.

The Ninth Circuit acknowledged "the absence of a specific discriminatory policy promulgated by Wal-Mart" (App. 59a), and plaintiffs to this day cannot point to one. Indeed, the only "policy" plaintiffs have identified to date—so-called "excess subjectivity"—is nothing more than discretionary decisionmaking, which is both lawful and the antithesis of a common policy that affects everyone in the same manner and thus cannot possibly satisfy Rule 23(a)'s commonality requirement. *See, e.g.*, *Garcia*, 444 F.3d at 632. "Like the proverbial shell game, . . . plaintiffs' circular presentation cannot conceal the fact that they have failed to offer any significant proof of a company-wide policy of discrimination, no matter which shell is lifted." App. 138a (Ikuta, J., dissenting).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 10-277

In the Supreme Court of the United States

WAL-MART STORES, INC.,
Petitioner,
v.
BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, KAREN WILLIAMSON, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF ALTRIA GROUP, INC., BANK OF AMERICA CORPORATION, CHRYSLER GROUP LLC, CIGNA CORPORATION, DEL MONTE FOODS COMPANY, DOLE FOOD COMPANY, INC., DOLLAR GENERAL CORPORATION, DUPONT COMPANY, GENERAL ELECTRIC COMPANY, HEWLETT-PACKARD COMPANY, KIMBERLY-CLARK CORPORATION, MCKESSON CORPORATION, MICROSOFT CORPORATION, PEPSICO, INC., TYSON FOODS, INC., UNITEDHEALTH GROUP INCORPORATED, UNITED PARCEL SERVICE, INC., AND THE WILLIAMS COMPANIES, INC., AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

In a sharply divided 6-5 decision that conflicts with many decisions of this Court and other circuits, the en banc Ninth Circuit affirmed the certification of the largest employment class action in history. This nationwide class includes every woman employed for any period of time over the past decade, in any of Wal-Mart's approximately 3,400 separately managed stores, 41 regions, and 400 districts, and who held positions in any of approximately 53 departments and 170 different job classifications. The millions of class members collectively seek billions of dollars in monetary relief under Title VII of the Civil Rights Act of 1964, claiming that tens of thousands of Wal-Mart managers inflicted monetary injury on each and every individual class member in the same manner by intentionally discriminating against them because of their sex, in violation of the company's express anti-discrimination policy.

The questions presented are:

I. Whether claims for monetary relief can be certified under Federal Rule of Civil Procedure 23(b)(2)—which by its terms is limited to injunctive or corresponding declaratory relief—and, if so, under what circumstances.

II. Whether the certification order conforms to the requirements of Title VII, the Due Process Clause, the Seventh Amendment, the Rules Enabling Act, and Federal Rule of Civil Procedure 23.

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In re Lorazepam & Clorazepate Antitrust Litig., 289 F.3d 98 (D.C. Cir. 2002)........ 18

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Prado-Steiman v. *Bush*, 221 F.3d 1266 (11th Cir. 2000)........ 18

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Regents of Univ. of Cal. v. *Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372 (5th Cir. 2007) 17

Sperling v. *Hoffmann-La Roche, Inc.*, 924 F. Supp. 1346 (D.N.J. 1996) 17

Stastny v. *S. Bell Tel. & Tel. Co.*, 628 F.2d 267 (4th Cir. 1980) 17

Szabo v. *Bridgeport Machs., Inc.*, 249 F.3d 672 (7th Cir. 2001) 18

Watson v. *Fort Worth Bank & Trust*, 487 U.S. 977 (1988) 15

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Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072-1073 (codified at 42 U.S.C. § 1981a(a)(1), (b)) 20

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OTHER AUTHORITIES

Philippe Aghion & Jean Tirole, *Formal and Real Authority in Organizations*, 105 J. Pol. Econ. 1 (1997) 10

Altria, *Diversity & Inclusion*, http://www.altria.com/en/cms/About_Altria/Our_People/Diversity_Inclusion/default.aspx?src=top_nav 12

Michael Armstrong, *A Handbook of Human Resource Management Practice* (10th ed. 2006) 11, 21

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Bank of America, *Supplier Diversity & Development*, http://www.bankofamerica.com/supplierdiversity/ index.cfm?template=sddi_awards_ov.cfm 13

Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251 (2002) 18

Alfred D. Chandler, Jr., *Strategy and Structure* (1962) 10

Myong-Hun Chang & Joseph E. Harrington, Jr., *Centralization vs. Decentralization in a Multi-Unit Organization*, 36 Mgmt. Sci. 1427 (2000) 9

James C. Collins & Jerry I. Porras, *Built To Last: Successful Habits of Visionary Companies* (1994) 8, 9

Richard L. Daft, *Organization Theory and Design* (10th ed. 2010) .... *passim*

DiversityInc, *2009 Top 50 Companies for Diversity: No. 24 PepsiCo*, http://diversityinc.com/content/1757/article/5475/?No_24_ PepsiCo 12

DiversityInc, *No. 9: Bank of America*, http://www.diversityinc.com/article/7269/ 13

DiversityInc, *The DiversityInc Top 10 Companies for Blacks*, http://www.diversityinc.com/article/7369/The-DiversityInc-Top-10-Companies-for-Blacks/ 12

DuPont, *Diversity and Inclusion*, http://www2.dupont.com/Diversity_and_Inclusion/en_US/about/about.html 13

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Henry J. Friendly, *Federal Jurisdiction: A General View* (1973) 18

Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits*, 71 Colum. L. Rev. 1 (1971) 18

Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 Fordham L. Rev. 37 (2009) 22, 23

L. Peter Jennergren, *Decentralization in Organizations*, in 2 *Handbook of Organizational Design* 39 (Nystrom & Starbuck eds., 1981) 8

Gareth R. Jones, *Organizational Theory, Design, and Change* (6th ed. 2010) 8, 9, 10

Ken Kollman *et al.*, *Decentralization and the Search for Policy Solutions*, 16 J.L. Econ. & Org. 102 (2000) 9

Nadav Levy, *Commitment, Exchange Autonomy, and the Boundary of the Hierarchical Firm*, 24 J.L. Econ. & Org. 184 (2008) 9

Jefferson P. Marquis *et al.*, *Managing Diversity in Corporate America* (2008) 11

John Monahan *et al.*, *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* 94 Va. L. Rev. 1715 (2008) 22, 23

Richard A. Nagareda, *Aggregation and Its Discontents*, 106 Colum. L. Rev. 1872 (2006) 18

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Richard A. Nagareda, *Common Answers for Class Certification*, 64 Vand. L. Rev. En Banc (forthcoming 2010) 23

Frank Ostroff, *The Horizontal Organization* (1999) 7, 8

PepsiCo, *Diversity & Inclusion*, http://www.pepsico.com/Purpose/Talent-Sustainability/Diversity-and-Inclusion.html 13

PepsiCo, *Global Diversity and Inclusion Governance Council*, http://www.pepsico.com/Download/DI-Awards-2010.pdf 13

George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. Legal Stud. 521 (1997) 18

Mitchell F. Rice, *Workforce Diversity in Business and Governmental Organizations*, in *Diversity and Public Administration: Theory, Issues, and Perspectives* 96 (Rice ed., 2d ed. 2010) 11, 12, 21

Oliver E. Williamson, *Markets and Hierarchies* (1975) 10

Ján Zábojník, *Centralized and Decentralized Decision Making in Organizations*, 20 J. Labor Econ. 1 (2002) 9

In the Supreme Court of the United States

No. 10-277

WAL-MART STORES, INC.,
Petitioner,
v.
BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, KAREN WILLIAMSON, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF ALTRIA GROUP, INC., BANK OF AMERICA CORPORATION, CHRYSLER GROUP LLC, CIGNA CORPORATION, DEL MONTE FOODS COMPANY, DOLE FOOD COMPANY, INC., DOLLAR GENERAL CORPORATION, DUPONT COMPANY, GENERAL ELECTRIC COMPANY, HEWLETT-PACKARD COMPANY, KIMBERLY-CLARK CORPORATION, MCKESSON CORPORATION, MICROSOFT CORPORATION, PEPSICO, INC., TYSON FOODS, INC., UNITEDHEALTH GROUP INCORPORATED, UNITED PARCEL SERVICE, INC., AND THE WILLIAMS COMPANIES, INC., AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

Amici are leading U.S. companies (listed and described in Appendix A) that employ millions of workers.[1]

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[1] Pursuant to this Court's Rule 37.2(a), *amici* certify that counsel of record for all parties received timely notice of *amici's* intent to file

Because of the size and scope of their operations, *amici* often must rely on centralized policies that leave implementation to local decisionmakers exercising an element of discretion within the bounds set by the policy. *Amici* also strive to foster a corporate culture that ensures that decisions comply with the law and are consistent with broader goals and values.

In the decision below, the Ninth Circuit allowed this discrimination suit to proceed as a class action based in part on Wal-Mart's centralized policies and corporate culture, even though there was no "significant proof" that those policies or culture were themselves discriminatory or caused the alleged discrimination by local decisionmakers exercising discretion. That ruling effectively punishes companies for adopting common organizational tools essential in the modern workplace by exposing them to increased risk of class-action claims. For that reason alone, *amici* are gravely concerned that the Ninth Circuit's decision threatens their ability to manage their workforces. Meritorious discrimination claims, of course, deserve vindication. And class-action treatment may be appropriate in certain circumstances. But the Ninth Circuit's decision threatens to expand the class-action device far beyond its traditional bounds—indeed, beyond any bounds supported by law or common sense.

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this brief, and that all parties consented to the filing of the brief. Copies of the letters granting consent have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amici* certify that no counsel for any party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici*, its members, and its counsel made such a monetary contribution.

Ironically, the Ninth Circuit's decision discourages even policies and cultures designed to foster the very values Title VII seeks to promote. The Nation's most successful and influential firms—including *amici*—have made significant, public commitments to eradicating discrimination and promoting diversity in their hiring and promotion practices. Effective implementation of those private-sector initiatives often depends on companywide policies and cultures—organizational tools no different from those the Ninth Circuit relied on as a basis for class certification here. *Amici* have a strong interest in ensuring that the profound private-sector commitment to fair employment practices and diversity is not undermined by a ruling that makes the companywide policies and cultures necessary to implement that commitment a basis for class-action liability.

REASONS FOR GRANTING THE PETITION

The decision below threatens to impose the staggering costs of class-action litigation based on the routine structural decisions that large corporations must make every day. As a business grows, it must delegate decisionmaking authority to local managers. At the same time, businesses rely on centralized policies and corporate culture to guide those local decisions. Corporate leaders must make crucial decisions about how to structure central policies, allocate local discretion, and develop corporate culture to achieve a company's goals. Those goals do not merely include quality, efficiency, service, and courtesy. They also include the promotion of important social values such as antidiscrimination, diversity, and inclusion.

The decision below impairs the ability of businesses to manage their operations through an effective combination of centralized policies, local discretion, and corporate culture. It transforms those commonplace organizational tools into a basis for class-action treatment of unrelated discrimination claims. It does so even when the company's decisions to use those tools raise no colorable Title VII concern. And it does so even when the decisions seek to promote Title VII's goals.

As this Court recognized in *General Telephone Co. of the Southwest* v. *Falcon*, 457 U.S. 147 (1982), there may be limited circumstances where a decision to allocate authority a particular way justifies a discrimination class-action. For example, where a company adopts a uniform policy of permitting local decisionmaking *in order to perpetuate discrimination*, class treatment may be appropriate. To ensure that companies are not saddled with massive class-action liability for benign decisions, however, this Court insisted on "[s]ignificant proof" that the policy was adopted as a means of discrimination. See *id.* at 159 n.15. Absent such proof, there is simply no "common" issue justifying class treatment. *Falcon*'s "significant proof" standard strikes a reasonable balance between affording businesses necessary organizational flexibility and preserving the class-action device for cases where plaintiffs can prove it is truly appropriate.

By rejecting *Falcon*'s "significant proof" standard, the Ninth Circuit upset that balance. The court allowed this case to proceed as a class action based in part on "company-wide corporate practices and policies, which include * * * excessive subjectivity in personnel decisions," even though there was *no proof* that those policies were adopted as a means of discrimination. Pet. App. 51a; see also *id.* at 53a ("company-wide policies and practices that, in part through their subjectivity, provide a *potential* conduit for discrimination" (emphasis added)). Indeed, at many points, the Ninth Circuit appeared to condemn companywide policies and culture generally, even those having nothing to do with excessive subjectivity. See, *e.g.*, *id.* at 51a ("strong corporate culture"); *id.* at 53a ("extensive oversight of store operations * * * and a strong, centralized corporate culture").

That approach is not merely inconsistent with *Falcon*. It also defies common sense. Class-action treatment is appropriate only if the relevant issues are sufficiently common among class members. Fed. R. Civ. P. 23(a)(2). The existence of a "strong corporate culture," "company-wide policies and practices," or "subjectivity" in local decisionmaking cannot provide that commonality in a discrimination suit unless there is evidence that the common policies and culture actually *caused* the discrimination. Absent such evidence, it makes no sense to group together otherwise disparate discrimination claims.

The Ninth Circuit's decision threatens the sorts of benign organizational decisions that large corporations must make every day. Because the specter of potentially enormous class-wide liability compels defendants to settle even meritless claims, class certification decisions are often tantamount to a decision on the merits. The Ninth Circuit's decision thus threatens to deter companies from adopting the "company-wide policies" and "strong corporate culture" that, according to the Ninth Circuit, can make the difference between individual discrimination claims and a nationwide class action. The decision below thus substantially interferes with corporations' ability to manage their organizations through companywide policies and cultures.

That distortion not only harms American business. It also undermines the very interests Title VII seeks to promote. In recent decades, the Nation's leading companies have made a profound commitment to eradicating discrimination and promoting diversity. Those private-sector initiatives have been critical in promoting equal opportunity in the workplace. In implementing those initiatives, however, corporations must often rely on the same tools—centralized policies, delegated authority, and corporate culture—that they use elsewhere. By making such organizational tools a potential basis for class-action treatment of otherwise unrelated discrimination claims, the Ninth Circuit's decision impairs companies' ability to implement even initiatives that promote Title VII's important goals. The adoption of a "company-wide policy" of diversity or a "strong corporate culture" of inclusion should not come at the price of converting otherwise disparate discrimination claims into a nationwide class action. But that is what the Ninth Circuit's decision portends.

I. CENTRALIZED POLICIES, DELEGATED IMPLEMENTATION, AND STRONG CORPORATE CULTURE ARE ESSENTIAL TO MANAGING A SUCCESSFUL WORKFORCE

Centralized policies and culture are essential for large firms to survive and thrive. The customer who enters a particular retail store expects the same look, feel, and treatment whether the store is in Alabama or Alaska. And a product should be manufactured the same whether the factory is in Houston or Hickory. In the past, companies could implement those policies by making all decisions at the top of a centralized hierarchy. But that is no longer feasible. Corporations have grown, and increasingly competitive global markets demand flexibility. Businesses must now balance uniformity against flexibility by coupling general *centralized policies* with *decentralized implementation*. Companywide policies are implemented by local managers who—with their feet on the ground—necessarily exercise discretion within the bounds set by the policy. Because policies cannot cover every scenario, moreover, corporations strive to inculcate a corporate culture in their workforce. That culture helps ensure that local decisions are consistent with the organization's broader values and strategic goals.

Those organizational tools—centralized policies, decentralized implementation, and corporate culture—are equally critical to diversity and antidiscrimination initiatives. A company that seeks to ensure an inclusive workforce will typically do so through a companywide diversity policy implemented by local managers exercising discretion in light of the facts before them. And the company will typically complement that policy by fostering a corporate culture that promotes respect and sensitivity. The decision below threatens those critical initiatives by undermining the structures necessary to effectuate them.

A. Centralized Policies Implemented by Local Decisionmakers Are Crucial to Managing a Large Company

1. Much of the Nation's industrial growth in the 19th and early 20th centuries can be traced to the adoption of centralized policies. "[B]y the mid-nineteenth century * * * American businesses were formalizing their chain of command and responsibility through the vertical organizational design or chart." Frank Ostroff, *The Horizontal Organization* 5 (1999). As "manufacturing and industrial production grew more complex and involved the management of more and more workers," the use of centralized policies expanded. *Id.* at 4; see also Richard L. Daft, *Organization Theory and Design* 23 (10th ed. 2010). In many industries, such policies were essential. "[T]he construction of the railroads in the 1840s," for example, "quickly revealed a desperate need for some means of controlling and managing the work of engi-

neers, builders, schedulers, and others." Ostroff, *supra*, at 4.

Companies looked to early organizational theorists such as Frederick Winslow Taylor, whose popular theory of "scientific management" promoted centralized policies and minimal local discretion. Ostroff, *supra*, at 5. "So long as markets were steady, competition was primarily domestic, technology meant simple, special-purpose machines such as the typewriter, and labor was abundant and semi-skilled," such policies "worked—and worked magnificently." *Id.* at 8.

2. Today, that model of absolute control is rarely realistic or desirable. Pure centralization "has been rendered inadequate for today's demanding competitive, technological, and workforce environments." Ostroff, *supra*, at 6. For large companies, some degree of decentralization "comes about out of sheer necessity." L. Peter Jennergren, *Decentralization in Organizations*, in 2 *Handbook of Organizational Design* 39, 42 (Nystrom & Starbuck eds., 1981). "[D]ecisions cannot be passed to the top because senior managers would be overloaded." Daft, *supra*, at 348.

Delegation also provides important benefits. Avoiding a lengthy chain of command for ordinary, on-the-ground decisions allows a company "to respond quickly to customers' needs or the actions of competitors." Gareth R. Jones, *Organizational Theory, Design, and Change* 123 (6th ed. 2010). And a local manager with greater ownership in the end result may be "more motivated to perform well." *Id.* at 104.

One need look no further than Wal-Mart's history to see the value of delegated authority. While adopting central policies, the company's founder also "valued change, experimentation, and constant improvement." James C.

Collins & Jerry I. Porras, *Built To Last: Successful Habits of Visionary Companies* 36 (1994). He "gave department managers the authority and freedom to run each department as if it were their own business," the famous "Store Within a Store" model. *Ibid.* That model—essentially, a corporate implementation of the genius of federalism—fosters innovation. The idea for a store greeter, for example, came from a manager in Crowley, Louisiana. *Id.* at 148. The manager "was having trouble with shoplifting" and experimented by hiring a greeter, who both "sent a message to potential shoplifters that someone would see them" and also "made honest people feel welcome." *Ibid.* That idea then spread, and the greeter is now ubiquitous across the country.

3. Businesses nonetheless still need centralized policies. Top managers must "coordinate organizational activities and keep the organization focused on goals." Jones, *supra*, at 104. Centralized policies maintain consistency of message and experience to the consumer. And they help ensure employees act consistently with the law and with the company's broader goals and values.

A "basic design challenge for all organizations" is thus to determine "how much to centralize or decentralize the authority to make decisions." Jones, *supra*, at 104. "Organizations may have to experiment to find the correct degree of centralization or decentralization to meet their needs." Daft, *supra*, at 93.[2] But most successful companies strike "a balance between centralization and decentralization of authority so that middle and lower managers who are at the scene of the action are allowed to make important decisions, and top managers' primary responsibility becomes managing long-term strategic decision making." Jones, *supra*, at 105.

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[2] A large body of scholarship addresses that issue. See, *e.g.*, Jones, *supra*, at 103-106; Myong-Hun Chang & Joseph E. Harrington, Jr., *Centralization vs. Decentralization in a Multi-Unit Organization*, 46 Mgmt. Sci. 1427 (2000); Nadav Levy, *Commitment, Exchange Autonomy, and the Boundary of the Hierarchical Firm*, 24 J.L. Econ. & Org. 184 (2008); Ján Zábojník, *Centralized and Decentralized Decision Making in Organizations*, 20 J. Labor Econ. 1 (2002); Ken Kollman *et al.*, *Decentralization and the Search for Policy Solu-*

B. A Strong Corporate Culture Likewise Benefits the Firm, Its Employees, and Its Customers

While centralized policies are important, it is impossible to have a policy for every situation. Accordingly, firms seek to instill a corporate *culture* that helps employees respond appropriately to the wide variety of situations they might confront. "Culture is the set of values, norms, guiding beliefs, and understandings that is shared by members of an organization and taught to new members as the correct way to think, feel, and behave." Daft, *supra*, at 374. Corporate culture helps "integrate members so that they know how to relate to one another" and "help[s] the organization adapt to the external environment." *Id.* at 377.

A corporate culture allows employees to "learn from each other how to interpret and respond to various situations in ways that are consistent with the organization's accepted values." Jones, *supra*, at 181. It "shap[es] and guid[es] behavior so that everyone's actions are aligned with strategic priorities." Daft, *supra*, at 387. Corporate culture also allows a firm to "respond rapidly to customer needs"—an employee already aware of firm expectations is better equipped to adapt to changes in the marketplace

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tions, 16 J.L. Econ. & Org. 102 (2000); Philippe Aghion & Jean Tirole, *Formal and Real Authority in Organizations*, 105 J. Pol. Econ. 1 (1997); Oliver E. Williamson, *Markets and Hierarchies* 132-141, 151-154 (1975); Alfred D. Chandler, Jr., *Strategy and Structure* 261-282 (1962).

in a manner consistent with company values. *Id.* at 377. While the optimal culture depends on a company's needs, a "strong culture that encourages adaptation and change" will normally "enhance[ ] organizational performance by energizing and motivating employees, unifying people around shared goals and a higher mission, and shaping and guiding behavior so that everyone's actions are aligned with strategic priorities." *Id.* at 387.

C. Corporations Rely on Policies and Culture To Prevent Discrimination and Promote Diversity and Inclusion

For most large U.S. employers today, a commitment to antidiscrimination and diversity is a critical component of company policies and culture. "By the end of the 1990s, three out of four Fortune 500 companies had launched diversity programs." Jefferson P. Marquis *et al.*, *Managing Diversity in Corporate America* 1 (2008). Those programs seek to "creat[e] a multicultural, diverse organization" that benefits not only society at large, but also the firm, its employees, and its customers. *Ibid.*

To implement those programs, companies often must rely on the same organizational structures they use in other contexts. At the top, they establish overarching "framework[s] of broad strategic and policy guidelines" to channel hiring and promotion decisions. Michael Armstrong, *A Handbook of Human Resource Management Practice* 58 (10th ed. 2006). While "a central governing body outlin[es] the requirements of [diversity] plans," however, "individual agencies and departments hav[e] their own plans tailored to their specific needs." Mitchell F. Rice, *Workforce Diversity in Business and Governmental Organizations*, in *Diversity and Public Administration: Theory, Issues, and Perspectives* 96, 109 (Rice ed., 2d ed. 2010). Even those local diversity plans necessarily leave an element of discretion to the managers that implement them. That combination of central policies and local discretion "reinforces a sense of ownership and ensures that managing diversity both has top-level support and is a reality throughout the organization." *Ibid.*

Amici have been leaders in promoting those goals through centralized policies and culture. The Altria family of companies, for example, has long been committed to promoting diversity and inclusiveness in its workforce. See Altria, *Diversity & Inclusion*, http://www.altria.com/en/cms/About_Altria/Our_People/Diversity_Inclusion/default.aspx?src=top_nav. Altria believes its position on diversity and inclusion "fosters greater employee productivity and creativity while giving Altria's diverse businesses a competitive edge." *Ibid.* The company has repeatedly been recognized for its efforts. For example, it was recently named the fifth best company for Black employees to work for by DiversityInc, the leading publication on diversity and business. See DiversityInc, *The DiversityInc Top 10 Companies for Blacks*, http://www.diversityinc.com/article/7369/The-DiversityInc-Top-10-Companies-for-Blacks/. Noting that "[a]lmost 20 percent of [Altria's] work force is Black and 22 percent of promotions to women in management went to Black women," the publication lauded Altria's "concerted effort to recruit, retain and promote Blacks." *Ibid.*

PepsiCo has likewise been recognized as a "longtime diversity leader" that "continues to push for an inclusive work force through strong employee-resource groups and diversity training." DiversityInc, *2009 Top 50 Companies for Diversity: No. 24 PepsiCo*, http://diversityinc.com/content/1757/article/5475/?No_24_PepsiCo. Its programs "promote a culture where [its] associates feel they have an equal opportunity to contribute and succeed."

PepsiCo, *Diversity & Inclusion*, http://www.pepsico.com/Purpose/Talent-Sustainability/Diversity-and-Inclusion.html. The company's efforts have been recognized dozens of times over the past few years. See PepsiCo, *Global Diversity and Inclusion Governance Council*, http://www.pepsico.com/Download/DI-Awards-2010.pdf.

Bank of America is "considered an industry leader with a world-class supplier diversity program," receiving "numerous national and regional awards and recognition." Bank of America, *Supplier Diversity & Development*, http://www.bankofamerica.com/supplierdiversity/index.cfm?template=sddi_awards_ov.cfm. DiversityInc ranked it among the top ten companies in 2010. DiversityInc, *No. 9: Bank of America*, http://www.diversityinc.com/article/7269/. DuPont likewise has a longstanding policy against discrimination and has been recognized for its commitment to diversity by numerous organizations. See DuPont, *Diversity and Inclusion*, http://www2.dupont.com/Diversity_and_Inclusion/en_US/about/about.html. That commitment is reflected in its principle of "'Respect for People,'" which "'has been a core value for [DuPont] for over 206 years.'" *Ibid.*

The other signatories to this brief have similarly vibrant diversity programs. See App., *infra*, 1a-7a. Time and again, many of those programs have been recognized by leading organizations and publications for their success in fostering a diverse and inclusive workforce where individuals of all backgrounds can flourish. See *ibid.* Such programs often rely on centralized policies, local implementation, and corporate culture to achieve their goals. See *ibid.*

II. THE DECISION BELOW DISTORTS ORGANIZATIONAL DECISIONMAKING AND THREATENS EVEN THOSE POLICIES THAT PROMOTE TITLE VII'S OBJECTIVES

The Ninth Circuit's decision has broad and disturbing ramifications for those common and necessary organizational tools. The Ninth Circuit relied on Wal-Mart's centralized policies, its local implementation of those policies, and its strong corporate culture to conclude that class treatment of otherwise disparate discrimination claims was appropriate—but without insisting on proof that those common features *caused* the alleged discrimination. That decision does not merely defy common sense. It also discourages companies from adopting the balance of centralized policies, local decisionmaking, and corporate culture necessary to remain competitive in the global marketplace. And it threatens to undermine policies and cultures designed to further Title VII's goals.

A. The Ninth Circuit's Decision Distorts Organizational Decisionmaking

1. In *General Telephone Co. of the Southwest* v. *Falcon*, 457 U.S. 147 (1982), this Court recognized that class treatment may be appropriate where a corporation adopts a policy of delegating subjective decisionmaking authority *in order to enable discrimination*. The Court insisted, however, on "[s]ignificant proof" that the policy was adopted to achieve that end. See *id.* at 159 n.15. Absent such proof, there is simply no "common" issue justifying class treatment—even if statistical disparities might suggest the possibility that some local managers exercised delegated authority in an improper manner. Even "an employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory

conduct." *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988).

Falcon's "significant proof" standard marks a reasonable dividing line between discrimination suits that can proceed as class actions and those that must proceed individually. By restricting class certification to cases where common corporate policies or cultures were adopted for the demonstrable purpose of perpetuating discrimination, the standard ensures that discrimination claims proceed as class actions only when they truly have as their basis facts that are subject to common proof. And the standard properly reserves the draconian consequences of class certification for organizational decisions that actually implicate Title VII's important concerns.

2. The Ninth Circuit, however, expressly rejected *Falcon*'s "significant proof" standard. See Pet. App. 41a-47a. It held that this case could proceed as a class action in part because of Wal-Mart's "company-wide corporate practices and policies, which include * * * excessive subjectivity in personnel decisions," even though there was *no proof* that those policies were adopted to enable discrimination. *Id.* at 51a; see also *id.* at 53a ("company-wide policies and practices that, in part through their subjectivity, provide a *potential* conduit for discrimination" (emphasis added)). At various points, the court invoked Wal-Mart's "strong corporate culture" and "corporate policies" generically, without connecting them to the local discretion in hiring and promotion that underlies plaintiffs' claims. See, *e.g.*, *id.* at 45a n.18 ("significant evidence of central control"); *id.* at 47a n.19 ("dominant corporate culture"); *id.* at 51a ("strong corporate culture"); *id.* at 53a ("extensive oversight of store operations * * * and a strong, centralized corporate culture"); *id.* at 71a ("corporate structure and policies"); *id.* at 78a ("cen-

tralized firm-wide culture and policies"). While hardly a model of clarity, the opinion is readily susceptible to the interpretation that *any* centralized policy or corporate culture can help corroborate an allegation of "common" discrimination.

Indeed, the district court below relied on policies and culture with no conceivable relation to discrimination. As evidence of Wal-Mart's centralized policies, for example, the court noted that Wal-Mart's Home Office "controls the temperature and music in each store throughout the country." Pet. App. 190a. And as evidence of strong corporate culture, the court noted that employees "do the Wal-Mart cheer" during shift changes. *Id.* at 188a-189a. Nowhere has anyone explained why such air-conditioning policies and morale-boosting exercises should make the difference between a multibillion-dollar nationwide discrimination class action and individual claims by employees with tangible grievances.

The Ninth Circuit's decision is simply wrong as a matter of law. Rule 23 requires commonality. See Fed. R. Civ. P. 23(a)(2). Without proof that a common policy of distributing discretion was adopted *to effectuate* discrimination, or that discretion was exercised in a discriminatory fashion *because of* central policies and culture, that required commonality is absent. That is true even if statistical disparities might suggest that some local decisionmakers exercised their discretion improperly (and thus that a number of persons affected by local decisions might have valid *individual* claims). "[A] decision by a company to give managers the discretion to make employment decisions, and the subsequent exercise of that discretion by some managers in a discriminatory manner, is not tantamount to a decision by a company to pursue a systematic, companywide policy of intentional discrimination." *Sperling* v. *Hoffmann-La Roche, Inc.*, 924 F. Supp. 1346, 1363 (D.N.J. 1996); see also *Stastny* v. *S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 279 (4th Cir. 1980) (subjectivity in employment decisions "cuts against any inference for class action commonality" even though it may "bolster proof on the merits of individual claims").

The court of appeals' contrary approach has potentially disastrous consequences for basic organizational decisions necessary to manage a successful enterprise. As explained above, see pp. 7-11, *supra*, corporations must routinely adopt centralized policies that leave room for local discretion in implementation. They also must often encourage local managers to implement those policies in a manner consistent with the firm's core goals and values by inculcating a corporate culture. Those sensitive and difficult organizational decisions can mean the difference between a thriving business that employs thousands of workers to serve millions of customers and a corporate train wreck.

The Ninth Circuit's decision upholding class certification based on such common organizational tools distorts those decisions. Courts across the Nation recognize that certification is normally the entire game in class-action litigation. The First Circuit has noted the "irresistible pressure to settle" that follows certification. *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 26 (1st Cir. 2008). The Fifth Circuit has noted that "certification may be the backbreaking decision that places 'insurmountable pressure' on a defendant to settle." *Regents of Univ. of Cal.* v. *Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 379 (5th Cir. 2007). And the Seventh Circuit has described settlement as "almost inevitable." *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1016 (7th Cir. 2002).[3]

Because of that hydraulic pressure to settle, certification imposes substantial costs "[i]rrespective of the merits." *Newton* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 167 (3d Cir. 2001). The potential for "an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low." *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996). "Many corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere." *Blair* v. *Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999); see also *Szabo* v. *Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001).

For that reason, even luminaries such as Judge Friendly have described such settlements as "blackmail." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973); see also Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits*, 71 Colum. L. Rev. 1, 8-9 (1971). It was in part that very concern—that "[a]n order granting certification * * * may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability"—that led to Rule 23's amendment in 1998 to permit interlocutory appeals of certification orders. See Fed. R. Civ. P. 23(f) & advisory committee note.

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[3] See also *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310 (3d Cir. 2009); *Lienhart* v. *Dryvit Sys., Inc.*, 255 F.3d 138, 144-145 (4th Cir. 2001); *Prado-Steiman* v. *Bush*, 221 F.3d 1266, 1274 (11th Cir. 2000); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 102-105 (D.C. Cir. 2002); Richard A. Nagareda, *Aggregation and Its Discontents*, 106 Colum. L. Rev. 1872, 1875 (2006); Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1285-1286 & n.129 (2002); George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. Legal Stud. 521, 522, 554 (1997).

By attaching potentially case-dispositive consequences to a corporation's decisions to adopt centralized policies, delegate implementation authority, and foster a strong corporate culture—even when those decisions have nothing to do with discrimination—the Ninth Circuit's opinion threatens to skew organizational decisionmaking. Having "company-wide policies" or a "strong corporate culture," even ones wholly unconnected to any claim of discrimination, may now mean the difference between a multibillion-dollar, *must-settle* nationwide class action and individual discrimination claims resolved *on their merits* in traditional proceedings. High-level managers seeking to structure their businesses for success in the global marketplace now must make those decisions with an artificial thumb on the scale to avoid the specter of a potentially ruinous class certification order.

The consequences are all the more troubling because it is not even clear what corporations can do to avoid them. The Ninth Circuit faulted Wal-Mart for its "company-wide corporate practices and policies" but, in the same breath, faulted those policies for leaving "excessive subjectivity" in the hands of local decisionmakers. Pet. App. 51a. The court thus condemned Wal-Mart for being both *too centralized* and *too decentralized* at the same time. Even the district court acknowledged "the tension inherent in characterizing a system as having both excessive subjectivity at the local level and centralized control." Pet. App. 192a. Courts should not act as "super-personnel department[s]." *Byrnie* v. *Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 106 (2d Cir. 2001). But here, the Ninth Circuit did not even set forth a coherent standard that personnel departments could follow.

A decision that a discrimination suit should not proceed as a nationwide class action in no way denigrates the underlying claims. Even in the best-managed companies, with robust policies and cultures designed to combat discrimination, there may be isolated instances where rogue managers make improper decisions. And, if the company is big enough, those instances may add up. But the law provides ample means of redress for those individual claims. Indeed, those remedies are even more expansive now than when this Court decided cases like *Falcon*. In 1991, Congress amended Title VII to provide for compensatory and punitive damages, not just backpay or equitable relief. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072-1073 (codified at 42 U.S.C. § 1981a(a)(1), (b)). Even before that amendment, prevailing plaintiffs could recover their attorney's fees. See 42 U.S.C. § 2000e-5(k). Those remedies amply ensure the vindication of meritorious individual claims without recourse to the class-action device. There is accordingly no reason to distort the class-action mechanism by converting ordinary corporate structural decisions with no proven connection to discrimination into a basis for class certification.

B. The Ninth Circuit's Decision Threatens Even Policies and Cultures Designed To Promote Title VII's Objectives

Ironically, the Ninth Circuit's decision poses a grave threat even to initiatives designed to promote Title VII's objectives. As explained above, see pp. 11-13, *supra*, *amici* and other leading American corporations have made a strong, public commitment to eradicating discrimination and promoting diversity. Those efforts reflect not only principle, but also good business sense: An organization that respects cultural differences and strives for an inclusive workforce will better serve both its employees and its customers.

To achieve those ideals, corporations often must rely on the same organizational tools they use in managing any other aspect of their business—they establish centralized antidiscrimination and diversity policies, provide for local implementation of those policies, and foster a corporate culture of inclusiveness and respect. A "central governing body outlin[es] the requirements of the plans, and individual agencies and departments hav[e] their own plans tailored to their specific needs." Rice, *supra*, at 109; see also Armstrong, *supra*, at 58; pp. 11-12, *supra*. That approach "reinforces a sense of ownership and ensures that managing diversity both has top-level support and is a reality throughout the organization." Rice, *supra*, at 109.

The Ninth Circuit's vague reasoning could render even those benign policies and cultures sufficient evidence of "commonality" to justify class treatment of otherwise unrelated discrimination claims. The court repeatedly referred generically to Wal-Mart's "strong corporate culture" and companywide "corporate policies" without clarifying which sorts of policies or cultures may be relevant to a finding of commonality. See pp. 15-16, *supra*. Precisely because the court's opinion is so vague, it leaves corporate executives to speculate over what policies or cultures may support class certification. The distortion that the decision portends for organizational decisionmaking generally thus applies with equal force to corporate diversity initiatives. The Ninth Circuit's decision therefore undermines, rather than advances, Title VII's important goals.

C. The Ninth Circuit's Decision Reflects Broader, Disturbing Trends in Class-Action Litigation

The decision below is emblematic of broader trends. A key component of the evidence the Ninth Circuit invoked to sustain class certification was the "social framework" analysis that, according to respondents' expert, suggested that Wal-Mart's policies were "vulnerable" to gender bias. Pet. App. 54a-55a. In a social-framework analysis, "the expert does not reach the conclusion that a specific decision was made with discriminatory intent; that judgment is for the fact finder." Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 Fordham L. Rev. 37, 45 (2009). Rather, the expert "offer[s] his or her knowledge of the social science research and identif[ies] the characteristics of policies challenged in the particular workplace that research has linked with higher likelihood of bias and stereotype." *Ibid.* Here, for example, respondents' expert criticized Wal-Mart's policies as vulnerable to gender bias even though he "conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking." *Dukes* v. *Wal-Mart, Inc.*, 222 F.R.D. 189, 192 (N.D. Cal. 2004).

The use of social-framework analysis in discrimination suits has greatly expanded in recent years. See John Monahan *et al.*, *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* 94 Va. L. Rev. 1715, 1716-1717, 1743 n.79 (2008). Its attractiveness to class-action plaintiffs' lawyers is easy to perceive. By demonstrating only the *possibility* of discrimination, plaintiffs leave *proof* of discrimination to a merits trial that will never occur. As proponents of social-framework analysis themselves acknowledge, "after a class is certified, the pressure on the employer to settle the dispute * * * is substantial." Hart & Secunda, *supra*, at 50. Thus, "as a practical matter, class certification operates as a kind of victory on the merits." *Ibid.*

Whatever the merits of social-framework analysis as a social-science tool, it cannot substitute for "significant proof" that various claimed instances of discrimination actually resulted from a common policy of discrimination. Plaintiffs should not obtain certification based on little more than an expert's "review[ ] [of] the litigation record in light of his understanding of what social science research shows about stereotyping" generally. Monahan *et al.*, *supra*, at 1747; see also Richard A. Nagareda, *Common Answers for Class Certification*, 64 Vand. L. Rev. En Banc (forthcoming 2010). As the dissent put it below: "'Vulnerability' to sex discrimination is not sex discrimination." *Dukes* v. *Wal-Mart, Inc.*, 509 F.3d 1168, 1194 (9th Cir. 2007) (Kleinfeld, J., dissenting). Allowing a discrimination class-action to proceed based on nothing more than the mere "possibility" that statistical disparities reflect a common policy of discrimination is no different from allowing a securities-fraud class action to proceed based on the mere "possibility" that a fraud caused the plaintiffs' loss. The Court granted review in *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336 (2005), to put an end to that latter theory. It should grant review here to put an end to the former.

The Nation's leading corporations have made a profound commitment to eradicating discrimination and promoting diversity in the workplace. This Court should not permit either speculative social-science methods or the flawed legal reasoning of the decision below to undermine the basic organizational tools firms so often need to implement those programs successfully.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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September 2010

APPENDIX

APPENDIX A

LIST OF *AMICI CURIAE*

Altria Group, Inc., is the parent company of Philip Morris USA, U.S. Smokeless Tobacco Company, John Middleton, Ste. Michelle Wine Estates, and Philip Morris Capital Corporation. The Altria Group of companies has about 10,000 employees throughout the United States. Its award-winning diversity programs seek to provide an inclusive work environment where different perspectives are encouraged and valued. See Altria, *Diversity & Inclusion*, http://www.altria.com/en/cms/About_Atria/Our_People/Diversity_Inclusion/default.aspx?src=top_nav.

Bank of America Corporation is one of the world's largest financial institutions, serving individual consumers, small- and middle-market businesses, and large corporations with a full range of banking, investing, asset management, and other financial products and services. With approximately 284,000 employees, the company has been broadly acclaimed for its diversity initiatives. It promotes a philosophy of inclusion that draws on the strength of every associate to build an atmosphere of personal and professional growth. See Bank of America, *Diversity and Inclusion*, http://careers.bankofamerica.com/learnmore/diversity.asp.

Chrysler Group LLC was formed in 2009 in collaboration with Fiat S.p.A. Chrysler Group produces Chrysler, Jeep, Dodge, and Ram vehicles. It has approximately 50,000 employees and embraces the importance of diversity in all areas of its business. Chrysler Group seeks to achieve excellence in diversity through work/life effectiveness programs, leadership development, and a policy of zero tolerance for discrimination or harassment. See Chrysler, *Global Diversity*, http://www.chryslergroupllc.com/company/global_diversity.

CIGNA Corporation provides healthcare and related benefits, the majority of which are offered through the workplace. Its products and services include healthcare, disability, life, and accident insurance. The company has approximately 30,000 employees, and its diversity policies seek to educate employees about the important role diversity plays in creating a winning environment across the enterprise. CIGNA has received awards and recognition for its diversity programs from such organizations as the National Committee for Quality Assurance and the Human Rights Campaign Foundation. See CIGNA, *Diversity: It's Who We Are*, http://careers.cigna.com/CIGNAPage.aspx?page=23.

Del Monte Foods Company is one of the country's largest and best-known producers, distributors, and marketers of premium quality, branded pet products and food products. Del Monte has a powerful portfolio of brands, and its products are found in eight out of ten U.S. households. The company employs about 15,000 individuals. It is committed to promoting and preserving a workplace environment rich in diversity—one in which individual differences are not simply tolerated or accepted, but truly appreciated. The company's commitment to diversity is respected in the industry for delivering results. See Del Monte Foods, *Workplace Diversity*, http://www.delmonte.com/careers/default.aspx?page=ca_workplacediversity.

Dole Food Company, Inc., is the world's largest producer and marketer of fresh fruit and vegetables. It does business in more than 90 countries and employs approximately 39,100 full-time employees and 36,500 part-time employees worldwide. The company practices nondiscriminatory policies and is an equal opportunity employer. See Dole, *Employees*, http://dolecsr.com/Principles/Employees/tabid/407/Default.aspx.

Dollar General Corporation is the Nation's largest small-box discount retailer. The company employs approximately 80,000 employees in 35 states. In keeping with its mission of "Serving Others," Dollar General has implemented policies designed not only to ensure compliance with antidiscrimination laws but also to foster a diverse and inclusive work environment. See Dollar General, *Diversity at Dollar General*, http://www.dollargeneral.com/Careers/Pages/Diversity.aspx.

DuPont Company is a science-based products and services company. Founded in 1802, DuPont puts science to work by creating sustainable solutions essential to a better, safer, healthier life for people everywhere. Operating in more than 90 countries, DuPont has more than 58,000 employees. DuPont's commitment to diversity is embodied in its vision to be a "great global company through people." That vision of inclusiveness seeks to overcome any and all cultural and structural barriers that dampen motivation, stifle creativity, and deter full participation at all levels of the company. DuPont has been recognized for its commitment to the advancement of women and minorities by several organizations. Its continuing goal is to ensure that all employees have the opportunity to grow personally and professionally during their careers with DuPont. See DuPont, *Diversity and Inclusion*, http://www2.dupont.com/Diversity_and_Inclusion/en_US/index.html.

General Electric Company is a global infrastructure, finance, and media company. It employs 300,000 people in more than 100 countries. The company implemented its first companywide equal employment opportunity policy in the 1930s and has a long history of fair employment practices, ensuring a level playing field for all. GE has been named in numerous "top employer" lists for its employment programs and practices. See GE, *Our People*, http://www.ge.com/company/culture/people.html.

Hewlett-Packard Company is the world's largest technology company. It creates technology solutions for consumers and business with a portfolio that spans printing, personal computing, software, services, and information technology infrastructure. It has approximately 304,000 employees worldwide. The company's diversity policy recognizes that creating a diverse, inclusive work environment is a process of continuous renewal. See HP, *The Diversity Value Chain*, http://www8.hp.com/us/en/hp-information/about-hp/diversity/value.html.

Kimberly-Clark Corporation provides family care, personal care, and other products to 1.3 billion consumers each day in more than 150 countries. Its well-known brands include Kleenex, Scott, and Huggies. The company has nearly 56,000 employees worldwide. Kimberly-Clark focuses on developing employee programs that retain and recruit engaged and skilled talent reflective of its customers, consumers, and communities. It believes that promoting a culture that values and capitalizes on individual and collective talents, opinions, perspectives, and ideas makes it a more innovative company. See Kimberly-Clark, *Diversity at Kimberly-Clark*, http://www.kimberly-clark.com/aboutus/diversity.aspx.

McKesson Corporation is dedicated to delivering the vital medicines, supplies, and information technologies that enable the healthcare industry to provide patients better, safer care. The company has over 32,000 employees across the Nation and around the world. McKesson is committed to fostering a workplace environment that respects the many ways we are different from one another, and supports and acknowledges the diverse world in which we live and work. See McKesson, *Diversity and Inclusion*, http://www.mckesson.com/en_us/McKesson.com/About%2BUs/Corporate%2BCitizenship/Diversity%2Band%2BInclusion.html.

Microsoft Corporation is a worldwide leader in software, services, and solutions that help people and businesses realize their full potential. Founded in 1975, it has approximately 88,000 employees worldwide. Microsoft strongly believes that a diverse workforce brings greater perspective, knowledge, and experience, and makes the company an employer of choice for talent from around the world. Being able to attract, develop, and retain this talent enables Microsoft to be more innovative in the products it develops, the way it solves problems, and the way it serves the needs of an increasingly global and diverse customer base. See Microsoft, *Global Diversity and Inclusion*, http://www.microsoft.com/diversity.

PepsiCo, Inc., is a world leader in convenient snacks, foods, and beverages. It is home to hundreds of brands, including Pepsi-Cola, Frito-Lay, Gatorade, Tropicana, and Quaker. PepsiCo has over 285,000 employees. It approaches diversity and inclusion as fundamental business priorities and has received dozens of awards for its efforts. See PepsiCo, *Diversity & Inclusion*, http://www.pepsico.com/Purpose/Talent-Sustainability/Diversity-and-Inclusion.html.

Tyson Foods, Inc., founded in 1935, is one of the world's largest processors and marketers of chicken, beef, and pork. The company has approximately 117,000 team members employed at more than 400 facilities and offices around the world. Inclusion and valuing diversity are cornerstones that have supported the growth of its business throughout its history, especially in the past few decades. See Tyson, *2009 Sustainability Report* 18, 28-29, http://www.tyson.com/Corporate/PressRoom/docs/2009SustainabilityReport_English.pdf.

UnitedHealth Group Incorporated is a diversified health and well-being company dedicated to helping people live healthier lives and making healthcare work better. With approximately 80,000 employees, UnitedHealth Group serves more than 75 million people worldwide through a broad spectrum of health benefit programs and health services. UnitedHealth Group embraces and encourages a culture of diversity and inclusion and knows that valuing diversity makes good business sense and helps to ensure the company's future success. The company is a member of the Select 50 Diversity Employers of Choice and has received numerous other awards and distinctions. See UnitedHealth Group, *Diversity & Inclusion*, http://diversity.unitedhealthgroup.com/.

United Parcel Service, Inc., is the world's largest package delivery company and a global leader in logistics, offering a broad range of solutions including the transportation of packages and freight, the facilitation of international trade, and the deployment of advanced technology to more efficiently manage the world of business. It has approximately 408,000 employees and serves more than 220 countries and territories worldwide. UPS has a longstanding commitment to diversity and believes that people do their best when their talents are encouraged to flourish in an environment that embraces diversity. The company has received awards and recognition for its diversity efforts from many organizations, including Hispanic Business magazine and the Women's Business Enterprise National Council. See UPS, *Diversity in Business*, http://www.responsibility.ups.com/Diversity.

The Williams Companies, Inc., is an integrated natural gas company. It produces, gathers, processes, and transports clean-burning natural gas to heat homes and power electric generation across the country, and employs approximately 5,000 people. The company's diversity mission is to foster an environment that attracts a high-performing, diverse workforce where individuals are respected and valued for their contributions and have the opportunity to achieve their maximum potential. See Williams, *2008 Corporate Responsibility Report* 26-28, http://www.williams.com/corporate_responsibility/docs/CSR_2008.pdf.

AMICUS
CURIAE
BRIEF

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No. 10-277

IN THE

Supreme Court of the United States

WAL-MART STORES, INC.,

Petitioner,

v.

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, KAREN WILLIAMSON, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, on behalf of themselves and all others similarly situated,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE CALIFORNIA EMPLOYMENT LAW COUNCIL IN SUPPORT OF PETITIONER

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EMPLOYMENT DISCRIMINATION LAW
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The California Employment Law Council (CELC) respectfully submits this brief *amicus curiae*, in support of the petition for a writ of certiorari.[1]

INTEREST OF THE *AMICUS CURIAE*

CELC is an organization of approximately 50 major employers, many of them nationwide, that operate in California. CELC regularly files amicus briefs in major employment cases. CELC's objective is fair and moderate employment laws, fair to employer and employee alike.

All of CELC's members are subject to Title VII of the Civil Rights Act of 1964 (Title VII) and other employment-related statutes and regulations. All of CELC's nationwide members operate in California. Therefore, any law firm desirous of bringing a nationwide class action against any of the CELC members has the option of doing so in the Ninth Circuit, even if the bulk of the company's operations is elsewhere. As the strong dissent of Judge Ikuta to the 6-5 *en banc* decision makes clear, nationwide class certification against such employers is virtually automatic in the Ninth Circuit after the *en banc* decision since there are only three prerequisites, all easily available in most circumstances: (1) the opinion of an expert such as Professor Bielby that white male decisionmakers, because of ingrained stereotypical views, cannot help discriminating if allowed to exercise subjective judgments; (2) a handful of uncorroborated, untestable perceptions of discrimination by class members (in the instant case one for every 12,500 class members); and (3) aggregated nationwide statistics which, based on an untestable choice of variables by the plaintiffs' expert, shows statistical significance against the class in question. (Statistical significance is based on two factors: degree of disparity and sample size. With the large sample size of any nationwide certification, the smallest of disparities shown by choice of variables will yield statistical significance.) *See* Dissent, *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 652 (9th Cir. 2010) ("Put simply, the door is now open to Title VII lawsuits targeting national and international companies, regardless of size and diversity, based on nothing more than general and conclusory allegations, a handful of anecdotes, and statistical disparities that bear little relation to the alleged discriminatory decisions.") Such a rule virtually guaranteeing nationwide class certifications against any nationwide employer that operates in the Ninth Circuit puts even the most non-discriminatory of America's nationwide employers at unfair risk.

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[1] Counsel for *amicus curiae* authored this brief in its entirety. He has been CELC's General Counsel for over 25 years. He was one of the lawyers representing Wal-Mart in the district court and was listed as one of the counsel of record on the panel but not the *en banc* appeal. No person or entity, other than the *amicus curiae* and its members, made a monetary contribution to the preparation or submission of this brief. Wal-Mart is not a member of CELC. The parties have filed blanket waivers.

STATEMENT OF THE CASE

This brief focuses only on the principal allegation in the case, allegedly discriminatory pay decisions made in a subjective fashion at the store level by the store managers of Wal-Mart's 3,400 stores. Plaintiffs relied on three categories of evidence in seeking a nationwide class certification: (1) the opinion of a sociologist; (2) a handful of anecdotes; and (3) statistics aggregated across region and nation. Only Wal-Mart's statistician did a store-by-store analysis.[2] The following is undisputed: 90% of Wal-Mart stores showed no statistically significant disparity with respect to male/female pay, 2.5% of the stores showed a statistical disparity *which favored women*, and 7.5% of the stores showed a statistical disparity which favored men. The dissent discussed the undisputed nature of the store-by-store analysis, with a citation to the district court opinion, at *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 630 (9th Cir. 2010). The district court certified a nationwide class for back pay, punitive damages, and injunctive relief.

On Wal-Mart's appeal, a three-judge panel, 2-1, with Judge Pregerson writing the majority opinion, affirmed in all respects, including affirming the trial court's trial plan. Under that trial plan, at Phase I, the jury would determine whether there was a pattern or practice of discrimination. If so, there would be no Phase II – based on expert opinion the total disparity in pay would be converted to a lump sum, which, along with any punitive damages awarded, would be distributed to discriminatee and non-discriminatee alike by formula. Following a petition for *en banc* hearing, which pointed out that the trial plan totally contradicted this Court's *Teamsters* line of cases (*Teamsters v. United States*, 431 U.S. 324 (1977), and the statute, particularly § 706(g) (court cannot award back pay to non-discriminatees), the panel totally withdrew their earlier opinion, totally rewrote it, and expressed no opinion on the district court's trial plan, stating that the panel was confident that the trial court could construct a trial plan which was defensible. Rehearing *en banc* was then granted, and by a 6-5 vote, the *en banc* court majority (Judges Reinhardt, Hawkins, Graber, Fisher, Paez, and Berzon) affirmed the nationwide certification, with two exceptions: It directed the trial court to reconsider for possible 23(b)(3) certification punitive damages and relief for persons who were ex-employees at the time the complaint was originally filed. Judge Ikuta and Chief Judge Kozinski filed strong dissents, joined by Judges Rymer, Silverman, and Bea. Wal-Mart filed the instant Petition for a Writ of Certiorari on August 25, 2010.

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[2] In fact, she did two store-by-store analyses: (1) analyzing grocery departments separately (only a minority of Wal-Mart stores have grocery departments), she compared all non-grocery operations; and (2) she compared separately Wal-Mart's basic merchandising operation, and specialty operations such as opticians, hearing aids, and grocery. Plaintiffs' expert admitted starting to do a store-by-store analysis, and then abandoning the effort.

SUMMARY OF REASONS FOR GRANTING THE PETITION

Conflicts between the Ninth Circuit's 6-5 majority and this Court's decisions, the decisions of other circuits, and the clear wording of the statute include, but are not limited to, the following:

(1) 42 U.S.C. § 705(g)(2)(A): This section (§ 706(g)(2)(A)), crucial to the passage of Title VII, prohibits a court from awarding back pay to any non-victim, a prohibition necessarily violated by any trial plan

discussed by the district court or court of appeals. Although heavily relied upon by the dissent, the majority simply ignores this clear statutory prohibition.

(2) 42 U.S.C. § 705(g)(2)(B): This mixed-motive provision, § 706(g)(2)(B), added by the 1991 Civil Rights Act, states that even if an employer has been shown to be discriminatory, it can avoid back pay by proving "a same decision" defense. Any trial plan discussed by the district court or the court of appeals would violate this prohibition.

(3) *Teamsters'* mandate of Phase I, Phase II: *Teamsters v. United States*, 431 U.S. 324 (1977), and its progeny, relying on § 706(g), held that in a Title VII class action, at Phase I plaintiffs must prove a pattern or practice of discrimination. At Phase II, individual claimants are presumed entitled to relief unless the employer can demonstrate that despite the pattern of discrimination the particular claimant was not a victim. Under any of the trial plans discussed by the district court or court of appeals, there would be no Phase II.

(4) The Rules Enabling Act: It provides that federal rules cannot abridge substantive rights. In order to create an unmanageable class action, Wal-Mart's substantive right not to pay money to non-discriminatees has been abridged.

(5) Conflict with the Second and Third Circuits on need to resolve merits issues that relate to Rule 23 requirements: Although paying lip service to the recent

decisions from the Second[3] and Third[4] Circuits that conflicts between experts must be resolved if relevant to Rule 23 issues, the *en banc* majority carved out a Title VII exception: It ruled that in Title VII cases conflicts between dueling statistical experts need not be resolved because the conflicts are simply too important: "Statistical evidence does not *overlap* with the merits, it largely *is* the merits . . . ." *Dukes*, 603 F.3d 571, 591 (emphasis in original).

(6) Aggregated statistics: The *en banc* majority is in conflict with numerous circuits, including two major decisions of the D.C. Circuit,[5] in certifying a geographically broad class based on aggregated statistics when the challenged decisions, subjective judgments by local managers, are made at the local level.

(7) Multiple-facility excess subjectivity: The *en banc* majority dismisses this Court's holding in *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 159 n.15 (1982), that in order to obtain class certification of a broad across-the-board excess subjectivity case there must be "[s]ignificant proof that an employer operated under a general policy of discrimination," as *dicta*. *Id.* at 595. If significant proof of a *general* policy of discrimination is required, it is not met when the store-by-store statistics

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[3] *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006).

[4] *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008).

[5] *Love v. Johanns*, 439 F.3d 723 (D.C. Cir. 2006); *Garcia v. Johanns*, 444 F.3d 625 (D.C. Cir. 2006).

indicate exactly the type of variance one would expect in a non-discriminatory environment.

(8) Daubert: The panel majority held that the district court was correct in not holding a Daubert hearing before relying on sociological testimony that white men can't help discriminating. This directly conflicts with a just-issued Seventh Circuit decision. *American Honda Motor Co., Inc. v. Allen*, 600 F.3d 813, 815 (7th Cir. 2010) ("[W]hen an expert's . . . testimony is critical to class certification . . . the district court must perform a full *Daubert* analysis . . . .").

(9) Need for a trial plan: The Third Circuit, in *Hohider v. United Parcel Service, Inc.*, 574 F.3d 169 (3d Cir. 2009), with Justice Sandra Day O'Connor sitting by designation, unanimously held that class certification is inappropriate without an approved trial plan. But the *en banc* majority ducked the issue: "[a]t this stage we express no opinion regarding Wal-Mart's objections to the district court's tentative trial plan . . . but simply note . . . there are a range of possibilities . . . ." *Dukes*, 603 F.3d at 625. "Given the tentative nature of the district court's trial plan, we decline to address Wal-Mart's due process and manageability challenges to that plan." *Id.* at 628.

(10) (b)(2) versus (b)(3): There is a clear circuit conflict between the multiple circuits following the Fifth Circuit's approach in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998) ((b)(2) certification proper only if monetary relief is incidental) and the *en banc* majority, authorizing (b)(2) certification when billions of dollars are at issue.

(11) Less rigorous review of district court decision certifying class than district court decision denying certification: The *en banc* majority, citing prior Ninth Circuit precedent, held that a district court's decision certifying a class is "subject to 'very limited' review . . . ." *Dukes*, 603 F.3d at 579. It cited a Second Circuit opinion for the proposition that "when reviewing a grant of class certification, we accord the district court noticeably more deference than when we review a denial of class certification." *Id.* Other circuits draw no such distinction.

(12) "Rigorous" versus "permissive" (a)(2) and (a)(3) analysis: The panel majority stated that commonality is "construed permissively" and that "one significant issue common to the class may be sufficient . . . ." *Id.* at 599. It held that typicality is also judged permissively. *Id.* at 614. But this Court, in *Falcon*, mandated a "rigorous analysis." 457 U.S. at 161.

We elaborate on some but not all of these reasons for granting the petition.

REASONS FOR GRANTING THE PETITON

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE RECURRING QUESTION OF WHETHER CLASSES CAN BE CERTIFIED THAT WOULD BE UNMANAGEABLE UNLESS FORMULA RELIEF WERE GRANTED TO NON-VICTIMS.

Under all trial plans discussed or proposed to make manageable a class now estimated to be approximately

3,000,000,[6] a pool of money will be calculated based on expert testimony, and distributed by formula to victim and non-victim alike. This procedure, under which Wal-Mart is precluded from proving which back-pay claimants are not discriminatees, conflicts with § 706(g)(2)(A) (court has no authority to award back pay to non-victims), as construed in at least five U.S. Supreme Court decisions, and with the Rules Enabling Act. Furthermore, it conflicts with § 706(g)(2)(B) (mixed motive; employer proved to be biased can avoid back pay by proving same decision would have been made in non-discriminatory environment).

Under any of the trial plans proposed or discussed (none of which has been approved even by the panel majority) the defendant will not be given the opportunity, at any stage of the case, to demonstrate that particular class members are not discrimination victims. Thus, numerous class members who are not discriminatees will recover back pay. That approach is incompatible with Title VII and due process.

The district court recognized, and the Ninth Circuit did not dispute, that the case was manageable as a class only if Wal-Mart was denied the right (i) to prove, at any phase of the trial, that particular persons (or groups of persons, such as employees at particular stores)[7] were not discriminated against, and (ii) to contest the eligibility of those individuals to back pay.

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[6] The panel majority's lower estimate ignores the fact that every woman hired since the year 2003, when class certification was briefed and argued, has been added to the class.

[7] The parties' briefs reveal that the undisputed statistical evidence is that there is no statistically significant difference in pay between men and women at more than 90% of Wal-Mart
(cont'd)

Under the district court's trial plan, which the majority neither approved nor disapproved, a "formula" would be used to determine the total amount of back pay. The trial plan envisions appointing a special master to identify the potential discriminatees, using "objective" evidence captured in Wal-Mart's personnel database (which, the court acknowledged, lacks relevant information such as the principal determinant of starting pay, prior experience, ER 1213).[8]

This procedure simply and demonstrably violates § 706(g)(2)(A) of Title VII. The mode of adjudication of a Title VII class action has been established since *Teamsters v. United States*, 431 U.S. 324 (1977). In Phase I, plaintiffs carry the burden of demonstrating that a pattern or practice of discrimination generally exists. Each class member seeking monetary relief

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stores nationwide, and that at 35-40% of the stores any disparity tends to favor *women*. The undisputed statistics thus suggest that the class includes hundreds of thousands of women who work at stores where women were statistically favored and thus do not appear to be even potential discriminatees.

[8] This means, for example, that a female meat cutter with one year of experience, hired at $15 per hour, on the same day that a male meat cutter with 20 years of experience is hired at $16 per hour, will be statistically presumed to be a discrimination victim and entitled to back pay. The potential discriminatees would receive back pay according to formula, with no opportunity for the defendant to prove the absence of discrimination.

enters Phase II with a presumption in her favor, but the employer has an opportunity to prove that, despite the finding of a pattern of discrimination, a particular claimant was not a victim and is not entitled to relief. But here there will be no Phase II.

The federal courts are not free to sacrifice substance in the name of procedure. Section 706(g) of Title VII provides, in relevant part: "No order of the court shall require . . . payment to [any individual] of any back pay, if such individual . . . was [treated as he or she was] for any reason other than discrimination . . . ."

Thirty years of Supreme Court cases have explained the origin and significance of that section. *Teamsters* made clear that mere membership in a disadvantaged class is insufficient to warrant judicial relief: "The [district] court will have to make a substantial number of individual decisions in deciding which of the minority employees were actual victims." 431 U.S. at 371. *Accord: Id.* at 361-62 ("To determine the scope of individual relief" following a pattern or practice finding, the employer may "demonstrate that the individual . . . was denied an employment opportunity for lawful reasons.").

Teamsters reaffirmed the holding of *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976). The Court in *Franks* (per Brennan, J.) cautioned that, even after a finding of a pattern or practice of discrimination at Phase I, the employer in the remedial phase will have the opportunity "to prove that [specific] individuals . . . were not in fact victims of . . . discrimination." *Id.* at 772.

Then, in *East Texas Motor Freight System Inc. v. Rodriguez*, 431 U.S. 395 (1977), the court of appeals had certified a class notwithstanding the district court's finding that certain persons were not qualified for the jobs they sought. This Court unanimously reversed: "Even assuming, *arguendo*, that the company's failure even to consider [plaintiffs'] applications was discriminatory, the company was entitled to prove at trial that the [plaintiffs] had not been injured because they were not qualified and would not have been hired in any event." *Id.* at 404 n.9.

In *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984), the Court again considered the issue of relief to persons not shown to be discrimination victims. The statute "provide[s] make-whole relief only to those who have been actual victims of illegal discrimination." *Id.* at 580. This Court reviewed the legislative history, noting that Title VII's opponents had sought to scuttle the bill by speculating that employers could be ordered to grant formula relief to non-discriminatees. The *Stotts* Court quoted Senator Hubert Humphrey's dispositive response in the legislative history at the time:

> [Under the proposed bill] [n]o court order can require . . . payment of back pay for anyone who was not . . . refused employment or advancement . . . by an act of discrimination forbidden by this title. This is stated expressly in [§ 706(g)] . . . .

Id. (quoting 110 Cong. Rec. 6549 (1964)) (remarks of Sen. Humphrey). *Stotts* also quoted "the authoritative" interpretative memorandum of the bill by Senators

Clark and Case, "the bipartisan 'captains' of Title VII." *Id.* at 580 n.14. Under the proposed bill, those Senators explained, "a court was not authorized to give [any relief] to nonvictims." *Id.* at 581 (quoting 110 Cong. Rec. at 7214).

Where there is a pattern or practice of discrimination, a court of course may order injunctive or other affirmative relief to put a stop to the discriminatory practice. But individual-specific monetary or equitable relief cannot be granted to non-victims, *Stotts* explained. This Court cited Title VII's bipartisan sponsors' newsletter: "[N]ot even a court, much less the [Equal Employment Opportunity] Commission, could order . . . payment of back pay for anyone who was not discriminated against in violation of this title." *Id.* at 581-82 (quoting 110 Cong. Rec. at 14465).

Thereafter, in *PriceWaterhouse v. Hopkins*, 490 U.S. 228 (1989), the Court considered the special problem of plaintiffs who may have been denied job benefits partly for legitimate and partly for discriminatory motives. Citing § 706(g), the Court reiterated "that Title VII does not authorize affirmative relief for individuals as to whom, the employer shows, the existence of systemic discrimination had no effect. [Citations to *Franks*, *Teamsters* and *Rodriguez* omitted.] These decisions suggest that the proper focus of § 706(g) is on claims of systemic discrimination . . . ." *Id.* at 245. Systemic discrimination is exactly the allegation here.[9]

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[9] The Civil Rights Act of 1991 codified *PriceWaterhouse* in part and modified it in part on grounds not material here. "The 1991 Act affirmed the *PriceWaterhouse* holding that mixed

(cont'd)

The *en banc* majority's decision here is irreconcilable with *Teamsters* and the other above-described cases of this Court construing § 706(g).[10] What has essentially been done is that substantive law (Wal-Mart's right not to pay money to non-victims) has been ignored in order to cram a particular case into the class action device.[11] The Rules Enabling Act says otherwise. 28 U.S.C.

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motive is an affirmative defense" for the employer to invoke. Barbara Lindemann & Paul Grossman, EMPLOYMENT DISCRIMINATION LAW 99 & n.318 (4th ed. 2007) (quoting 42 U.S.C. § 2000e-5(g)(2)(B)) (permitting the employer to demonstrate that it "would have taken the same action in the absence of the impermissible motivating factor").

[10] The *en banc* majority relies on the outlier case of *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996), which was a class action protesting torture, summary execution and disappearance at the hands of Ferdinand Marcos, the Philippines' former President. *Id.* at 771. Even ignoring the outlier nature of *Hilao*, it was not an employment discrimination case. Thus, § 706(g) and the *Teamsters* line of Supreme Court decisions, barring relief to non-victims, were inapplicable.

[11] One fallacy, not expressed in but perhaps underlying the *en banc* majority's decision, is that it must be "this class or no class," and that Wal-Mart because of its size is seeking an effective exemption from the law. Not so. More narrowly tailored litigation of course is possible. Here, as noted above, the undisputed store-by-store statistics show that only 10% of Wal-Mart stores had a statistically significant difference in pay (with one-fourth of those stores favoring women). If this Court reverses class certification, the nationwide consortium of law firms representing plaintiffs surely will bring individual store class actions at the stores where the statistics indicate that a real problem may have existed in the past. Wal-Mart stores are
(cont'd)

§ 2072(b). As the Supreme Court said, in discussing Rule 23:

> The Rules Enabling Act underscores the need for caution. As we said in *Amchem*, no reading of [Rule 23] can ignore the Act's mandate that rules of procedure shall not abridge, enlarge or modify any substantive right.

Ortiz v. Fibreboard Corp., 527 U.S. 815, 845 (1999) (internal quotation marks and citations omitted); *accord*: *e.g.*, *In Re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002) ("Tempting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties' legal rights may be respected.").

II. THE NINTH CIRCUIT'S REFUSAL TO RESOLVE THE DIRECT CONFLICT BETWEEN TWO STATISTICAL APPROACHES (AGGREGATED VERSUS STORE-BY-STORE) DIRECTLY CONFLICTS WITH THE SECOND CIRCUIT'S REPUDIATION OF THE *CARIDAD* DECISION IN *IPO* AND THE THIRD CIRCUIT'S *HYDROGEN PEROXIDE* DECISION.

There could not be a more direct conflict between the two sides' statistical experts. The lower court record reveals that Wal-Mart's statistical expert did two different store-by-store studies: (1) she compared each store's entire store operations, excluding only a

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(cont'd)
large, and an individual store class action would average hundreds of class members, the size of a typical, manageable Title VII class action.

separate line of business, the grocery departments, for those stores that had grocery departments; and (2) she compared the core merchandising business of each store, and, separately, the specialty departments such as tires, hearing aids, optical and grocery. Each led to substantially similar findings: At 90% of Wal-Mart's 3,400 stores, there was no statistically significant difference in pay between men and women; at 30-40% of the stores women were favored, although not to a statistically significant degree. Women were favored in 2.5% of the stores to a statistically significant degree; 7.5% of the stores favored men to a statistically significant degree. Plaintiffs' expert admitted that he began a store-by-store analysis, but abandoned it. He submitted only aggregated statistics, nationwide and by region (a region includes approximately 80 stores). The district court refused to resolve the conflict, citing the now repudiated Second Circuit decision in *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999), for the following proposition: "The statistical dueling in which defendant sought to engage the Court was not relevant to the certification determination . . . ." *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 159 n.29 (N.D. Cal. 2004) (internal quotations to *Caridad* omitted).

The Ninth Circuit majority purports to agree with the recent seminal opinions of the Second and Third Circuits in *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006), *decision clarified on denial of reh'g*, 483 F.3d 70 (2d Cir. 2007), and *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008). *Dukes*, 603 F.3d at 594. *IPO* repudiated *Caridad*. Both *IPO* and *Hydrogen Peroxide* held that conflicts between experts must be resolved at the class certification stage if relevant to Rule 23 issues even if also relevant to the merits. But the *en banc* panel majority then limits the *IPO/Hydrogen Peroxide* requirement to resolve conflicts between dueling experts to securities class actions despite the fact that *Hydrogen Peroxide* was not a securities class action, it was an antitrust case. *Id.* at 610. Then, out of whole cloth, the Ninth Circuit creates a Title VII exception to the rule that conflicts between dueling experts must be resolved when relevant to class certification issues:

> [I]n contrast to a securities class action based on a fraud-on-the-market theory, in a pattern and practice discrimination case, a plaintiff will typically not come to court in the first place without anecdotal evidence. For practical purposes . . . the plaintiff's statistical evidence does not *overlap* with the merits, it largely *is* the merits. [citations omitted] This means that disputes over whose statistics are more persuasive are often not disputes about whether the plaintiffs raise common issues or questions, but are really arguments going to proof of the merits.

Id. at 591 (emphasis in original).

The conflict between the experts could not be more critical. Plaintiffs' theory, as the dissent points out (*Id.* at 628), is purely and simply that individual store managers using subjective judgments made biased decisions. But the store-by-store statistical analysis, if accepted as the more probative for Rule 23 purposes, demonstrates a total lack of commonality and typicality.

As the dissent points out, a female class member in California, where perhaps the statistics indicate men are favored, has nothing in common with a female class member in Wyoming, where the statistics might indicate that females are favored. *Id.* at 632 (dissent).

The Second and Third Circuits laid down a rule of law applicable to all requests for Rule 23 certification: Where there is an overlap between expert testimony relevant to Rule 23 requirements and the merits, conflicts between experts must be resolved. The Ninth Circuit's refusal to allow this in Title VII cases creates the clearest possible circuit conflict.

III. IN APPROVING A MULTIPLE-FACILITY EXCESS SUBJECTIVITY NATIONWIDE CERTIFICATION BASED ON AGGREGATED STATISTICS, THE NINTH CIRCUIT HAS CREATED THE CLEAREST POSSIBLE CONFLICT WITH THE D.C. CIRCUIT.

Even without the store-by-store statistics referenced above, it is intuitively obvious that when the plaintiffs' theory is "excess subjectivity" – that managers at geographically separate locations made biased subjective judgments at the local level – the effect of these subjective judgments would differ facility-by-facility, rendering a multiple-facility excess subjectivity case, absent unusual facts, analytically impossible. There would be no commonality and typicality – every location would require a separate analysis. That is precisely what the D.C. Circuit has held.

In *Garcia v. Johanns*, 444 F.3d 625 (D.C. Cir. 2006), a national origin lending discrimination case, the allegation was that multiple-facility decisionmaking was subjective and led to discrimination. The D.C. Circuit affirmed a denial of class certification:

> Establishing commonality for a disparate treatment class is particularly difficult where, as here, multiple decisionmakers with significant local autonomy exist.

Id. at 632.

> [T]heir claims arise from multiple individual decisions . . . . [Plaintiffs did] not cite a single reversal of a district court's denial of class certification based on no commonality resulting from the geographic spread of the decisionmakers. [numerous citations omitted]

Id. at 633. Plaintiffs argued, as do the plaintiffs in the Wal-Mart case, that excess subjectivity was both disparate treatment and disparate impact. The D.C. Circuit rejected the idea that either could be attacked on an excess subjectivity theory spread over numerous decisionmaking locations: The "subjective decisionmaking process constitutes the [allegedly] common facially neutral practice." *Id.* at 633-34. "We reject both theories and instead affirm the district court's denial of class certification because the appellants failed to show a common facially neutral . . . policy . . . ." *Id.* at 634.

In language equally applicable herein, the D.C. Circuit stated: "It does not suffice under Rule 23(a)(2) to show an ethnic imbalance . . .; rather the appellants must show that a common facially neutral policy caused the imbalance." *Id.* at 635.

The D.C. Circuit in *Love v. Johanns*, a companion case charging sex discrimination in lending at multiple geographic locations, noted in language also equally applicable to the Wal-Mart case that if the class was certified "the outcome . . . would nevertheless turn on a series of individualized inquiries into . . . practices in more than 2,700 . . . offices across the country . . . ." *Id.* at 730. "The District Court concluded that the geographic dispersal and decentralized organization . . . 'cut[] against any inference for class action commonality.'" *Id.*

Perhaps the most extensive analysis of why an excess subjectivity multiple-facility class action cannot be certified was done in *Reid v. Lockheed Martin Aeronautics Co.*, 205 F.R.D. 655 (N.D. Ga. 2001). After reviewing numerous excess subjectivity multiple-facility cases, the court denied class certification because plaintiffs seemed to be contending that the employer "had a centralized policy of decentralization, which is insufficient . . . to satisfy commonality or typicality" with respect to a multi-facility class. *Id.* at 670. The court noted that this Court in *Falcon* required significant proof to justify certification of a broad class based on excess subjectivity and this is not shown by aggregated statistics.

IV. THE *EN BANC* COURT'S WILLINGNESS TO CERTIFY THIS NATIONWIDE CLASS WITHOUT AN APPROVED TRIAL PLAN DIRECTLY CONFLICTS WITH THE THIRD CIRCUIT'S RECENT DECISION IN *HOHIDER*.

Hohider v. United Parcel Service, Inc., 574 F.3d 169 (3d Cir. 2009), reversed a nationwide class certification in an employment discrimination case. Justice Sandra Day O'Connor sat on the unanimous panel by designation. The Third Circuit rejected the concept of a conditional certification, holding that a trial court must make a definitive determination that the requirements of Rule 23 have been met and cannot rely on later developments to determine whether certification is appropriate. The Third Circuit relied on the advisory committee's 2003 note to Rule 23 in holding that there must be an approved "trial plan." The Third Circuit concluded: "The court's deferral of this analysis [how the trial plan would deal with monetary relief issues] post-class certification was an abuse of discretion." *Id.* at 202.

What the Third Circuit rejected in *Hohider* is exactly what the *en banc* majority did in the instant case. The history of the efforts of the Ninth Circuit panel and later the *en banc* court to come up with a trial plan that met statutory and due process requirements is instructive. The original panel decision affirmed the trial court's trial plan, describing it as follows:

> [T]he district court reasoned that if, at the merits stage, Wal-Mart was found liable of discrimination, the court could employ a

formula to determine the amount of back pay and punitive damages owed to the class members.

In sections of its opinion entitled "*Teamsters* does not require individualized hearings," "Title VII does not require individualized hearings," and "Statistical methods may be applied to determine relief," the original panel expressly held that this trial plan was permissible. *En banc* review was sought. The CELC amicus brief in support of *en banc* review focused on the statutory language prohibiting any back pay to non-discriminatees and the *Teamsters* line of cases, requiring a Phase II at which the employer could contest individual entitlement to monetary relief. The panel reassumed jurisdiction, gutted its original opinion, took out everything pertaining to a defense of the district court's trial plan, and merely held that it was confident that the district court could come up with some trial plan that would meet statutory and due process requirements.

The *en banc* panel majority has now done the same thing:

> At this stage, we express no opinion regarding Wal-Mart's objections to the district court's tentative trial plan (or that trial plan itself), but simply note that because there are a range of possibilities–which may or may not include the district court's proposed course of action–that would allow this class action to proceed in a manner that is both manageable and in

> accordance with due process, manageability concerns present no bar to class certification here.

Dukes, 603 F.3d at 625.

There is the clearest possible conflict between the Third Circuit's requirement of a manageable trial plan as a condition of class certification, and the Ninth Circuit's affirmance of a nationwide certification without an approved trial plan.

CONCLUSION

The Petition should be granted to resolve the numerous conflicts between the Ninth Circuit *en banc* decision, other circuits, the statute, and this Court's prior opinions. Only in the Ninth Circuit is, as the dissent makes clear, nationwide Title VII class certification automatic based simply on the submission of three categories of evidence: (1) the opinion of a sociologist which will not be reviewed under Daubert; (2) anecdotal claims of discrimination from 1/100th of 1% of the class which cannot be tested; and (3) aggregated nationwide statistics which are exempt from the requirement of resolving the conflict between the experts – the issue of which expert's opinion is more probative with respect to Rule 23 issues. Dissent, *Id.* at 652 ("Put simply, the door is now open to Title VII lawsuits targeting national and international companies . . . based on nothing more than general and conclusory [expert] allegations, a handful of anecdotes, and statistical disparities that bear little relation to the alleged discriminatory decisions.").

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IN THE

Supreme Court of the United States

WAL-MART STORES, INC.,
Petitioner,

v.

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, KAREN WILLIAMSON, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, on behalf of themselves and all others similarly situated,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Barnes v. American Tobacco Co.,
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Castano v. American Tobacco Co.,
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DG ex rel. Stricklin v. Devaughn,
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Dukes v. Wal-Mart Stores, Inc.,
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OTHER AUTHORITY

Jim Copland,
These actions have no class, San Francisco Examiner, Sept. 15, 2004 17

Drug and Device Law,
Dukes v. Wal-Mart – On to the Supreme Court, We Hope, Apr. 26, 2010 16

Howard M. Erichson,
En Banc Rehearing in Dukes v. Wal-Mart, Mass Tort Litigation Blog, Feb. 19, 2009 16

Donald Falk et al.,
Dukes v. Wal-Mart Stores: Ninth Circuit Lowers the Bar for Class Certification and Creates Circuit Split in Approving Largest Class Action Ever Certified, Antitrust Chronicle, Competition Policy International, Aug. 10, 2010 15

Bruce Hoffman,
Remarks, *Panel 7: Class Actions as an Alternative to Regulation: The Unique Challenges Presented by Multiple Enforcers and Follow-*

On Lawsuits,
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Mark Moller,
The Anti-Constitutional Culture of Class Action Law: An expected Supreme Court case involving Wal-Mart may radically alter the American legal landscape, 30 Regulation 50 (Summer 2007) 16

Richard A. Nagareda,
Common Answers for Class Certification, 64 Vand. L. Rev. En Banc (forthcoming 2010) 14, 16

David L. Wallace,
A Litigator's Guide to the 'Siren Song' of 'Consumer Law' Class Actions, LJN's Product Liability Law & Strategy (Feb. 2009) 17

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States of America ("Chamber") respectfully submits this brief as *amicus curiae* in support of petitioner Wal-Mart Stores, Inc.[1]

STATEMENT OF INTEREST

The Chamber is the world's largest business federation, representing three hundred thousand direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations. The Chamber represents its members' interests by, among other activities, filing briefs in cases implicating issues of vital concern to the nation's business community.

The Chamber's members operate in nearly every industry and business sector in the United States, and many are subject to Title VII of the Civil Rights Act of 1964, which is a focus of the decision below. The Chamber's members devote extensive resources to developing employment practices and compliance programs designed to ensure compliance with Title VII and other legal requirements.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.2, *amicus curiae* states that Petitioner and Respondent, upon timely receipt of notice of the Chamber's intent to file this brief, have consented to its filing. Petitioner and Respondent have each filed with the Clerk of the Court a letter granting blanket consent to the filing of *amicus* briefs.

The Chamber's members also have an interest in the ruling below because the Ninth Circuit's ill-considered application of Rule 23(b)(2) will likely encourage an avalanche of new class action litigation on a broad array of subject matters, beyond employment issues. If allowed to stand, the ruling thus has the potential to dramatically increase the class action exposure of the Chamber's members and all companies doing business in the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

In a 6-5 *en banc* decision with four opinions, the Ninth Circuit affirmed a district court decision that certified a massive Rule 23(b)(2) class of female Wal-Mart employees – with "little in common but their sex and this lawsuit" – who seek billions of dollars in monetary compensation. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 652 (9th Cir. 2010) (Kozinski, J., dissenting).

By considering plaintiffs' proposed class under the rubric of Rule 23(b)(2) – despite the enormity of their damages request – and then applying a liberal construction of Rule 23(b)(2)'s procedural requirements – in contrast to nearly every other Circuit – the courts below have issued an invitation to plaintiffs' attorneys across the country to bring their employment, antitrust, medical monitoring, consumer fraud and other class actions to the Ninth Circuit and masquerade million- and billion-dollar damages claims under the guise of requests for injunctive relief.

The Ninth Circuit's ruling badly misreads the scope of Rule 23(b)(2) and rashly sacrifices substantive law to the gods of efficiency. First, it expands the scope of Rule 23(b)(2) – which lacks the express procedural protections set forth in Rule 23(b)(3) – to include sprawling class actions that seek billions of dollars in potential damages. Second, it suggests that federal courts can certify a class pursuant to Rule 23(b)(2) in any area of the law without regard to whether doing so alters – or even eviscerates – the defendant's substantive rights. This lawless approach violates the clear mandate of the Rules Enabling Act – and the separation-of-powers principles on which that act is premised.

The Ninth Circuit's loose approach to class certification places it in conflict with numerous other Circuits – and threatens to establish the West Coast as a haven for class actions that would be rejected in the rest of the country. If allowed to stand, the Ninth Circuit's decision will thus have deeply destructive effects on businesses nationwide, as plaintiffs will suddenly flock to its district courts with a broad array of class actions that purportedly seek "injunctive relief" against local and national companies – but are in fact damages actions in disguise. This Court should grant the petition for a writ of certiorari to ensure that the courts of the Ninth Circuit do not become the destination of choice for improper class actions that deprive our nation's critical industries of the fundamental due process right to defend themselves when they are sued.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION TAKES RULE 23(b)(2) FAR BEYOND ITS INTENDED SCOPE, CREATING GRAVE RISKS FOR AMERICAN BUSINESS.

A. This Court Should Resolve The Circuit Split On Application Of Rule 23(b)(2) – And Adopt A Standard Consistent With The Language And Intent Of That Provision.

Rule 23(b)(2) permits the certification of a class only if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). While the Rule "is silent as to whether monetary remedies may be sought in conjunction with injunctive or declaratory relief," *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 411 (5th Cir. 1998), the Advisory Committee Notes on Rule 23 state that class certification under Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or *predominantly* to money damages." Fed. R. Civ. P. 23 (advisory committee notes) (emphasis added).

In addressing "what monetary relief is permissible in a (b)(2) class action," courts have generally adopted the same position "taken by the advisory committee that monetary relief may be obtained in a (b)(2) class action so long as the predominant relief sought is injunctive or declaratory." *Allison*, 151 F.3d at 413 (citing *Eubanks v. Billington*, 110 F.3d 87, 92 (D.C. Cir. 1997); *Jenkins v. United Gas Corp.*, 400 F.2d 28, 34 n.14 (5th Cir. 1984); *Boughton v. Cotter Corp.*, 65 F.3d 823, 827 (10th Cir. 1995); *Zimmerman v. Bell*, 800 F.2d 386, 389-90 (4th Cir. 1986); *In re School Asbestos Litig.*, 789 F.2d 996, 1008 (3d Cir. 1986); *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1155 (11th Cir. 1983); *Simer v. Rios*, 661 F.2d 655, 668 n.24 (7th Cir. 1981); *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 564 (2d Cir. 1968)).

The Advisory Committee Notes do not define or explain what the concept of "predominating relief" means – instead interpreting the term literally as "controlling, dominating, [or] prevailing." Fed. R. Civ. P. 23 (advisory committee notes). But, as courts have noted, that does not "translate[] into a workable formula for comparing different types of remedies." *Allison*, 151 F.3d at 412. As a result, federal appellate courts have struggled to find a logical standard by which to assess the applicability of Rule 23(b)(2) in actions involving requests for both injunctive/declaratory and monetary relief.

The simplest approach would be to read Rule 23(b)(2) at its word – as applying only to cases seeking pure injunctive relief. Most courts have adopted a more nuanced approach, however, as best expressed by the Fifth Circuit in *Allison*, which held that "monetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory relief." *Id.* at 415. According to the court, "[b]y incidental, we mean damages that flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief." *Id.* "Ideally," the court noted, "incidental damages should be only those to which class members automatically would be entitled once liability to the class (or subclass) as a whole is established." *Id.* (citing Manual for Complex Litigation (Fourth) at 348 (2004)). "Moreover, such damages should at least be capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances." *Id.* In short, [l]iability for incidental damages should not require additional hearings to resolve the disparate merits of each individual's case; it should neither introduce new and substantial legal or factual issues, nor entail complex individualized determinations." *Id.*

Applying this test in *Allison*, the Fifth Circuit affirmed the trial court's refusal to apply Rule 23(b)(2) to a proposed Title VII class seeking injunctive relief, as well as monetary relief in the form of back pay, front pay, compensatory damages and punitive damages. *Id.* at 416. The court agreed with the district court that the relief sought "did not flow directly from proof of liability on the aspects of the plaintiffs' disparate impact or pattern or practice claims that entitled them to injunctive or declaratory relief." *Id.* Instead, "[e]ntitlement to back pay and other equitable monetary remedies [would require] separate hearings in which each class member would have to show that the discrimination caused a loss." *Id.* "Similarly, recovery of compensatory and punitive damages required particularly individualized proof of injury, including how each class member was personally affected by the discriminatory conduct." *Id.* Thus, the trial court correctly held that the proposed class could not be certified under Rule 23(b)(2).

This "incidental damages" approach has also been adopted by the Third, Sixth, Seventh and Eleventh Circuits. *See Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 646-51 (6th Cir. 2006); *In re Allstate Ins. Co.*, 400 F.3d 505, 507 (7th Cir. 2005); *Barabin v. Aramark Corp.*, No. 02-8057, 2003 U.S. App. LEXIS 3532 (3d Cir. Jan. 24, 2003) (adopting "incidental damages" test; "whether damages are incidental depends on: (1) whether such damages are of a kind to which class members would be automatically entitled; (2) whether such damages can be computed by 'objective standards' and not standards reliant upon 'the intangible, subjective differences of each class member's circumstances;' and (3) whether such damages would require additional hearings to determine") (citation omitted); *Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001) (proposed class's "damages claim predominates over its claims for equitable relief" because "assessing damages for these inherently individual injuries compels an inquiry into each class member's individual circumstances") (citation omitted).

According to the Seventh Circuit in *In re Allstate*, "[t]he operational meaning of 'incidental' damages . . . is that the computation of damages is mechanical, 'without the need for individual calculation,' so that a separate damages suit by individual class members would be a waste of resources. 400 F.3d at 507 (quoting Manual for Complex Litigation (Fourth) § 21.221 (2004)). Thus, "just as the presence of a damages claim does not always require insisting that the case proceed under Rule 23(b)(3), so the fact that declaratory or injunctive relief is sought (and no, or only incidental, damages) should not automatically entitle the class to proceed under Rule 23(b)(2)." *Id.* This is because "[t]here can be critical differences among class members that are independent of differences in the amount of damages." *Id.* "[W]hen, though the suit is for declaratory relief, the effect of the declaration on individual class members will vary with their particular circumstances," application of Rule 23(b)(2) is not appropriate. *Id.* at 508.

The Ninth Circuit declined to follow the incidental-damages model. Instead, it minted a new standard, fashioned from the dictionary definition of "predominant." *Dukes*, 603 F.3d at 616. Based on that definition, it determined that a request for monetary relief predominates when it is "'superior [in] strength, influence, or authority' to injunctive and declaratory relief." *Id.* (quoting *Merriam-Webster's Collegiate Dictionary* 978 (11th ed. 2004)). Under this standard, a district court apparently will consider "the objective effect of the relief sought in the litigation." *Id.* at 617 (citation and internal quotation marks omitted). "Factors such as whether the monetary relief sought determines the key procedures that will be used, whether it introduces new and significant legal and factual issues, whether it requires individualized hearings, and whether its size and nature – as measured by recovery per class member – raise particular due process and manageability concerns would all be relevant, though no single factor would be determinative." *Id.*

This new standard for determining whether monetary relief predominates is insufficiently rigorous, as revealed by its application to this case. In applying the standard, the court first considered the likely size of the class members' damages awards, explaining that the relevant inquiry involves a "comparison between the amount of monetary damages available for each plaintiff and the importance of injunctive . . . relief for each." *Id.* at 618. It offered no standards to guide such an apples-and-oranges comparison, instead resting on an unexplained conclusion that "Wal-Mart has not shown that the size of the monetary request undermines Plaintiffs' claim that injunctive and declaratory relief predominate." *Id.*[2]

The court then found that the plaintiffs' request for declaratory and injunctive relief predominated solely because – apparently as a categorical matter – "the calculation of backpay generally involves relatively uncomplicated factual determinations and few individualized issues" and because "back pay is an integral component of Title VII's 'make whole' remedial scheme." *Id.* at 619 (citation, alterations, and some internal quotation marks omitted).

The court's adherence to this rote principle – even assuming it is generally valid[3] – blinded it to the glaring distinction between this case and others addressing demands for backpay – the substantial size and diversity of the class. It gives no consideration to whether the backpay claims of a class comprising at least 1.5 million women[4] and "encompassing both salaried and hourly employees in a range of positions" at over "3,400 stores across the country" would really involve only "relatively uncomplicated factual determinations." *Id.* at 598, 619. Owing to this diversity, the class is teeming with individualized facts, all of which would be directly relevant both to entitlement to relief in the first place and to the calculation of any backpay. *See, e.g.*, *id.* at 652 (Kozinski, J., dissenting) (highlighting illustrative differences within the class). The court simply swept these concerns aside, concluding that "the predominance test turns on the primary goal and nature of the litigation – not the theoretical or possible size of the total damages award." *Id.* at 618.

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[2] At the same time, however – again without analysis or articulation of any standard – it concluded that the potential for an award of $300,000 in punitive damages per class member "militates in favor of a finding that monetary relief predominates" as to the punitive damages claims. *Dukes*, 603 F.3d at 622.

[3] In fact, as set forth in Wal-Mart's Petition, the better-reasoned view is that backpay "weighs on the monetary side of the scale." (*See* Pet. 16 (citing App. 91a n.40).)

This analysis missed the mark, and it reveals the problem with the Ninth Circuit's novel test. The size of the class and potential damages award *does* matter – particularly when there are individualized issues within the class. As district courts have long observed in the Rule 23(b)(3) context, individualized issues make class action trials extremely difficult as a practical matter, even in cases with much smaller classes. *San Antonio Tel. Co. v. Am. Tel. & Tel. Co.*, 68 F.R.D. 435, 438 (W.D. Tex. 1975) ("Once again, the fact of damage must be proved as to each individual member of the class. Such proof, in light of a class size of up to 500, makes the class action unmanageable in this respect."). And even when common issues predominate over individualized ones in Rule 23(b)(3) classes, the class size can reach a breaking point from the perspective of manageability. *Boshes v. Gen. Motors Corp.*, 59 F.R.D. 589, 599 (N.D. Ill. 1973) ("[E]ven if common questions predominate, a class action may not be a superior or, to be more exact, a feasible method of adjudication because the 'class' is simply unmanageable. It is the opinion of this court that the proposed class falls into the latter category. Although size, in and of itself, will not generally be enough to make a class unmanageable, this court is unaware of any case that certified a class of the potential size proposed in this case. The figures are nothing less than staggering.").

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[4] The class included 1.5 million women over a five-year period when it was certified in 2004. Since then, the class has vastly expanded, and it is still growing, as are the potential damages. *See Dukes*, 603 F.3d at 577-78 & n.3, 598; *id.* at 628-30 (Ikuta, J., dissenting); *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 142 (N.D. Cal. 2004).

In sum, the Ninth Circuit's novel approach to deciding what qualifies as a (b)(2) class action is neither principled nor practical. Instead, it invites plaintiffs to "attempt to shoehorn damages actions into the Rule 23(b)(2) framework" and thereby avoid the strict procedural protections of Rule 23(b)(3), including manageability and, as discussed in the next section, predominance. *See Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 976 (5th Cir. 2000).

B. By Opening The (b)(2) Door To Claims For Damages – While Rejecting The Cohesiveness Approach Adopted By Other Courts – The Ninth Circuit Has Effectively Embraced Standard-Free Class Certification.

The Ninth Circuit's liberal view of what constitutes a Rule 23(b)(2) class is particularly problematic in light of its implicit rejection of the "cohesiveness" standard for (b)(2) certification that has been adopted by nearly every other Circuit. The result is that (b)(2) class actions can proceed in the Ninth Circuit even if common questions do not predominate.

As noted above, this is not the first case to present the question of how to categorize a class action with both injunctive relief and damages components. In attempting to deal with such "hybrid" class actions, most courts have made it clear that even where these cases qualify for Rule 23(b)(2) treatment, that does not give plaintiffs a free pass on satisfying the core requirements of Rule 23(b)(3). To the contrary, eight of the U.S. Courts of Appeals have expressly recognized that Rule 23(b)(2) incorporates a cohesiveness requirement, which, like the predominance requirement of Rule 23(b)(3), bars class treatment unless "the case will not depend on adjudication of facts particular to any subset of the class nor require a remedy that differentiates materially among class members." *Lemon v. Int'l Union of Operating Eng'rs*, 216 F.3d 577, 580 (7th Cir. 2000).[5] In the words of the U.S. Court of Appeals for the Third Circuit: Rule 23(b)(2) classes require "*more* cohesiveness than a (b)(3) class" – not less. *Barnes*, 161 F.3d at 142-43;[6] *see also Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 41 (1st Cir. 2003) ("Rule 23(b)(3) is intended to be a less stringent requirement than Rule 23(b)(1) or (b)(2)").

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[5] *See also Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 n.18 (3d Cir. 1998) (stating that under Rule 23(b)(2) it is "well established that the class claims must be cohesive"); *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 314 (4th Cir. 2006) (recognizing that a Rule 23(b)(2) class must be "sufficiently cohesive" for the class-action device to be employed); *Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 524 (5th Cir. 2007) (holding that a Rule 23(b)(2) class cannot be certified where "individualized issues . . . overwhelm class cohesiveness") (citing *Allison*, 151 F.3d at 414); *In re St. Jude Med. Inc.*, 425 F.3d 1116, 1121-22 (8th Cir. 2005) ("Because unnamed members are

The Ninth Circuit's decision swims against this tide, implicitly rejecting the need to test the homogeneity of proposed class members as long as a court determines that Rule 23(b)(2) applies. This liberalized approach will have far-reaching implications for the treatment of class actions in Ninth Circuit courts – and likely result in the certification of cases that would be rejected nearly everywhere else in the country.

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bound by the action without the opportunity to opt out of a Rule 23(b)(2) class, even greater cohesiveness generally is required than in a Rule 23(b)(3) class.") (citation and internal quotation marks omitted); *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188 (10th Cir. 2010) (noting that Rule 23(b)(2) requires "cohesiveness among class members with respect to their injuries") (internal citation and quotation marks omitted); *Holmes*, 706 F.2d 1144.

[6] The *Barnes* court identified two reasons why (b)(2) classes require greater cohesion. 161 F.3d at 143. First, unnamed class members are bound by the action without notice or an opportunity to opt out. *Id.* Therefore, it is the court's responsibility to "ensure that significant individual issues do not pervade the entire action." *Id.* (internal quotation marks omitted). Second, without this inquiry, "the suit could become unmanageable and little value would be gained in proceeding as a class action . . . if significant individual issues were to arise consistently." *Id.* (internal citation and quotation marks omitted).

* * *

The combined effect of these two deviations from standard Rule 23 analysis threatens to turn the Ninth Circuit into a haven for class action plaintiffs and a deathtrap for American businesses. *See* Richard A. Nagareda, *Common Answers for Class Certification*, 64 Vand. L. Rev. En Banc (forthcoming 2010) (manuscript at 19) ("If left unchecked [by the Supreme Court], . . . *Dukes* threatens to undermine the progress made in the law of class certification elsewhere among the federal appellate courts by virtually inviting certification efforts in the anomalous circuit – indeed, by doing so especially in the kinds of high-stakes, national-market class actions in which careful certification analysis is most needed.").

Employment cases are just the tip of the iceberg. As commentators have recognized, *Dukes* will have broad implications for a variety of class actions against a host of industries, from antitrust cases to product liability actions to medical-monitoring claims. *See, e.g.*, Donald Falk et al., *Dukes v. Wal-Mart Stores: Ninth Circuit Lowers the Bar for Class Certification and Creates Circuit Split in Approving Largest Class Action Ever Certified*, Antitrust Chronicle, Competition Policy International, Aug. 10, 2010 ("Because *Dukes* lowers the bar to class certification in the Ninth Circuit, businesses that may be targeted by antitrust class actions should be prepared to face more litigation there, and should be sure to preserve important issues for potential Supreme Court review."); Drug and Device Law, *Dukes v. Wal-Mart – On to the Supreme Court, We Hope*, Apr. 26, 2010 (advocating reversal of Ninth Circuit decision); Howard M. Erichson, *En Banc Rehearing in Dukes v. Wal-Mart*, Mass Tort Litigation Blog, Feb. 19, 2009 ("OK, it's not a mass tort. But for anyone interested in mass litigation, the *Dukes* case represents an important test of the limits of Rule 23(b)(2) class actions in which significant monetary damages are sought along with injunctive relief."); *see also* Nagareda, *supra*, at 4 ("[T]he potential impact of *Dukes* on the law of class certification extends well beyond the employment discrimination context.").

These implications cannot be overstated. It has long been recognized that loose certification standards have serious repercussions for American business because they present a risk of gargantuan verdicts – and even bankruptcy. Mark Moller, *The Anti-Constitutional Culture of Class Action Law: An expected Supreme Court case involving Wal-Mart may radically alter the American legal landscape*, 30 Regulation 50, 53 (Summer 2007) ("[L]oose certification standards are vulnerable to trial judges' political biases. A populist trial judge with a strong aversion to large corporations might, for example, want to punish big corporate interests, 'sending a message' that they must respect the little guy. Inaugurating a large class action, triggering reams of negative press and sending the defendant's stock price through the floor, is a good way to do so."). "Following certification, class actions often head straight down the settlement path because of the very high cost for everybody concerned, courts, defendants, plaintiffs of litigating a class action . . . ." Bruce Hoffman, Remarks, *Panel 7: Class Actions as an Alternative to Regulation: The Unique Challenges Presented by Multiple Enforcers and Follow-On Lawsuits*, 18 Geo.

J. Legal Ethics 1311, 1329 (2005) (panel discussion statement of Bruce Hoffman, then Deputy Director of the Federal Trade Commission's Bureau of Competition). For this reason, "certification is the whole shooting match" in most cases, David L. Wallace, *A Litigator's Guide to the 'Siren Song' of 'Consumer Law' Class Actions*, LJN's Product Liability Law & Strategy (Feb. 2009), and defendants faced with improvidently certified, meritless lawsuits feel "intense pressure to settle" before trial, *see In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (stating that defendants in a class action lawsuit "may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle"); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("These settlements have been referred to as judicial blackmail.") (citation omitted); Jim Copland, *These actions have no class*, San Fran. Examiner, Sept. 15, 2004 (analyzing *Dukes v. Wal-Mart* and stating: "to permit hundreds or even millions of plaintiffs to join class action suits without letting the employers address individual bias claims on their merits is . . . no more than [a] corporate shakedown[]"). That pressure will be all the greater in the Ninth Circuit because, as discussed below, its ruling not only extends welcoming arms to dubious class actions but also promises to dilute the substantive law that will apply in those cases.

II. THE NINTH CIRCUIT'S DECISION SACRIFICES SUBSTANTIVE LAW TO PROMOTE EFFICIENCY.

The Rules Enabling Act provides that a procedural rule may not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). As numerous courts have recognized, the Act plays a particularly important role in the area of class actions, where courts may be "tempt[ed]" to sacrifice substantive law for the sake of procedural efficiency. *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002) ("tempting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties' legal rights are respected"); *see also Eisen*, 479 F.2d at 1014 ("Amended Rule 23 was not intended to affect the substantive rights of the parties to any litigation."); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (noting that the Rules Enabling Act "limits judicial inventiveness" with respect to Rule 23). The Ninth Circuit gave in to that temptation, stripping defendants of the right to present defenses under Title VII *that have been recognized by this Court*, simply to facilitate use of the class device.

In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), this Court reversed a verdict for the Government in an employment-discrimination action alleging pattern-or-practice discrimination against a class of minorities who decided not to apply for positions because they were deterred by discriminatory hiring practices. In rejecting the verdict, the Court explained that it was troubled by the possibility that some of the class members either did not want the jobs at issue – or were not qualified for them. *Id.* at 369. The Court thus concluded that the Government needed to prove that each class member was qualified and would have applied for the relevant jobs "but for" his or her knowledge of the employer's discriminatory policies. *Id.* at 371 (emphasizing that this burden of proof would have to be carried "with respect to each specific individual"). To satisfy this burden, the Court held, the district court would have to conduct mini-hearings "recreat[ing] the conditions and relationships that would have been had there been no unlawful discrimination." *Id.* at 372 (citations and internal quotation marks omitted). Although the task would not be a "simple one," such mini-trials were necessary to shave off frivolous claims and to determine whether each individual class member would be entitled to relief: "[a]fter the evidentiary hearings to be conducted on remand, both the size and composition of the class of minority employees entitled to relief may be altered substantially. Until those hearings have been conducted and both the number of identifiable victims and the consequent extent of necessary relief have been determined, it is not possible to evaluate abstract claims . . . ." *Id.* at 371-76.

Despite this clear guidance, the district court's certification ruling brushed aside the need to comply with *Teamsters* on the ground that "holding individual hearings for the number of women . . . in this case is impractical on its face." *Dukes*, 222 F.R.D. at 176. "[T]hus," the court concluded, "the traditional *Teamsters* mini-hearing approach is not feasible here." *Id.* The Ninth Circuit agreed, endorsing a sampling approach, under which Wal-Mart would be allowed to "present individual defenses in the randomly selected 'sample cases,' thus revealing the approximate percentage of class members whose unequal pay or nonpromotion was due to something *other* than gender discrimination." *Dukes*, 603 F.3d at 627 n.56. At the end of the day, such a trial by probability could well leave Wal-Mart liable to hundreds – if not thousands – of class members who could not prove their claims in an individual trial. As Judge Ikuta noted in her dissent, "[i]t seems obvious that the district court's determination that it could not certify the class in compliance with *Teamsters* compels the conclusion that it could not certify the class at all." *Id.* at 644 (Ikuta, J., dissenting); *see also Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998) (the "shortcut [of denying individual hearings that] was necessary in order for this suit to proceed as a class action should have been a caution signal to the district court that class-wide proof of damages was impermissible"). But the majority *en banc* opinion did not find this conclusion to be "obvious" at all.

Once again, the Ninth Circuit's approach was contrary to that of other Circuits – and will have broad implications for a variety of class actions against a broad swath of industries. Indeed, the "sampling" approach condoned by the court is no different from the "fluid recovery" method of proof that has been sharply condemned by other courts in consumer fraud and product liability cases. In *McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 230-31 (2d Cir. 2008), for example, the plaintiffs sought to demonstrate damages through aggregate statistical proof and distribute those damages to the entire class based on a similar sampling approach to that endorsed by the Ninth Circuit. The Second Circuit said no, rejecting this approach on the ground that it would impermissibly "alter defendants' substantive right to pay damages reflective of their actual liability." *Id.* at 231.

The Ninth Circuit's apparent disregard for the Rules Enabling Act and the principles on which it rests strongly suggest that it would have reached the opposite outcome in *McLaughlin*, allowing plaintiffs to go forward with class claims even though many class members were not entitled to recovery. This implication will not be lost on plaintiffs' counsel, and absent review by this Court, it will only add to the allure of filing dubious, sprawling class actions in the Ninth Circuit that bring American companies to their knees. Such a result would undermine judicial integrity, increase the "blackmail" effect of class actions, and threaten the stability of an already-vulnerable American economy. For this reason too, the Court should grant the petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, and for those stated by petitioner Wal-Mart Stores, Inc., the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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IN THE
Supreme Court of the United States

WAL-MART STORES, INC.,
Petitioner,

v.

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, KAREN WILLIAMSON, DEBORAH GUNTER, CHRISTINE KWAPKNOSKI, CLEO PAGE, on behalf of themselves and all others similarly situated,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI—the Voice of the Defense Bar is an international organization that includes more than 23,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys, to promote the role of the defense lawyer, to improve the civil justice system, and to preserve the civil jury. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and—where national issues are involved—consistent.

To promote these objectives, DRI participates as *amicus curiae* in cases raising issues of importance to its members, their clients, and the judicial system. This is just such a case. In approving certification of the largest employment class action in history, the Ninth Circuit disregarded this Court's precedent, deepened a well-recognized circuit conflict, and distorted Title VII, the Rules Enabling Act, and the Federal Rules of Civil Procedure.

The issues raised here can have considerable, and even dispositive, impact on countless class actions in virtually all contexts, including employment discrimination, products liability, insurance, securities, and antitrust. DRI's members are frequently confronted with the precise issues raised by petitioner, and their clients are affected by the lack of clear, uniform rules governing class certification. This Court's review is essential to prevent unseemly and improper forum-shopping and to bring fairness, consistency, and predictability to class certification.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amicus curiae* certifies that counsel of record for both parties received timely notice of *amicus curiae*'s intent to file this brief. Counsel of record for both parties have consented to its filing in letters on file with the Clerk's office.

INTRODUCTION

In a 6-5 en banc decision, the Ninth Circuit affirmed certification of the largest employment class action in history, allowing over 1.5 million plaintiffs with factually distinct claims to proceed together as a single unit. In reaching that result, the Ninth Circuit majority widened an acknowledged circuit conflict and approved a certification order that deprives the defendant of its substantive right to defend against each individual plaintiff's claims. This Court's intervention is urgently needed.

Petitioner has persuasively demonstrated that this Court should grant review of both questions presented. In this brief, DRI does not separately address the first question but fully supports review of it because the lower courts are deeply split regarding whether, and to what extent, a class action that includes a claim for monetary relief may proceed under Rule 23(b)(2). See Pet. 10-12. The stakes of this debate are high for plaintiffs and defendants alike: Rule 23(b)(2) authorizes "mandatory" class actions, which do not require that individual plaintiffs receive notice or allow them to opt out. See Fed. R. Civ. P. 23(c)(2), (3). Further, this disagreement among the courts of appeals invites forum shopping by plaintiffs and deprives parties of the consistency and predictability of decision-making that the Federal Rules are intended to guarantee.

DRI also supports review of the second question presented and submits this brief to highlight additional reasons why review is necessary to vindicate the protections of the Rules Enabling Act, 28 U.S.C. § 2072. That Act empowers the Judiciary to adopt rules of "practice and procedure," but expressly provides that no such rule, including Rule 23, may "abridge, enlarge or modify any substantive right." *Id.* § 2072(a), (b). The Act's legislative history and this Court's decisions make clear that the statute requires courts to exercise particular caution in applying Rule 23 because class certification can have a dramatic impact on a lawsuit and parties' rights. See *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 629 (1997). This caution promotes stability in the law by ensuring that rules of decision do not change just because plaintiffs filed a class action.

In the decision below, however, the Ninth Circuit majority abandoned caution and approved a certification order that negates a substantive defense of the employer, in direct violation of the Rules Enabling Act. Under Title VII and this Court's precedents, when plaintiffs allege a pattern or practice of intentional discrimination, the employer is entitled to show that any individual employment action was not discriminatory before the affected plaintiff may obtain individualized relief. *Infra* at 10-12. The lower courts rightly perceived that, in this case, individualized hearings on the employer's defense and each plaintiff's claimed injury were "not feasible." Pet. App. 251a; see also *id.* at 104a-105a. But rather than reject class certification, the Ninth Circuit allowed the district court to strip the employer's right to individualized hearings in favor of a formula-based "'rough justice'" approach that, concededly, would "generat[e] a 'windfall'" for some employees who were not "genuine victims of discrimination." *Id.* at 254a. Unsurprisingly, this application of Rule 23—which contravenes the Rules Enabling Act by modifying Title VII's substantive provisions—conflicts with the decisions of other circuits.

The troubling consequences of the Ninth Circuit's approach to class certification militate heavily in favor of review. By sanctioning the district court's misuse of Rule 23, the Ninth Circuit's decision introduces unpredictability regarding class certification procedures and the substantive rules of decision. Plaintiffs will be emboldened to propose creative methods of generalized proof in order to assemble ever larger classes that should be ineligible for certification under Rule 23 due to substantive requirements of individualized proof. The incentives for forum shopping created by the decision below are obvious. Indeed, for cases in which plaintiffs allege that a defendant engaged in nationwide conduct, the Ninth Circuit's lenient approach to class certification will effectively become the nationwide rule as plaintiffs will naturally file suit in courts bound by the decision below. The enormous hydraulic pressure on defendants to settle cases that lack merit becomes overwhelming. To prevent these intolerable results, certiorari should be granted.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE RULES ENABLING ACT AND THIS COURT'S PRECEDENTS.

The decision below approved an unprecedented class certification that sacrifices the defendant's substantive defense under Title VII and violates the plain terms of the Rules Enabling Act. This Court should grant review and clarify the important restraints the Act places on "'adventuresome'" uses of Rule 23. *Amchem*, 521 U.S. at 617-18.

A. The Rules Enabling Act Prohibits Courts From Construing The Federal Rules To Alter Substantive Rights.

1. The Rules Enabling Act empowers the Judiciary to promulgate "general rules of practice and procedure." 28 U.S.C. § 2072(a). But in the same breath, Congress also provided that "[s]uch rules shall not abridge, enlarge or modify any substantive right." *Id.* § 2072(b). Thus, to comply with the Rules Enabling Act, a Federal Rule may "affect[ ] only the process of enforcing litigants' rights, and not the rights themselves." *Burlington N. R.R.* v. *Woods*, 480 U.S. 1, 8 (1987).

The commands of the Rules Enabling Act track the Constitution's separation of powers. Congress holds "[a]ll legislative Powers," U.S. Const. art. I, § 1, and "the judicial power" is "limited to 'Cases' and 'Controversies.'" *Mistretta* v. *United States*, 488 U.S. 361, 385 (1989) (quoting *Muskrat* v. *United States*, 219 U.S. 346, 356 (1911)); see U.S. Const. art. III, § 2. Congress may delegate rulemaking authority that is "appropriate to the central mission of the Judiciary," only if the rulemaking "do[es] not trench upon the prerogatives of another Branch." *Mistretta*, 488 U.S. at 388. The Rules Enabling Act provides such a limited delegation, authorizing the Court to make rules of "practice and procedure" only. 28 U.S.C. § 2072(a); see *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 9-10 (1941). A broader delegation, which permitted the Court to make or modify "substantive right[s]," 28 U.S.C. § 2072(b), would impermissibly convey legislative authority and violate the Constitution's exclusive "prescription for legislative action," *INS* v. *Chadha*, 462 U.S. 919, 951 (1983).

In light of the Rules Enabling Act's constitutional underpinnings, the principle of constitutional avoidance should guide its application. If a court has any doubt that an interpretation of a Federal Rule would stray into the legislative domain by altering substantive rights, the constitutional infirmity should be avoided by choosing the plausible interpretation that does not give rise to a serious risk of violating the Constitution. See *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

2. That restrained approach is precisely what Congress envisioned. The legislative history of the Rules Enabling Act makes clear that Congress intended the Judiciary to adhere strictly to the narrow confines of its delegation.

During the twenty-year campaign leading to enactment of the Rules Enabling Act, opponents "protested that the judiciary's rulemaking authority would usurp legislative power." Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 Minn. L. Rev. 1303, 1312 (2006); see S. Rep. No. 69-1174, at 20, 33 (1926). To meet that objection, proponents of the Act added the statement that the Court's rules could not "'abridge, enlarge, nor modify . . . substantive rights.'" Redish & Amuluru, *supra* at 1312; see also Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. Pa. L. Rev. 1015, 1073-80 (1982). The key Senate report explained:

> In view of the express provision inhibiting the court from affecting "the substantive rights of any litigant," any court would be astute to avoid an interpretation which would attribute to the words "practice and procedure" an intention on the part of Congress to delegate a power to deal with such substantive rights and remedies . . . .
>
> . . . .
>
> Where a doubt exists as to the power of a court to make a rule, the doubt will surely be resolved by construing a statutory provision in such a way that it will not have the effect of an attempt to delegate to the courts what is in reality a legislative function.

S. Rep. No. 69-1174, at 11.

Congress thus made clear that the Act did not countenance rules that modified "substantive rights and remedies." *Id.*; see also S. Rep. No. 70-440, at 16 (1928) ("Matters of jurisdiction and of substantive right are clearly within the power of the legislature. These are not to be affected. It cannot be too strongly emphasized that the general rules of court contemplated under this bill will deal only with the details of the operation of the judicial machine."). Pertinent here, Congress expected that, in close cases, "any doubt will surely be resolved" by selecting the construction that would not intrude the legislative domain by modifying substantive rights. S. Rep. No. 69-1174, at 11.

3. Such restraint is especially appropriate when considering Rule 23 class certifications, as this Court has warned. See, *e.g.*, *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 845 (1999). Unlike most procedural rules, which typically have little effect on a case, a class certification "dramatically affects the stakes for

defendants." *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996). By aggregating claims, a class certification "makes it more likely that a defendant will be found liable" and "creates insurmountable pressure on defendants to settle." *Id.*; see also *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (observing that class certification puts defendants "under intense pressure to settle" and calling "settlements induced by a small probability of an immense judgment in a class action 'blackmail settlements'") (quoting Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973)).

Class certification also poses potential harms to absent plaintiffs that counsel in favor of restraint. Absent plaintiffs may prefer to assert their claims separately (or not at all), and yet Rule 23(b)(2) certification binds them to the class action's disposition without giving them notice or an opportunity to opt out. See Fed. R. Civ. P. 23(c)(2)(A), (c)(3)(A). Under Rule 23(b)(2), the success or failure of the named plaintiffs becomes the success or failure of every absent plaintiff. For that reason, this Court has advised that "mandatory class actions aggregating damages claims," like the action here, "implicate the due process 'principle'" that requires service of process before one is bound to a judgment *in personam*. *Ortiz*, 527 U.S. at 846; see also *Amchem*, 521 U.S. at 628 ("we recognize the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous").

In view of Rule 23's potency and potential harms, the Court has stressed that "Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act." *Amchem*, 521 U.S. at 613; see also *Ortiz*, 527 U.S. at

845 ("no reading of [Rule 23] can ignore the Act's mandate that rules of procedure shall not abridge, enlarge or modify any substantive right") (internal quotation marks omitted). Regardless of the efficiencies promised by Rule 23, a defendant cannot be subject to liability more easily just because plaintiffs choose to plead a class action. 28 U.S.C. § 2072(b); see also *McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008) ("federal rules of procedure, such as Rule 23, cannot be used to abridge, enlarge or modify any substantive right") (internal quotation marks omitted); *Blaz* v. *Belfer*, 368 F.3d 501, 504 (5th Cir. 2004) ("A class action is merely a procedural device; it does not create new substantive rights . . . .") (internal quotation marks omitted).

Rule 23 is not an invitation to "judicial inventiveness." *Amchem*, 521 U.S. at 620. Particularly when, as here, "individual stakes are high and disparities among class members [are] great," this Court has "call[ed] for caution." *Id.* at 625. Any doubts about whether certifying a proposed class under Rule 23 would "abridge, enlarge or modify any substantive right" must be resolved by denying class certification. 28 U.S.C. § 2072(b); see *Amchem*, 521 U.S. at 621; S. Rep. No. 69-1174, at 11.

B. The Class Certification Affirmed By The Ninth Circuit Alters Substantive Rights Under Title VII In Violation Of The Rules Enabling Act.

Disregarding the Rules Enabling Act and this Court's warnings, the Ninth Circuit affirmed a class certification order that modified the substantive Title VII cause of action. In so doing, the Ninth Circuit increased the unpredictability that already plagues class certification decisions. This Court's intervention is needed to correct the Ninth Circuit's alteration of substantive law.

1. The substantive law governing plaintiffs' claims is clear. Plaintiffs allege that the petitioner engaged in a pattern or practice of intentional discrimination on the basis of sex in violation of 42 U.S.C. § 2000e-2. See Pet. App. 278a. This Court has allowed pattern and practice claims to proceed as class actions under the two-stage framework developed in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). In stage one, plaintiffs must prove that the employer engaged in a "systemwide pattern or practice of" intentional discrimination—*i.e.*, that sex "discrimination was the company's standard operating procedure." *Id.* at 336. "Without any further evidence," however, plaintiffs who prevail at stage one are entitled only to "prospective relief" to the class, such as "an injunctive order against continuation of the discriminatory practice." *Id.* at 361; see also *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984).

If plaintiffs seek "individual relief," as plaintiffs do here, a second stage consisting of individualized proceedings is required. See *Teamsters*, 431 U.S. at 361 ("a district court must usually conduct additional proceedings . . . to determine the scope of individual relief"); see also *Cooper*, 467 U.S. at 876. This requirement of individualized proof follows directly from Title VII's text. The operative provision makes it unlawful for an employer "to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* . . . sex." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). Title VII expressly prohibits granting relief to "an individual" if the evidence shows that the adverse employment action was taken for "any reason other than discrimination on account of . . . sex." *Id.* § 2000e-5(g)(2)(A); see also *id.* § 2000e-5(g)(2)(B)(ii) (court "shall not award damages or issue an order requiring . . . payment" if the employer demonstrates that it "would have taken the same action in the absence of the impermissible motivating factor").

Contrary to the Ninth Circuit majority's view, Pet. App. 104a-105a & n.53, this Court's decisions establish that, in the second stage, the employer is "*entitled* to prove" that individual plaintiffs were not victims of discrimination.[2] *E. Tex. Motor Freight Sys., Inc.* v. *Rodriguez*, 431 U.S. 395, 404 n.9 (1977) (emphasis added); see also *Teamsters*, 431 U.S. at 362 (employer may "demonstrate that the individual applicant was denied an employment opportunity for lawful reasons"); *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 772 (1976) (employer may show that "individuals . . . were not in fact victims of previous hiring discrimination"). Thus, "Title VII does not authorize affirmative relief for individuals as to whom, the employer shows, the existence of systemic discrimination had no effect." *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 245 n.10 (1989) (plurality); *id.* at 266 (O'Connor, J., concurring in the judgment) (same).

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[2] This Court's decisions in *Teamsters* and *Franks* hold that the employer has the burden of proof at the second stage because plaintiffs' stage one "proof of the pattern or practice supports an inference that any particular employment decision . . . was made in pursuit of that policy." *Teamsters*, 431 U.S. at 362; *see Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 772 (1976). However, this Court's subsequent decisions addressing individual disparate treatment claims (as opposed to class action pattern-or-practice disparate treatment claims) have clarified that the plaintiff always retains the ultimate burden to prove intentional discrimination. *See, e.g., St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 507 (1993); *U.S. Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 716 (1983). These subsequent cases cast doubt on *Teamster's* and *Frank's* placement of the burden on defendants. *See Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 267 (1989) (plurality) (O'Connor, J., concurring in the judgment). Regardless of where the burden lies, however, the decision below gives the defendant *no* opportunity to present its defense in violation of the Rules Enabling Act.

2. Despite the plain requirements of Title VII and the Rules Enabling Act, the lower courts in this case modified the Title VII cause of action by dispensing with individualized proof solely in order to make the class action manageable.

The district court acknowledged that conducting "individual hearings" in stage two is the "norm," but found that conducting such hearings would be "impractical on its face" and "not feasible." Pet. App. 251a-252a. Given the size of the putative class and plaintiffs' theory of discrimination through "subjective criteria," the court reasoned that "it is virtually impossible" to determine "which class members were the actual victims of the defendant's discriminatory policy." *Id.* at 252a-253a. As the dissent below explained, the district court's findings "compel[ ] the conclusion that it could not certify the class at all." *Id.* at 146a.

Instead, the district court denied defendant its substantive right to mount individualized defenses. Pet. App. 247a-258a; see *id.* at 247a (Wal-Mart "is not, however, entitled to circumvent or defeat the class nature of the proceeding by litigating whether every individual store discriminated against individual class members"). The court proposed a formula-based approach to determine individual plaintiffs' relief without considering petitioner's defense to their claims. *Id.* at 251a-276a. The district court would calculate a class-wide, lump-sum backpay award, and then use employment information from petitioner's corporate records to fashion individual awards. *Id.* This approach would preclude the petitioner from showing that a non-discriminatory reason not evident in corporate records—such as a plaintiff's inferior pre-Wal-Mart work experience, *id.* at 272a-273a & n.55—actually motivated the lower pay or non-promotion. See *id.* at 272a-276a. Even though plaintiffs allege that discrimination occurred through local store managers' subjective decisions, *id.* at 77a-78a, the defendant's ability to show that any given manager did not act "because of" a plaintiff's sex is sharply limited. This result transgresses Title VII's express provisions. 42 U.S.C. §§ 2000e-2(a), 2000e-5(g).

The Ninth Circuit majority justified allowing this wayward approach on the ground that, in stage one, "the pattern and practice *has* to be proven on a group basis." Pet. App. 105 n.53. But that truism says nothing about the employer's right to contest individual plaintiffs' claims in stage two.[3] That is the stage when the statutorily created right to present individualized defenses is vindicated. *Teamsters*, 431 U.S. at 362. A court cannot use Rule 23 to abridge that right. 28 U.S.C. § 2072(b).

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[3] On that critical point, the majority principally relied on two inapposite Ninth Circuit decisions to claim that the district court could dispense with individualized hearings. Pet. App. 105a-110a & n.53. The first case actually undermines the majority's conclusion because it properly held that a Title VII defendant could avoiding making backpayment by "proving that the applicant was unqualified or showing some other valid reason why the claimant was not, or would not have been, acceptable." *Domingo* v. *New England Fish Co.*, 727 F.2d 1429, 1445 (9th Cir. 1984). The second decision involved Alien Tort Claims Act claims, not Title VII claims, and, in any event, was based on the same flaws that plague this case. *Hilao* v. *Estate of Marcos*, 103 F.3d 767, 768 (9th Cir. 1996); *see id.* at 788 (Rymer, J., dissenting) ("If . . . a real prove-up of causation and damages cannot be accomplished because the class is too big or to do so would take too long, then . . . the class is unmanageable and should not have been certified in the first place.").

It is no answer to suggest, as the Ninth Circuit majority did, Pet. App. 110a n.56, that an employer's right could be protected by "allow[ing] Wal-Mart to present individual defenses in the randomly selected 'sample cases,' thus revealing the approximate percentage of class members whose unequal pay or non-promotion was due to something *other* than gender discrimination." *Id.* This "'rough justice'" approach—to use the district court's words, *id.* at 254a—does not accord with the text of Congress's enactment. Congress prohibited affording relief to "an individual" if the evidence shows that the employment action was taken against that individual for a reason other than sex discrimination. 42 U.S.C. § 2000e-5(g)(2)(A); see also *id.* § 2000e-5(g)(2)(B). Congress did not authorize "'approximat[ions]'" of aggregate liability based on "rough" statistical models, which (the district court frankly admitted) would "generat[e] a 'windfall for some employees'" who were not actual victims of discrimination. Pet. App. 254a. Nor did Congress permit district courts, in the name of judicial efficiency, to "'undercompensat[e] the genuine victims of discrimination.'" *Id.* Because the district court's approach would "enlarge" the substantive rights of uninjured plaintiffs and "abridge" the rights of any actual victims, as well as the defendant, it contravenes Title VII and the unmistakable terms of the Rules Enabling Act. 28 U.S.C. § 2072(b).

Rather than approve the district court's experiment, the Ninth Circuit should have interpreted Rule 23's requirements "with fidelity to the Rules Enabling

Act." *Amchem*, 521 U.S. at 629; see also *Ortiz*, 527 U.S. at 845. At a minimum, the district court's approach raises serious doubts about whether it has trenched upon Congress's prerogative to design Title VII, and therefore, the Ninth Circuit should have resolved doubts by reversing the class certification. See S. Rep. No. 69-1174, at 11; see also *supra* Part I.A.1. Certiorari should be granted to clarify the proper approach to class certification and foreclose any further class action inventiveness.

II. THE DECISION BELOW CONFLICTS WITH CLASS CERTIFICATION DECISIONS OF OTHER CIRCUITS.

This Court's review is all the more necessary because the Ninth Circuit's decision exacerbates confusion among the circuits regarding an employer's right to present individualized defenses to a Title VII class action and intensifies a broader conflict regarding the Rules Enabling Act's limits on class certification.

In the context of Title VII, two circuits have approved class certifications that, like the flawed certification approved here, would forgo individualized determinations required by substantive law in favor of generalized determinations. See *EEOC* v. *O & G Spring & Wire Forms Specialty Co.*, 38 F.3d 872, 880 & n.9 (7th Cir. 1994) (affirming certification without individualized hearings because conducting them "would have been unreasonable" and it "would be impossible to determine which specific class members would have been hired absent discrimination"); *Segar* v. *Smith*, 738 F.2d 1249, 1291-92 (D.C. Cir. 1984) (affirming certification without individualized hearings even "[t]hough Section 706(g) generally does not allow for backpay to those whom discrimination has not injured," and even though this created a "risk that a small number of undeserving individuals might receive backpay"). In addition, the Fifth Circuit, while recognizing that "only those individuals who have suffered a loss of pay because of the illegal discrimination are entitled to compensation," has nonetheless approved a class action judgment that awarded individual relief using a formula-based approach that excluded certain undeserving plaintiffs, but did not allow the employer to present all of its individualized defenses. *Shipes* v. *Trinity Indus.*, 987 F.2d 311, 318-19 (5th Cir. 1993).

At least four other circuits, however, have recognized that an employer has a right to show that any particular adverse employment action was not discriminatory—even though plaintiffs moved for class certification. See *Reeb* v. *Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 651 (6th Cir. 2006) (reversing class certification and explaining that "whether the discriminatory practice actually was responsible for the individual class member's harm, the applicability of nondiscriminatory reasons for the action, showings of pretext, and any affirmative defense all must be analyzed on an individual basis"); *Cooper* v. *Southern Co.*, 390 F.3d 695, 722 (11th Cir. 2004) (affirming denial of class certification and noting that even if the court found grounds for prospective injunctive relief, "it would still be *necessary* for a single jury to hear and rule on more than 2,000 individual claims for compensatory damages") (emphasis added); *Catlett* v. *Mo. Highway & Transp. Comm'n*, 828 F.2d 1260, 1267 (8th Cir. 1987) (remanding class certification decision and noting that an employer "is *entitled*" to show that "individual class claimants" were "not qualified" receive a backpay award) (emphasis added); *Dillon* v. *Coles*, 746 F.2d 998, 1004 (3d Cir. 1984) ("Until the individual has demonstrated actual injury to himself, the court may not direct individual relief. . . . [D]iscrimination in general does not entitle an individual to specific relief.").

The decision below is also at odds with cases outside the Title VII context that refuse to sanction class actions that would potentially modify the substantive cause of action in contravention of the Rules Enabling Act. For example, in *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990), the Fifth Circuit reversed a class certification that, like here, depended on forgoing individual determinations of causation and injury in favor of statistical analyses of general causation.[4] *Id.* at 712. The court held that, because the resulting trial plan would modify substantive law, it could not proceed consistent with the Rules Enabling Act. *Id.* (the trial plan would "treat[ ] discrete claims as fungible claims" and "lift[ ] the description of the claims to a level of generality that tears them from their substantively required moorings to actual causation and discrete injury"); see also *Cimino* v. *Raymark Indus., Inc.*, 151 F.3d 297, 312, 319 (5th Cir. 1998) (rejecting trial plan that would use test cases to determine liability and damages for other plaintiffs as inconsistent with the Rules Enabling Act).

Other court of appeals decisions are in accord, conflicting with the decision below. See, *e.g.*, *Sacred*

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[4] This decision is in tension with the Fifth Circuit's later decision in *Shipes*, 987 F.2d at 318-19, which, as noted, *supra* at 16, improperly approved class certification in a Title VII case. The inconsistency may be explained, however, by the fact that the defendant in *Shipes* failed to raise the Rules Enabling Act issue. *See Shipes*, 987 F.2d at 316-19. In any event, this intra-circuit conflict demonstrates the confusion surrounding these important class certification issues that warrants this Court's review.

Heart Health Sys., Inc. v. *Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1176 (11th Cir. 2010) (reversing class certification as inconsistent with the Rules Enabling Act because there likely "'was a breach of contract with some class members, but not with other class members,'" such that class-wide relief would lead to "an abridgment of the defendant's rights"); *Hohider* v. *UPS, Inc.*, 574 F.3d 169, 185-86, 196-98 (3d Cir. 2009) (reversing class certification of Americans With Disabilities Act discrimination claim because "the statutorily required inquiry into qualification is incompatible with the requirements of Rule 23," rendering certification improper under the Rules Enabling Act); *McLaughlin*, 522 F.3d at 231 (reversing class certification premised on an "aggregate determination" of damages that "would inevitably alter defendants' substantive right to pay damages reflective of their actual liability"); *Windham* v. *Am. Brands, Inc.*, 565 F.2d 59, 66 (4th Cir. 1977) (en banc) (affirming district court's refusal to certify an antitrust class action because "issues of injury and damages" were "strictly individualized" such that class-wide determination would "contravene the mandate of the Rules Enabling Act"); *cf. Seijas* v. *Republic of Arg.*, 606 F.3d 53, 58 (2d Cir. 2010) (approving Rule 23(b)(3) certification, but vacating damage award calculated on class-wide basis because the "likely inflated" award "'offends the Rules Enabling Act'"). Indeed, the decision below diverges even from the Ninth Circuit's own precedent, which has reversed class certification when "individual questions" of causation and damages would "overwhelm the common questions, unless some of the required elements or allowed defenses . . . are eliminated or impaired." *In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974).

The decision below thus creates both inter-circuit and intra-circuit conflicts, compounding the uncertainty defendants face when served with a class action complaint. This Court should grant the petition and confirm that the Rules Enabling Act fully applies in the class-action context.

III. THE DECISION BELOW WILL HAVE FAR REACHING, UNTOWARD CONSEQUENCES FOR DEFENDANTS AND IMPLICATES THIS COURT'S DUTY TO ENSURE UNIFORMITY OF FEDERAL PROCEDURES.

Even aside from the demonstrable flaws in the Ninth Circuit's decision, this Court's intervention is necessary to blunt the widespread, unfair consequences that the decision below will have on defendants and to ensure uniformity on potentially dispositive issues of class action procedure.

A. The impact of the Ninth Circuit's class certification decision will not be limited to employment discrimination suits. It will also affect plaintiffs' bids to obtain class certification in myriad other contexts, including products liability, securities, and antitrust cases. In each of these areas, plaintiffs assert claims that require proof that a defendant's conduct actually caused some injury. See, *e.g.*, *Castano*, 84 F.3d at 740 (products liability); *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336, 341-42 (2005) (securities fraud); *Associated Gen. Contractors of Cal., Inc.* v. *Cal. State Council of Carpenters*, 459 U.S. 519, 538 (1983) (antitrust). Thus, a critical part of a defendant's case is often to dispute causation and injury. For example, here, Wal-Mart would be entitled to show that it paid a particular plaintiff a lower wage not because of her sex, but because she was less willing to work weekends or rotating shifts. See Pet. App. 272a-273a & n.55.

Cases that involve varying individual proof of causation and injury generally are not eligible for class certification, as individual issues overwhelm the common issues. See *Amchem*, 521 U.S. at 620; Fed. R. Civ. P. 23(a). To avoid that result, the trial court discarded the defendant's individual defenses, severely impairing the defendant's right to a fair trial. The Ninth Circuit's decision invites plaintiffs to propose novel changes to other areas of substantive law to skirt the individual issues that would otherwise preclude class treatment.

This potential for lopsided trials will intensify the pressure that any class certification order puts on a defendant to settle, making the class action procedure an even stronger magnet for frivolous claims. In enacting the Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4, members of Congress expressed considerable concern that, "[b]ecause class actions are such a powerful tool, they can give a class attorney unbounded leverage." S. Rep. No. 109-14, at 20 (2005). "Such leverage can essentially force corporate defendants to pay ransom to class attorneys by settling—rather than litigating—frivolous lawsuits." *Id.* On numerous occasions, DRI's members have represented defendants placed in this precise situation. Needless to say, "when plaintiffs seek hundreds of millions of dollars in damages, basic economics can force a corporation to settle the suit, even if it is meritless and has only a five percent chance of success." *Id.* at 21; see also *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 163-64 (2008) (explaining how the prospect of "extensive discovery" can enable "plaintiffs with weak claims to extort settlements from innocent companies"). This Court should grant review and deter such abusive practices.

B. Review is also warranted because the Ninth Circuit's decision implicates this Court's duty to ensure uniformity of federal procedure across the country. The very purpose of the Rules Enabling Act (and the Federal Rules of Civil Procedure, which the Act empowers this Court to promulgate) is to create a single uniform system of procedure. See *Woods*, 480 U.S. at 5 n.3; Burbank, *supra* at 1024.

Divergent practices among federal courts on important issues of procedure, like the Rule 23 issues presented here, inevitably give rise to forum shopping. This Court has repeatedly warned "that it would be unfair for the character or result of a litigation materially to differ" merely because of where the suit is filed. *Hanna* v. *Plumer*, 380 U.S. 460, 467 (1965); see also, *e.g.*, *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 404, 411 (1975). In addition to its basic unfairness, forum shopping "overburdens jurisdictions with the most plaintiff-friendly approach, tends to place the suit in a locale that is removed from the source of the contest so that the litigants' expenses are greater, and perpetuates a negative perception of the fairness of the legal system." James D. Cox et al., *Do Differences in Pleading Standards Cause Forum Shopping in Securities Class Actions?: Doctrinal and Empirical Analyses*, 2009 Wis. L. Rev. 421, 452.

By affirming a class certification order that dispenses with statutorily required individualized proof, the decision below provides a strong incentive for plaintiffs to choose to litigate in courts within the Ninth Circuit. Class certification is a high-stakes issue that effectively resolves many cases before they ever reach the merits. See *supra* at 7-8, 20. Given the central importance of class certification, plaintiffs will seek out jurisdictions with procedural rules that favor and facilitate class certification. Because defendants that operate nationwide are effectively subject to suit anywhere, plaintiffs that allege class actions arising from nationwide conduct have their pick of the circuits. In those circumstances, "a single divergent circuit stands to swallow up the stance of all others." Richard A. Nagareda, *Common Answers for Class Certification*, 64 Vand. L. Rev. En Banc, at 6 (forthcoming 2010), *available at* http://ssrn.com/abstract_id=1662620.

Unless this Court intervenes, the Ninth Circuit's errant approach to class certification will become the *de facto* nationwide approach, as plaintiffs gravitate toward the Ninth Circuit and away from the courts that follow the text of Title VII and the Rules Enabling Act.

CONCLUSION

For these reasons, and those stated by petitioner, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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IN THE

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---

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council (EEAC) respectfully submits this brief *amicus curiae* with the consent of the parties. The brief supports the petition for a writ of certiorari.[1]

---

[1] Counsel of record for all parties received notice of the *amicus curiae's* intention to file this brief at least 10 days prior to its due date. Both parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

Comprising potential defendants to large-scale employment class action litigation, the nationwide constituency that EEAC represents has a direct and ongoing interest in the issues presented in this case regarding the type of analysis a district court must undertake in deciding whether class certification is appropriate under Rule 23 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 23. The *en banc* decision below effectively rejects the "rigorous analysis" standard established by this Court in *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982), for district court review of class certification motions by requiring only a minimal evidentiary showing that Respondents' claims meet the threshold requirements of Rule 23. Such a rule, if permitted to stand, would allow class certification of virtually any well-pled complaint, thus undermining the purposes of the class action tool and profoundly disadvantaging the employers having to defend such actions.

EEAC seeks to assist the Court by highlighting the impact the decision below may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the Court's attention relevant matters that the parties have not raised. Because of its experience in these matters, EEAC is well-situated to brief the Court on the concerns of the business community and the significance of this case to employers.

SUMMARY OF REASONS FOR GRANTING THE WRIT

This case presents the Court with the opportunity to resolve a persistent conflict in the courts regarding the proper standards to be applied in evaluating the propriety of class certification under Rule 23 of the Federal Rules of Civil Procedure. While this Court in *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982), instructed courts to conduct a "rigorous analysis" in determining whether the requirements of Rule 23 have been satisfied, further clarification is desperately needed regarding the breadth of analysis contemplated under *Falcon*, as well as the standard of proof applicable to plaintiffs seeking Rule 23 class certification.

The sharply divided *en banc* court below affirmed certification of a class of at least half a million – and as many as 1.5 million – current and former female employees of Petitioner who were "employed for any period of time over the past decade, in any of [Petitioner's] approximately 3,400 separately managed stores, 41 regions, and 400 districts, and who held positions in any of approximately 53 departments and 170 different job classifications." Pet. for Cert., at i. It rejected the argument that the district court failed to require Respondents to present significant proof of a company-wide practice, which as applied to all 1.5 million purported class members resulted in them falling victim to the same type of discrimination under similar circumstances and at the hands of the same decisionmakers.

Instead, the court below found that even though individual workers "in different stores with different managers may have received different levels of pay or may have been denied promotion or promoted at different rates," Pet. App. 30a, because Petitioners asserted that they were subjected to sex discrimination "through alleged common practices – *e.g.*, excessively subjective decisionmaking in a corporate culture of uniformity and gender stereotyping" – the district court did not commit reversible error in concluding that they established common questions of fact that are typical of the claims or defenses of the class as a whole. *Id.* Thus, while expressly acknowledging the many differences in each individual class members' circumstances, the court below nevertheless concluded that the mere allegation of a corporate culture of subjective decisionmaking was sufficient to permit the district court to find that the requirements of Rule 23 were satisfied. *Id.* at 30a-32a.

The decision below magnifies the already pronounced conflict among the lower courts regarding the role of the district courts in evaluating and ruling upon Rule 23 motions for class certification, as well as the proper evidentiary standard applicable to plaintiffs seeking Rule 23 class certification. The Second, Third, and Fifth Circuits all have held that such plaintiffs must establish, by a preponderance of the evidence, "each fact necessary to meet the requirements of Rule 23," *In re Hydrogen Peroxide*

Antitrust Litig., 552 F.3d 305, 320 (3d Cir. 2008). *See also Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*, 546 F.3d 196, 202 (2d Cir. 2008); *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 228-29 (5th Cir. 2009), while the Fourth, Eleventh and District of Columbia Circuits, apply different, seemingly lower standards. *See Brown v. Nucor Corp.*, 576 F.3d 149, 153 (4th Cir.), *modified*, 2009 U.S. App. LEXIS 22224, at *8 (4th Cir. 2009), *cert. denied*, __ U.S. __, 130 S. Ct. 1720 (2010); *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1267 (11th Cir. 2009); *Garcia v. Johanns*, 444 F.3d 625, 634 n.10 (D.C. Cir. 2006).

As one trial court observed:

> [T]he Circuit Courts in recent years have severely tightened the requirements for certifying a class under Rule 23. The First Circuit remains circumspect about "whether 'findings' regarding the class certification criteria are ever necessary," holding only that "when a Rule 23 requirement relies on a novel or complex theory as to injury . . . the district court must engage in a searching inquiry into the viability of that theory and the existence of the facts necessary for the theory to succeed." But other Circuits clearly require the trial judge to make factual findings by a preponderance of the evidence on all the Rule 23 criteria before certifying a Rule 23 class. . . . These decisions purport to flow from the language of Rule 23, but policy concerns (such as the make-or-break decision of certifying a huge class action) clearly drive some of the decisions.

Prescott v. Prudential Ins. Co., 2010 U.S. Dist. LEXIS 76293, at *20-*21 (D. Me. July 27, 2010) (citations omitted).

The decision below also adds to the disagreement among lower courts over whether actions seeking monetary damages, in addition to equitable and injunctive relief, *ever* are suitable for class certification under Rule 23(b)(2). This Court has indicated that granting class certification status under Rule 23(b)(2) where monetary damages are sought raises constitutional and due process concerns, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999), strongly suggesting that a "substantial possibility" exists that certification of such claims is never appropriate. *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994).

The persistent lack of consistency in the courts regarding the propriety of Rule 23 class certification creates substantial uncertainty in an area of law that is of great importance to the business community. This inconsistency threatens to undermine the traditional role of the courts as gatekeepers in eliminating meritless cases at the class certification stage, thereby minimizing the enormous pressure placed on defendants to settle such claims.

REASONS FOR GRANTING THE WRIT

I. REVIEW OF THE DECISION BELOW IS NECESSARY IN ORDER TO PROVIDE MUCH NEEDED CLARITY ON ISSUES OF SUBSTANTIAL IMPORTANCE TO THE EMPLOYER COMMUNITY

The decision below, which held that the district court properly examined whether Respondents satisfied the strict class certification requirements of Rule 23 of the Federal Rules of Civil Procedure, establishes such a low evidentiary bar that it is difficult to imagine an employer that would not be extremely vulnerable under that framework. It departs from decisions of other courts of appeals and, while paying lip service to this Court's admonition in *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982), that district courts perform a "rigorous analysis" as to whether the plaintiffs' evidence supports Rule 23 class certification, ultimately disregards that principle. Given the conflict in the lower courts on what standards apply to motions for class certification under Rule 23, review of the decision below by this Court is warranted.

A. Despite This Court's Admonition In *Falcon*, There Remains Considerable Disagreement Regarding The Proper Analysis Required Of District Courts In Evaluating Rule 23 Motions For Class Certification

In *General Telephone Co. of the Southwest v. Falcon*, this Court declared that district courts, in determining whether plaintiffs seeking class certification have met the requirements of Rule 23, must engage in a "rigorous analysis" of the facts presented in support of the request. 457 U.S. 147, 161 (1982). It noted that in doing so, it sometimes "may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Id.* at 160.

Falcon appeared to dispel the misconception that the Court's earlier ruling in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), created a bright-line rule barring merits-based inquiries at the class certification stage. In *Eisen*, the Court observed that there is "nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits" when considering whether or not the requirements of Rule 23 have been met. 417 U.S. at 177. Shortly after *Eisen* was decided, the Court went on to observe that the "[e]valuation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims ... [of which] typicality ... adequacy ... and the presence of common questions of law or fact are obvious examples." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.12 (1978) (citation and internal quotation omitted). It is this overlap between the merits of plaintiffs' claims and the Rule 23 class certification standards that makes it necessary, as the Court eventually instructed in *Falcon*, to "probe behind the pleadings" and inquire into the merits of plaintiffs' allegations. *Falcon*, 457 U.S. at 160.

Because the Court in *Falcon* did not expressly reconcile the "rigorous analysis" approach with its earlier caution in *Eisen* against merits-based inquiries, lower courts have struggled in determining what level of review satisfies the "rigorous analysis" test. A number of courts, most notably the Second, Third and Seventh Circuits, hold that district courts must not refrain from examining the merits of the plaintiffs' allegations at the expense of conducting a thorough Rule 23 analysis. *See In re Initial Pub. Offering (IPO) Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672 (7th Cir. 2001); *see also Brown v. Am. Honda (In re New Motor Vehicles Canadian Exp. Antitrust Litig.)*, 522 F.3d 6, 24 (1st Cir. 2008) ("Our sister circuits agree that when class criteria and merits overlap, the district court must conduct a searching inquiry regarding the Rule 23 criteria, but how they articulate the necessary degree of inquiry ranges along a spectrum which suggests substantial differences") (citing cases).

The Second Circuit recently clarified the proper standard for granting class certification in the context of so-called "statistical dueling" between the parties on the commonality issue, abandoning the approach it previously had adopted in *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999). *In re IPO Sec. Litig.*, 471 F.3d at 39-40. In *In re IPO*, the court noted that *Caridad* condemned "statistical dueling" between experts based on the no-merits-inquiry approach taken by this Court in *Eisen*. *Id.* at 35. It observed that "*Caridad*, by the imprecision of its language, left unclear whether the merits dispute between the experts was not to be resolved at the class certification stage or whether their dispute about a class certification requirement was not to be resolved at that stage." *Id.* (footnote omitted). The court thus repudiated its prior holding in *Caridad*, concluding that judges must resolve factual disputes relevant to each Rule 23 requirement before ruling on whether to certify a class:

> With *Eisen* properly understood to preclude consideration of the merits only when a merits issue is unrelated to a Rule 23 requirement, there is no reason to lessen a district court's obligation to make a determination that every Rule 23 requirement is met before certifying a class just because of some or even full overlap of that requirement with a merits issue.

Id. at 41.

The Seventh Circuit also has held that where a Rule 23 class certification issue is so closely tied to the merits of the underlying claim, the court "must make a preliminary inquiry into the merits" in order to determine whether class certification is proper. *Szabo*, 249 F.3d at 676. Giving uncontestable weight to the plaintiffs' allegations "moves the court's discretion to the plaintiff's attorneys," and essentially permits the plaintiffs to "tie the judge's hands by making allegations relevant to both the merits and class certification." *Id.* at 677. Relying on the Seventh Circuit's rationale in *Szabo*, the Third Circuit similarly found in *In re Hydrogen Peroxide Antitrust Litigation* that district courts "must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits—including disputes touching on elements of the cause of action." 552 F.3d at 307.

In contrast, the court below, joined by lower courts within its jurisdiction, evokes the "rigorous analysis" framework, while in fact applying a much less stringent standard than that adopted by other circuits striving to properly apply *Falcon*. Indeed, when the legal principles purportedly endorsed by the *en banc* court below are actually applied to the facts, it becomes abundantly clear that the district court refused to conduct any meaningful, merits-based review in determining whether the requirements of Rule 23 were satisfied.

The district court granted class certification based on evidence that Petitioner maintained a "common policy" of allowing local managers to use some discretion in making employment decisions and that its uniform corporate culture "could be" subject to gender stereotyping and, in doing so, refused to consider evidence offered by Wal-Mart undermining class certification, concluding that delving into the merits in such a manner would be improper. *Dukes* *v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004). It said:

> In *Falcon*, the Court reiterated the well-recognized precept that the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action. Nevertheless, we find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Thus, although some inquiry into the substance of a case may be necessary to ascertain satisfaction of the commonality and typicality requirements of Rule 23(a), it is improper to advance a decision on the merits to the class certification stage.

Id. at 144 (citations and internal quotations omitted).

Despite the district court's strained interpretation and improper application of *Falcon*, a three judge panel of the Ninth Circuit, in a 2-1 decision, nevertheless affirmed class certification. *Dukes v. Wal-Mart Stores, Inc.*, 509 F.3d 1168 (9th Cir. 2007), *vacated and reh'g granted*, 556 F.3d 919 (9th Cir. 2009). A divided *en banc* court below, endorsing the district court's flawed approach, also affirmed. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010). Stripped of its rhetoric, its decision can only be viewed as establishing the very lowest standard of rigor applicable to district courts deciding the propriety of class certification under Rule 23.

Continued inconsistency in this area of the law will have a profound effect on the business community in general, but in particular on large companies that operate and employ staff across the United States. For instance, companies doing business within the Ninth Circuit's jurisdiction (which includes California, the nation's most populous state)[2] will be subject to Title VII class actions that might never have been certified under the more rigorous approach applied by the Second and Third Circuits – whose jurisdictions includes New York, Connecticut, Vermont, Pennsylvania, New Jersey, Delaware, and the U.S. Virgin Islands.

B. Without Definitive Guidance From This Court, The Lower Courts Will Continue To Apply Vastly Different Standards Of Proof Applicable To Plaintiffs Seeking Rule 23 Class Certification

> Although it is clear that the party seeking certification must convince the district court that the requirements of Rule 23 are met, little guidance is available on the subject of the proper standard of "proof" for class certification. The Supreme Court has described the inquiry as a "rigorous analysis" and a "close look," but it has elaborated no further.

In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 315-16 (citations and footnote omitted). Indeed, left to figure it out, the lower courts have applied wide ranging standards of proof on plaintiffs seeking to proceed on a class-wide basis. *See Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*,

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[2] U.S. Census Bureau, Annual Estimates of the Population for the United States, Regions, States and Puerto Rico: April 1, 2000 to July 1, 2009, Table 1 (July 1, 2009), *available at* http://www.census.gov/popest/states/tables/NST-EST2009-01.xls

546 F.3d 196 (2d Cir. 2008); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008); *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221 (5th Cir. 2009); *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256 (11th Cir. 2009); *Garcia v. Johanns*, 444 F.3d 625 (D.C. Cir. 2006).

The Second, Third, and Fifth Circuits all have held that plaintiffs seeking Rule 23 class certification must establish, by a preponderance of the evidence, "each fact necessary to meet the requirements of Rule 23." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 320; *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*, 546 F.3d at 202; *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d at 228-29. As the Second Circuit explained:

> Although we did not use the words "preponderance of the evidence" in *In re IPO* to describe the standard of proof applicable to Rule 23 issues, we in effect required the application of a cognate standard by directing district courts "to assess all of the relevant evidence admitted at the class certification stage," to "resolve[] factual disputes relevant to each Rule 23 requirement," and "[to] find[] that whatever underlying facts are relevant to a particular Rule 23 requirement have been established," notwithstanding an issue's overlap with the merits. Today, we dispel any remaining confusion and hold that the preponderance of the evidence standard applies to evidence proffered to establish Rule 23's requirements.

Teamsters, 546 F.3d at 202 (citations omitted).

By contrast, the Eleventh Circuit has suggested that plaintiffs, in order to proceed as a class, must make "some showing" that all of the requisite Rule 23 requirements have been satisfied, *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1267 (11th Cir. 2009), while the District of Columbia Circuit seems to endorse a "significant showing" proof standard. *Garcia v. Johanns*, 444 F.3d 625, 632 (D.C. Cir. 2006) (citation omitted). The Fourth Circuit in *Brown v. Nucor Corp.*, recently endorsed a "facial" showing standard, 576 F.3d 149, 156 n.10 (4th Cir.), *modified*, 2009 U.S. App. LEXIS 22224, at *19 n.10 (4th Cir. 2009), *cert. denied*, __ U.S. __, 130 S. Ct. 1720 (2010), which seems to comport most closely with the "threshold showing" approach expressly rejected by both the Second and Third Circuits in *Teamsters Local 445* and *In re Hydrogen Peroxide*. As the Third Circuit explained:

> A "threshold showing" could signify, incorrectly, that the burden on the party seeking certification is a lenient one (such as a prima facie showing or a burden of production) or that the party seeking certification receives deference or a presumption in its favor. So defined, "threshold showing" is an inadequate and improper standard.

552 F.3d at 321.

To the extent that the decision below rejected the more robust standard of proof endorsed by most other circuit courts in favor of a lower, more nebulous one, it exacerbates a problematic conflict among the courts. Without further clarification from this Court, the lower courts will continue to apply remarkably differing standards of proof to plaintiffs seeking class certification under Rule 23, as employers subject to class litigation in multiple jurisdictions continue to face substantial uncertainty in defending such claims.

C. The Decision Below Magnifies The Conflict In The Courts Regarding Whether Rule 23(b)(2) Class Certification Is Permissible In Title VII Discrimination Cases Seeking Substantial Monetary Relief

To maintain a class action alleging violations of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. §§ 2000e *et seq.*, plaintiffs must satisfy all four requirements of Rule 23(a), and at least one of the requirements of Rule 23(b), of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 23. Rule 23(a) permits class certification only when "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

Rule 23(b)(2), in turn, allows certification only when the defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Rule 23(b)(3) permits certification where "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

Here, the *en banc* court below affirmed class certification under Rule 23(b)(2). It found no error in the district court's analysis under Rule 23(a), agreeing that evidence of Petitioner's "subjective decisionmaking policies suggests a common legal or factual question regarding whether [Petitioner's] policies or practices are discriminatory," thus satisfying the commonality requirement. Pet. App. 78a. As for typicality, the *en banc* majority determined that even though individual workers "in different stores with different managers may have received different levels of pay or may have been denied promotion or promoted at different rates, because the discrimination they claim to have suffered occurred through alleged common practices – *e.g.*, excessively subjective decisionmaking in a corporate culture of uniformity and gender stereotyping" – the district court did not commit reversible error in concluding the claims of the class members also were sufficiently typical to satisfy Rule 23(a)(3).[3] Pet. App. 30a.

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[3] Notably, the U.S. District Court for the Northern District of Illinois recently denied class certification in a Title VII race discrimination case involving allegations and factual circumstances strikingly similar to the instant case. *McReynolds v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 2010 U.S. Dist. LEXIS 80002 (N.D. Ill. Aug. 9, 2010). There, the plaintiffs claimed that the defendant "has a corporate culture of racial discrimination that it implements through the discretionary decisions of over 15,000 [financial advisors], over 600 branch office managers, 135 complex directors, 30 Regional Managing Directors and 5 Divisional Managers situated across the entire United States." *Id.* at *14. Rejecting the plaintiffs' motion for Rule 23(b)(2) class certification, the district court observed, "[a]fter identifying these so-called common issues, however, plaintiffs offer little to establish the 'significant proof' required by *Falcon* to establish that the asserted discriminatory culture manifested itself in the 'same general fashion' as to all putative class members." *Id.* at *13. It went on to point out

> In fact, however, the plaintiffs' attempt to make this showing is undermined by the different experiences of the

The *en banc* majority also affirmed the district court's finding that the class is maintainable under Rule 23(b)(2). Despite the billions of dollars in backpay and punitive damages being sought, the district court concluded that injunctive relief is the primary purpose of the litigation. It observed that while Rule 23 precludes class certification where the relief sought "relates exclusively or predominately to money damages," it does not bar plaintiffs from seeking *any* monetary damages on a class wide basis.

In deciding when monetary relief actually does predominate over injunctive relief, the *en banc* majority reviewed its prior ruling in *Molski v. Gleich*, as well as precedent in other jurisdictions, observing that courts have disagreed over the years as to whether class certification under Rule 23(b)(2) is improper unless the claim for monetary damages is merely incidental to the injunctive relief being sought. 318 F.3d 937, 949-50 (9th Cir. 2003). *See Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998) (citing cases); *Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 645-50 (6th Cir. 2006); *Cooper v. Southern Co.*, 390 F.3d 695, 720-21 (11th Cir. 2004), *overruled on other grounds by Ash v. Tyson Foods,*

> proposed class members, in terms of length of service with the defendant, income, position levels, the people who made the relevant employment decisions, and the conflicting and unconvincing anecdotal evidence found in their declarations . . . Plaintiffs' position essentially is that all of these decisions were made by racist employees of a racist company. As numerous decisions from this district demonstrate, however, class certification should be denied when the plaintiffs' class definition implicates numerous, independent decision-makers resulting in the need for numerous individual inquiries.

Id. at *13-*15.

Inc., 546 U.S. 464 (2006); *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 163-64 (2d Cir. 2001).

Molski focused on evaluating the "subjective intent" of the plaintiffs in bringing the action, while at the other end of the spectrum, the Fifth Circuit in *Allison* focused on whether the monetary claims amounted to no more than "incidental damages." 151 F.3d at 415-16. There, the Fifth Circuit examined the impact of the Civil Rights Act of 1991 on Rule 23(b)(2) class certification determinations in Title VII cases. It observed that the Civil Rights Act significantly changed the character of Title VII actions by creating a right of both parties to a jury trial and expanding statutory remedies for violations to include up to $300,000 in compensatory and punitive damages, in addition to injunctive and equitable relief. 42 U.S.C. § 1981a. The amendments emphasized the need for individual remedies, particularly in the case of punitive damages awards, which require individualized proof "that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1) (emphasis added); *see also Kolstad v. American Dental Ass'n*, 527 U.S. 526, 534 (1999) (noting that "Congress plainly sought to impose two standards of liability—one for establishing a right to compensatory damages and another, higher standard that a plaintiff must satisfy to qualify for a punitive award").

For that reason, the Fifth Circuit in *Allison* concluded, "monetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory relief." *Allison*, 151 F.3d at 415; *see also Murray v. Auslander*, 244 F.3d 807, 812 (11th

Cir. 2001); *Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d 894, 898-99 (7th Cir. 1999). It explained, "[b]y incidental, we mean damages that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief." *Allison* at 415.

In *Robinson*, however, the Second Circuit held that claims for monetary relief do not automatically render class certification inappropriate; rather, the district court must assess on a case-by-case basis whether the monetary relief predominates, and whether class treatment would be efficient and manageable. 267 F.3d at 164. The Ninth Circuit in *Molski* adopted *Robinson's* case-by-case test, and expressly rejected the Fifth Circuit's approach in *Allison*. 318 F.3d at 949-50.

The *en banc* court below ultimately refused to endorse any of the existing standards, expressly rejecting *Molski*. It held, "to the extent *Molski* required the district court to inquire only into the intent of the plaintiffs and focus primarily on determining whether reasonable plaintiffs would bring suit to obtain injunctive or declaratory relief in the absence of a possible monetary recovery, it is overruled." Pet. App. 37a (citation omitted). It went on to articulate a different, arguably more confusing rule under which class certification will be improper where monetary relief is "predominant" over injunctive relief, as determined on a case-by-case basis by considering the objective effect the relief has on the litigation. Factors relevant to the "objective effect" determination include whether the monetary relief sought dictates what procedures are used; introduces "new and significant" legal and factual issues into the litigation; and requires individualized hearings. Pet. App.

33a. Also relevant is whether the size and the nature of the monetary relief raise due process and litigation manageability concerns.

Applying the new standard, the court below concluded that the district court did not abuse its discretion in granting certification under Rule 23(b)(2). It rejected Petitioner's argument that given the enormous size of the class – and the possibility of monetary liability amounting to several billion dollars – monetary relief necessarily predominates, making class certification improper, noting that the amount of potential damages "is principally a function of Wal-Mart's size, and the predominance test turns on the primary goal and nature of the litigation – not the theoretical or possible size of the total damages award." Pet. App. 39a.

Because the new principles established by the *en banc* court below only further perpetuate confusion over the extent to which Rule 23(b)(2) class certification *ever* is appropriate in Title VII cases seeking monetary damages, review by this Court is warranted.

II. IMPROPER CERTIFICATION OF EMPLOYMENT DISCRIMINATION CLASS ACTIONS PROFOUNDLY DISADVANTAGES EMPLOYERS, WHO OFTEN ACQUIESCE TO THE PRESSURE TO SETTLE SUCH CLAIMS, REGARDLESS OF THEIR MERIT

A district court's decision on a Rule 23 motion for class certification "is often the defining moment in class actions (for it may sound the 'death knell' of the litigation on the part of plaintiffs, or create unwarranted pressure to settle nonmeritorious claims on the part of defendants)." *In re Hydrogen Peroxide*, 552 F.3d at 310 (citation omitted). Indeed, class certification "'may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.'" *Id.* (quoting Fed. R. Civ. P. 23 advisory committee's note, 1998 Amendments). Because of the importance of Rule 23 class certification determinations, courts must be able to understand and rigorously apply the rules in a manner that ensures consistency and fairness for both plaintiffs and defendants.

The larger a class, the greater the potential liability and defense costs, which very well could lead to what some courts have called judicial "blackmail." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (footnote omitted). As the Eleventh Circuit has found:

> Once one understands that the issues involved in the instant case are predominantly case-specific in nature, it becomes clear that there is nothing to be gained by certifying this case as a class action; nothing, that is, except the *blackmail value* of a class certification that can aid the plaintiffs in coercing the defendant into a settlement.

Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228, 1241 n.21 (11th Cir. 2000) (emphasis added).

Judge Posner also astutely has observed that when companies face millions, or in some cases, billions, of dollars in potential liability as a result of a class action, "[t]hey may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (citation omitted).

See also In re Visa Check/Mastermoney Antitrust Litig., 280 F.3d 124, 152 (2d Cir. 2001) (Jacobs, J., dissenting) (quoting *Rhone-Poulenc Rorer*), *overruled on other grounds by In re IPO Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 167-68 n.8 (3d Cir. 2001) (same).

Traditionally, it has been the role of the courts to act as gatekeepers in eliminating meritless cases at the certification stage, minimizing the enormous "blackmail value" of large classes. *Rutstein*, 211 F.3d at 1241 n.21. The panel majority's improper application of Rule 23's class certification requirements represents an abandonment of that role. By allowing unchallenged evidence to form the basis for class certification on the theory that the evidence will be evaluated at trial, the panel majority ignores the reality that class certification almost invariably leads to a settlement, making it likely that the evidence will never be evaluated. The decision below will make it easier to certify large class actions, increasing exponentially the pressure on employers to settle even meritless claims.

CONCLUSION

Accordingly, the *amicus curiae* Equal Employment Advisory Council respectfully requests the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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WAL-MART STORES, INC.,

Petitioner,

v.

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, KAREN WILLIAMSON, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, on behalf of themselves and all others similarly situated,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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In re "Agent Orange" Product Liability Litig.,
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In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig., 288 F.3d 1012 (7th Cir 2002) 12

In re Brooklyn Navy Yard Asbestos Litigation,
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Int'l Bhd. of Teamsters v. *United States*,
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Krupski v. *Costa Crociere S.p.A.*,
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Lindsey v. *Normet*,
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TABLE OF AUTHORITIES – cont'd

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Reeb v. *Ohio Dep't of Rehab. and Corr.*,
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Regents of University of California v. *Credit Suisse First Boston (USA), Inc.*,
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Other Authorities

Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251 (2002) 10

HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973) 6, 13

Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377 (2000) 3

Sarah Kirk, *Ninth Circuit Discrimination Case Could Change The Ground Rules For Everyone*, 14 TEX. REV. L. & POL. 163 (Fall 2009) 19, 20

Gary M. Kramer, *No Class: Post-1991 Barriers to Rule 23 Certification of Across-the-Board Employment Discrimination Cases*, 15 LAB. LAW. 415 (2000) 9

Bartlett H. McGuire, *The Death Knell for* Eisen*: Why the Class Action Analysis Should Include an Assessment of the Merits*, 168 F.R.D. 366 (1996) 8

TABLE OF AUTHORITIES – cont'd

Page(s)

Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, And CAFA*, 106 COLUM. L. REV. 1872 (2006) 5

Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97 (2009) 22

George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521 (1997) 11

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BRIEF OF INTEL CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

Intel Corporation is the world's largest semiconductor manufacturer and is also a leading manufacturer of computer, networking, and communications hardware and software products. Given its size, Intel frequently is named as a defendant in litigation in which plaintiffs seek class certification, including certification under Federal Rule of Civil Procedure 23(b)(2). At present, there are nearly 100 putative class actions pending against Intel. Indeed, for the past ten years Intel has continuously been named as a defendant in one or more putative class actions.

As a result, Intel has a significant interest in maintaining proper limitations on class-action procedures. Class certification can transform an ordinary lawsuit into "bet-the-company" litigation, even for a company of Intel's size. But companies can seldom afford to make such bets—no matter how small the odds are of an adverse judgment—so class certification almost always coerces an immediate settlement. "Blackmail settlements," as Judge Friendly aptly termed such results, damage Intel, impose costs on its customers, and ultimately harm its shareholders. Furthermore, as a company headquartered in California, Intel is especially vulnerable to lawsuits filed under the extraordinarily permissive standards for class certification that the Ninth Circuit adopted by a 6-5 vote in the decision below. Intel is therefore well positioned to explain the pressing need for further review of the deeply flawed decision reached by the majority below.

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[1] The parties received timely notice of *amicus*'s intent to file this brief and have consented to its filing. No counsel for a party authored this brief in whole or in part, and no counsel for a party or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

I.A. Improper class certification puts inappropriate settlement pressure on defendants. Defendants simply cannot risk a multi-billion-dollar jury verdict awarding damages to thousands (or millions) of members of a certified class. Improper certification gives plaintiffs unfair leverage to extract an outsized settlement from even moderately risk-averse defendants. Corporate decisionmakers must often settle even meritless cases because they cannot "stake their companies on the outcome of a single jury trial." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995). Courts must therefore vigilantly guard against erroneous certifications.

B. The decision below exacerbates the problem of coerced settlements. It effectively reduces the requirements for certification of a class, and it permits courts to make that crucial determination before squarely resolving whether all the threshold requirements imposed by Rule 23 are met. Consequently, the majority's rule creates a loophole through which classes may be wrongly certified. Because certification often *is* the ballgame, such errors will translate to erroneous and massive liability for corporate defendants.

II.A. The plain text of Rule 23(b)(2) does not provide for the certification of class actions seeking monetary relief. Rather, that subsection permits certification only of classes seeking injunctive or declaratory relief. Wrongly authorizing the availability of money damages is bad enough; doing so when that mistake is then multiplied by thousands or even millions of plaintiffs is an error of the highest order.

B. To the extent that a class seeking monetary relief may be certified under Rule 23(b)(2) at all, such certification is limited to actions in which damages are truly incidental to injunctive or declaratory relief. The decision below misconstrues Rule 23(b)(2) and exacerbates existing, mature, and acknowledged circuit conflicts by allowing the certification of an action seeking billions of dollars in monetary relief.

III. Particularly in employment-discrimination actions, a defendant has a right (and the need) to present an individualized defense against each plaintiff. Rule 23 cannot alter that essential requirement in the name of aggregation or convenience. By denying petitioner the right to present individualized defenses, the courts below violated the Due Process Clause, the Rules Enabling Act, and Title VII itself.

ARGUMENT

"[C]lass actions are without doubt the most controversial subject in the civil process today." Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1377 (2000). Much of the controversy centers on certification; indeed, class certification can transform a comparatively modest case into one with millions of claimants and billions of dollars in claimed damages. Here, the order certifying the class expanded a Title VII action, brought by a variety of plaintiffs who claim to be victims of biased *subjective* decisionmaking by a handful of *different* supervisors, into a behemoth comprising 1.5 million plaintiffs and with potentially billions at stake. Pet. App. 112a (Ikuta, J., dissenting), 89a. Many scholars and observers have rightly criticized decisions that, like the majority opinion below, permit class certification without fully addressing and resolving the difficulties posed by that crucial threshold inquiry.

Intel takes no position on the merits of the underlying Title VII action but concurs with petitioner, and with Judge Ikuta in dissent, that the majority decision rests on a deeply flawed interpretation of Federal Rule of Civil Procedure 23 and this Court's precedents. Intel also agrees with petitioner that the majority opinion is in conflict with decisions of other federal appellate courts, by allowing the certification under Rule 23(b)(2) of an action in which the billions of dollars in monetary relief sought cannot be construed as incidental to injunctive or declaratory relief. This brief focuses principally on three particular reasons why it is essential to confine class certification to the precise limits set forth in Rule 23, and why this Court's review of the decision below is therefore so urgently needed.

I. Improper Class Certification Puts Inappropriate Settlement Pressure On Defendants

Even in ordinary cases, litigation can be enormously expensive for businesses. The out-of-pocket costs alone can be massive, not to mention the distractions and lost business opportunities that frequently accompany lawsuits. The prospect of erroneous outcomes—such as a mistaken finding of liability or (as is all too common) an outsized damages award—also looms large. These costs and risks are a fact of life for businesses, and they present significant obstacles under the best of circumstances.

If an action is brought on behalf of not one plaintiff but thousands or millions, the stakes skyrocket. Once a class of that magnitude is certified, an action that individually might represent only a modest risk—and thus could be fully adjudicated or otherwise appropriately resolved—can instantly metastasize into a potentially catastrophic judgment worth billions of dollars. Faced with those circumstances, defendants almost invariably will settle. See, *e.g.*, Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, And CAFA*, 106 COLUM. L. REV. 1872, 1875 (2006) ("Whatever their partisan stakes in a given litigation, all sides recognize that the overwhelming majority of actions certified to proceed on a class-wide basis (and not otherwise resolved by dispositive motion) result in settlements."); Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531, 1546 n.74 (2000) ("[T]hat defendants would rather settle large class actions than face the risk, even if it be small, of crushing liability from an adverse judgment on the merits is widely recognized.").

Accordingly, careful analysis of and fidelity to the text of the rule are paramount. As Wal-Mart's petition explains and as Intel will explain further in this brief, the majority opinion below, instead of guarding against procedures that will lead to coerced settlements, throws open the barn door. If left undisturbed, the decision below will make it far more likely that plaintiffs with weak cases will nonetheless be able to extract massive settlements.

A. The Prospect Of "Blackmail Settlements" Drives Companies To Settle Even The Weakest Cases

Certification of a class action forces a defendant to settle, even if the claim has no merit. "Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action 'blackmail settlements.'" *In re Rhone-Poulenc*, 51 F.3d at 1298 (quoting HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973)). As one commentator recently explained: "[I]f class action certification is granted, defendants are often unwilling to suffer the risks of trial—even in marginal cases—and face enormous pressure to settle the case for a very substantial amount." Roger H. Trangsrud, *James F. Humphreys Complex Litigation Lecture: The Adversary System and Modern Class Action Practice*, 76 GEO. WASH. L. REV. 181, 189 (2008).

Those pressures are so overwhelming because defendants face massive exposure for the slightest miscalculation or error in determining liability. Suppose, for example, that a defendant faces lawsuits by one hundred plaintiffs claiming a combined $100 million in damages, but the defendant believes those claims are really worth no more than $10 million. If those claims are addressed individually, the defendant has good reason to believe that most of the time the correct result will be achieved and something close to the expected aggregate liability will result. Errors are likely to be few in number and evenly distributed—that is, sometimes the plaintiff will win too big, and sometimes the defendant will get off too easy. The net effect of such errors is therefore likely to be minimal, and defendants can act in accordance with their best estimate of their true liability.

In a class action, the defendant is forced to gamble all at once against thousands or even millions of opponents. Even a moderately risk-averse defendant will settle rather than face the truly disastrous consequences of an unexpected outcome. Unless one can predict the result of a jury trial with certainty—and no such thing is possible—the strength of one's case is almost irrelevant. Because the price of a single error (however remote the prospect) could be hundreds of millions (or, as here, *billions*) of dollars, the only rational strategy is to settle.

That harsh reality is no secret. As the Senate Judiciary Committee recently observed, class certification

> can give a class attorney unbounded leverage * * * * [that] can essentially force corporate defendants to pay ransom to class attorneys by settling—rather than litigating—frivolous lawsuits. * * * [W]hen plaintiffs seek hundreds of millions of dollars in damages, basic economics can force a corporation to settle the

> suit, even if it is meritless and has only a five percent chance of success. Not surprisingly, the ability to exercise unbounded leverage over a defendant corporation and the lure of huge attorneys' fees have led to the filing of many frivolous class actions.

S. REP. NO. 109-14, at 20-21 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 21; see Bartlett H. McGuire, *The Death Knell for* Eisen*: Why the Class Action Analysis Should Include an Assessment of the Merits*, 168 F.R.D. 366, 370-371 (1996) ("class certification can give plaintiffs tremendous leverage in settlement negotiations, even where the claims are tenuous. * * * [T]enuous claims are hard to dispose of before trial; and jury trials are risky propositions * * *."). The result is an *in terrorem* effect that compels defendants to settle claims that have no merit. See, *e.g.*, *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1465 n.3 (2010) (Ginsburg, J., dissenting) ("A court's decision to certify a class * * * places pressure on the defendant to settle even unmeritorious claims."); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 102 (D.C. Cir. 2002) ("[T]he grant of class status can put substantial pressure on the defendant to settle independent of the merits of the plaintiffs' claims."); see also Linda Silberman, *The Vicissitudes of the American Class Action—With a Comparative Eye*, 7 TUL. J. INT'L & COMP. L. 201, 205 (1999) ("[T]he specter of huge damage awards against defendants in a class action suit and the expense of litigating these large suits in a system without cost-shifting frequently led defendants to settle even marginal cases.").

Those concerns are grounded in real-world experience. Beginning in the late 1970s, for example, veterans of the Vietnam War filed lawsuits against chemical companies alleging that their exposure to an herbicide manufactured by the defendants caused various health problems. *In re "Agent Orange" Product Liability Litig.*, 611 F. Supp. 1223, 1228 (E.D.N.Y. 1985). The district court ultimately certified a huge, multinational class over defendants' objections. *Id.* at 1229. Facing the untenable risk of an adverse judgment, defendants settled the case for $180 million. See *In re "Agent Orange" Product Liability Litig.*, 818 F.2d 145, 151 (2d Cir. 1987). Yet the plaintiffs' claims were so weak that, when adjudicating the claims of plaintiffs who had opted out of the class, the district court eventually granted summary judgment in favor of defendants. 611 F. Supp. at 1264; see also *Regents of University of California* v. *Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 379 (5th Cir. 2007) ("[C]lass certification may be the backbreaking decision that places insurmountable pressure on a defendant to settle, even where the defendant has a good chance of succeeding on the merits.") (internal quotation marks omitted).

Not only is the risk of losing at trial magnified, but so are the costs of getting there. See, *e.g.*, Gary M. Kramer, *No Class: Post-1991 Barriers to Rule 23 Certification of Across-the-Board Employment Discrimination Cases*, 15 LAB. LAW. 415, 416-417 (2000) (discussing increased costs associated with litigating class action). Moreover, defending a class action can do substantial damage to a defendant's reputation, because such lawsuits often attract publicity out of proportion to their merit and because the mere aggregation of plaintiffs suggests to the public that, where there is so much smoke, there must be fire. See, *e.g.*, *Abdallah* v. *Coca-Cola Co.*, 186 F.R.D. 672, 676 (N.D. Ga. 1999) (describing negative publicity resulting from class action). And class actions are likely to be tried in a manner that is ultimately prejudicial to the defendant. "[T]he playing field changes dramatically when there is a class certified. All the rules are different." WORKING PAPERS OF THE ADVISORY COMMITTEE ON PROPOSED AMENDMENT TO CIVIL RULE 23 pt. 3, 107-108 (1997). Most significantly, "[f]or each plaintiff who may have been in a different period of time, with different facts in a single trial, much of the evidence would not come in to that particular plaintiff, that particular claim." *Ibid; see* also *Castano* v. *American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("Aggregation of claims also makes it more likely that a defendant will be found liable * * *."). In the face of all that, corporate defendants typically have no choice but to settle, with little regard for the merits of the underlying claims.

What is more, every large award coerced in settlement of a dubious claim further entices other plaintiffs (and plaintiffs' lawyers) to file still more specious lawsuits. A "lack of attention to the merits make[s] the class action an attractive vehicle for frivolous suits." Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1302 (2002). As one scholar has noted:

> It is surely a curious circumstance in a country committed to the rule of law to accept the propositions (1) that class certification alone creates great negotiating power, (2) that that power leads to actual settlements, sometimes

> large dollar settlements, and, simultaneously, (3) that this great negotiating power can be created without any judicial review of a claim on the merits and, in some cases, without any merit to the claim.

George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521, 547 (1997). In short, certification of a dubious class action not only produces a settlement that far exceeds the merits of the claim, but it also guarantees the persistent recurrence of such lawsuits.

B. The Ninth Circuit's Rule Will Exacerbate Settlement Pressure

Instead of recognizing the problems created by careless class certification and committing to a careful and thorough analysis, the decision below aggravates the problem of coerced settlements by permitting the certification of actions that are inappropriate for class treatment. Among its most glaring defects, the majority opinion does not require the district court actually to determine how a case will be tried on a class-wide basis as required by Rule 23(c)(1)(B). Instead, a class may be certified even where (as here) it does not meet the basic requirements of Rule 23(b)(2), see Part II, *infra*, and where individual hearings of the type necessary for a defendant to present individual defenses in a case seeking back pay are deemed "impractical," Pet. App. 251a; see Part III, *infra*. Certification thus will be available to classes that would *not* be certified under a correct reading of Rule 23. The net result is a system in which a class may be easily—and incorrectly—certified, at which point "plaintiffs and their counsel

* * * have in hand the means to extract a favorable settlement of what may be weak claims." *In re Visa Check/MasterMoney Antitrust Litigation*, 280 F.3d 124, 152 (2d Cir. 2001) (Jacobs, J., dissenting) (citing *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974)); see also *Oscar Private Equity Invs.* v. *Allegiance Telecom, Inc.*, 487 F.3d 261, 267 (5th Cir. 2007) ("We cannot ignore the in terrorem power of certification.").

Plaintiffs here seek billions of dollars in damages on behalf of 1.5 million current and former employees. Their untested allegations of discrimination should not suffice to erect a barrier to a meaningful examination of such a massive class-action complaint and the unfair burdens that allowing such a gargantuan lawsuit to proceed would impose on a defendant. Yet the courts below have "ma[de] the case so unwieldy, and the stakes so large, that settlement becomes almost inevitable—and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims." *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1016 (7th Cir 2002).

II. The Decision Below Misconstrues Rule 23(b)(2)

Federal Rule of Civil Procedure 23(b)(2), promulgated in 1966, allows a class action to be maintained if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." The rule mentions *only* two kinds of relief – injunctive and declaratory. It does not mention monetary relief.

The 1966 amendments to Rule 23 "greatly augmented the volume of private litigation" through the "expanded concept of the class action." FRIENDLY, FEDERAL JURISDICTION, *supra*, at 118. Initially, as Judge Friendly noted, there were "few grounds for serious criticism of Rule 23(b)(2)" because "[t]he relief sought is generally an injunction or decree." *Ibid.* If properly confined to injunctive or declaratory relief, the overarching goal of a (b)(2) class action was to "*prevent*[] further litigation." *Ibid.* That stands in stark contrast to class actions for money damages under Rule 23(b)(3), which coerce unwarranted settlements and thereby ignite seemingly endless additional litigation. See FRIENDLY, FEDERAL JURISDICTION, *supra*, at 119; Part I, *supra*.

For that reason, class actions seeking monetary relief generally cannot be certified under Rule 23(b)(2); they must instead meet the more stringent requirements imposed by Rule 23(b)(3). By certifying under the former a class seeking billions of dollars, the majority strayed from the plain text of Rule 23(b)(2). The majority's decision also adds to the widely recognized split among the circuits over the extent to which a Rule 23(b)(2) class may seek monetary relief.

A. Class Actions Seeking Monetary Relief Cannot Be Certified Under Rule 23(b)(2)

A plain reading of Rule 23(b)(2) compels the conclusion that it cannot be used to certify class actions seeking monetary relief. Again, that rule permits certification only of classes for which "final *injunctive* relief or corresponding *declaratory* relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2) (emphasis added). There is, quite conspicuously, no mention of suits for money damages.

Indeed, scholars have long recognized that "Rule 23(b)(2) was not originally drafted to provide a vehicle for obtaining compensatory damages and other forms of monetary relief." Trangsrud, *supra*, 76 GEO. WASH. L. REV. at 186. Rather, the touchstone of Rule 23(b)(2) "is whether the party's actions would affect all persons similarly situated so that those acts apply generally to the whole class. If they do not, then Rule 23(b)(2) cannot be properly invoked." 7AA CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1775, at 41 (3d ed. 2005) (footnote omitted); see, *e.g.*, *Monreal* v. *Potter*, 367 F.3d 1224, 1236 (10th Cir. 2004) (affirming denial of certification "[b]ecause the variety of claims asserted in the Complaint do not lend themselves to the formulation of appropriate class-wide injunctive or declaratory relief and because it is clear from the pleadings here that the primary relief sought is monetary damages").

It was only by "seizing on certain language in the advisory committee notes to the rule, [that] the plaintiffs' bar was successful in persuading federal courts that monetary relief should be allowed * * *." Trangsrud, *supra*, 76 GEO. WASH. L. REV. at 186. In fact, every circuit to allow such class actions under Rule 23(b)(2) has relied on a portion of the text of an Advisory Committee Note to alter—not merely to interpret—the text of Rule 23(b)(2). What is more, even those circuits cannot agree on the extent to which money damages should be available, most likely because there is no textual basis for such relief in the first place. See Pet. 10-12. The better course would be—as this Court's cases instruct—to follow the Rule's unambiguous text, which makes Rule 23(b)(2) available only for injunctive and declaratory relief and *requires* use of Rule 23(b)(3) when monetary relief is sought.

"As with a statute, our inquiry is complete if we find the text of [a Federal] Rule [of Civil Procedure] to be clear and unambiguous." *Business Guides, Inc.* v. *Chromatic Communications Enters., Inc.*, 498 U.S. 533, 540-541 (1991); accord *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U.S. 120, 123 (1989). The text of Rule 23(b)(2) cannot be altered by Advisory Committee Notes. *Krupski* v. *Costa Crociere S.p.A.*, No. 09-337, slip op. at 1 (June 7, 2010) (Scalia, J., concurring in part and concurring the judgment) ("The Advisory Committee's insights into the proper interpretation of a Rule's text * * * * have no effect on the Rule's meaning. Even assuming that we and the Congress that allowed the Rule to take effect read and agreed with those intentions, it is the text of the Rule that controls."); *Black* v. *United States*, No. 08-876, slip op. at 1 (June 24, 2010) (Scalia, J., joined by Thomas, J., concurring in part and concurring the judgment) ("The Committee's view is not authoritative"); *Tome* v. *United States*, 513 U.S. 150, 167-168 (1995) (Scalia, J., concurring in part and concurring the judgment) ("the Notes cannot, by some power inherent in the draftsmen, change the meaning that the Rules would otherwise bear").

The practical effect of distorting Rule 23(b)(2) is to offer the same relief contemplated by Rule 23(b)(3), but without the latter's tight limitations. See Pet. App. 151a (Ikuta, J., dissenting) (citing *Ticor Title Ins. Co.* v. *Brown*, 511 U.S. 117, 121 (1994)). Most notably, Rule 23(b)(3) requires that a court find—before certifying a class—that common questions predominate and that a class action is the superior method of resolving the dispute. Rule 23(b)(2) contains no such protections for defendants. Rule 23(b)(3) also protects plaintiffs, requiring notice and the opportunity to opt out of the suit. See Fed. R. Civ. P. 23(c)(2)(B). Rule 23(b)(2), by its terms, is not so limited. See Fed. R. Civ. P. 23(c)(2)(A).[2] Rather, because suits under Rule 23(b)(3) can seek only injunctive or declaratory relief, the benefits and burdens of the class action properly run to the class as a whole. See *Allison* v. *Citgo Petroleum Corp.*, 151 F.3d 402, 412-15 (5th Cir. 1998). As one judge rightly observed, courts

> risk unduly extending (b)(2) in cases with monetary claims by inviting district judges to use it and then protect claimants with individualized damage amounts either by affording them opt-out rights or certifying only the liability issue.

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[2] Some courts—including the district court and court of appeals below, Pet. App. 95a-96a; 243a—have concluded that the absence of an opt-out provision in Rule 23(b)(2) does not prevent granting opt-out rights for money damages claims sought under that provision. It would be unnecessary to invent such rights, however, if these courts had confined the rule to its proper scope to allow class actions seeking only injunctive and declaratory relief.

> Such devices strike me as a way of undermining the (b)(3) requirement that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

Parker v. *Time Warner Entertainment Co.*, 331 F.3d 13, 24 (2d Cir. 2003) (Newman, J., concurring) (quoting Fed. R. Civ. P. 23(b)(3)).

Moreover, certifying classes seeking damages under 23(b)(2) only *magnifies* opportunities for abuse in class actions seeking predominantly money damages. As this Court has noted, "the limitations on class size associated with Rule 23(b)(3) actions do not apply" to classes certified under 23(b)(2). *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979). While "a nationwide class" certified under 23(b)(2) may not necessarily be "inconsistent with principles of equity jurisprudence," *ibid.*, the same cannot be said for damages actions that typically rest on even more highly individualized inquiries. Allowing the pursuit of money damages by a Rule 23(b)(2)-certified class ignores that critical distinction and avoids the strict limitations imposed under Rule 23(b)(3) See *Coleman* v. *GMAC*, 296 F.3d 443, 447 (6th Cir. 2002) ("These procedural protections are considered unnecessary for a Rule 23(b)(2) class because its requirements are designed to permit only classes with homogenous interests."). This case perfectly illustrates that potential: Some 1.5 million plaintiffs have been aggregated under Rule 23(b)(2) and effectively seek billions of dollars in money damages, but they could not possibly do so in a single class under Rule 23(b)(3).

B. A 23(b)(2) Class Should Not Be Certified When Damages Are More Than Incidental To Injunctive Or Declaratory Relief

The court below, parsing a word that does not appear in the Rule's text but only in an Advisory Committee Note, saw its task as determining "the appropriate standard for determining when monetary relief 'predominates' over declaratory and injunctive relief and therefore precludes certification of a Rule 23(b)(2) class." Pet. App. 85a. If courts are to go down that path at all, they must remain extraordinarily vigilant that such relief is only incidental to injunctive or declaratory relief. As Judge Ikuta recognized in dissent below, "Rule 23(b)(2) was designed for classes seeking class-wide injunctive relief to remedy a common injury to the class as a whole, not for classes seeking individual damages, back pay, or other individual relief." Pet. App. 149a (Ikuta, J., dissenting); see *Thorn* v. *Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 331 (4th Cir. 2006) ("Because Appellants' injunction request is illusory, their prayer for injunctive relief cannot predominate over their prayer for non-injunctive, non-declaratory equitable relief under any reasonable interpretation of Rule 23(b)(2)."); *Allison*, 151 F.3d at 413 ("The underlying premise of the (b)(2) class * * * 'begins to break down when the class seeks to recover back pay or other forms of monetary relief to be allocated based on individual injuries.'") (quoting *Eubanks* v. *Billington*, 110 F.3d 87, 95 (D.C. Cir. 1997)).

The claims for monetary relief in this case "predominate"—under any meaningful standard for such an inquiry—and thus cannot be shoehorned into a Rule 23(b)(2) class action. At least two-thirds of the class members are former employees who lack standing to pursue injunctive relief. See *Elizabeth M. v. Montenez*, 458 F.3d 779, 784-85 (8th Cir. 2006) (holding that that the district court had abused its discretion by certifying a 23(b)(2) class including both past and current mental health facility patients, because the former lacked Article III standing to seek injunctive relief). And the multi-billion-dollar price tag plaintiffs attach to their lawsuit belies any claim that injunctive relief is their primary target. *See Reeb v. Ohio Dep't of Rehab. and Corr.*, 435 F.3d 639, 641 (6th Cir. 2006) ("Title VII cases in which plaintiffs seek individual compensatory damages are not appropriately brought as class actions under Rule 23(b)(2) because such individual claims for money damages will always predominate over requested injunctive or declaratory relief."); Sarah Kirk, *Ninth Circuit Discrimination Case Could Change The Ground Rules For Everyone*, 14 TEX. REV. L. & POL. 163, 168 (Fall 2009) ("[T]he court erred by certifying, under Rule 23(b)(2), an unmanageable class in which claims for declaratory and injunctive relief plainly do not predominate.").

As Wal-Mart's petition explains, and Intel will not repeat, the circuit conflict over what it means for monetary relief to "predominate" in a Rule 23(b)(2) class action is mature, acknowledged, and implicated by this case. If that inquiry is to be pursued at all (instead of following the text of the Rule and disallowing monetary damages altogether in such actions), this case is an appropriate vehicle to resolve the conflict.

III. Rule 23 Cannot Undermine A Defendant's Right To Present An Individualized Defense

Rules of procedure may not abridge, enlarge, or modify any substantive right. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997); Rules Enabling Act, 28 U.S.C. § 2072(b). A court therefore "must ensure that its certification of a class does not affect the substantive rights of either party." Pet. App. 139a (Ikuta, J. dissenting).

The Due Process Clause "prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense.'" *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)); *ICC v. Louisville & Nashville R.R. Co.*, 227 U.S. 88, 93 (1913). Due process does not permit elimination of defenses merely because trying them would preclude fashioning a class-wide remedy. See Pet. App. 146a (Ikuta, J. dissenting).

"[I]t is well established that every [defendant]" in an employment-discrimination suit "is entitled to put on evidence showing that particular plaintiffs are not entitled to relief because they were denied an employment opportunity for lawful reasons." Kirk, *supra*, 14 TEX. REV. L. & POL. at 174. Accordingly, trial of a claim based on disparate treatment typically will require individual hearings, both in order to compensate each plaintiff for her respective injury and to permit the defendant to present individualized defenses. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 368 (1977).

Even though the district court here acknowledged that Wal-Mart's defenses to the various plaintiffs' claims would be individualized, Pet. App. 251a, the Ninth Circuit upheld the denial of Wal-Mart's right to individual hearings. Pet. App. 145a-146a (Ikuta, J., dissenting). Wal-Mart is thus effectively barred from explaining to the jury why individual employees were treated in a certain way, thereby nullifying Wal-Mart's basic right to "to present every available defense." *Philip Morris USA*, 549 U.S. at 353; *Teamsters*, 431 U.S. at 360-62 (an employer-defendant cannot be deprived of the right to raise individualized defenses simply because plaintiffs claim a pattern or practice of discrimination).

As the petition correctly explains, short-circuiting the defense in the name of convenience violates both the Due Process Clause and Title VII itself. Pet. 28-30. The petition also correctly notes that, under the Rules Enabling Act, Rule 23 cannot alter the substance of a claim, only the procedure by which it is vindicated. Pet. 28-30; see *Shady Grove Orthopedic Assocs., P.A.*, 130 S. Ct. at 1461 (Ginsburg, J., dissenting). Finally, the petition correctly argues that the statistical sampling method invoked in *Hilao v. Estate of Marcos*, 103 F.3d 767, 786-787 (9th Cir. 1996) (allowing "a probabilistic prediction (albeit an extremely accurate one) of how many of the total claims are invalid") is no substitute for a resolution of each claim on its individual merits. Pet. 32-33.

A rule that deprives defendants of the ability to present individual defenses—particularly coupled with the enormous settlement pressures that accompany class actions, see Part I, *supra*—will allow plaintiffs who sustained no damage at all to reap significant monetary rewards. "If a cohesive class can be created through such savvy crafting of the evidence, then there would seem to be little limit to class certification in our modern world of increasingly sophisticated aggregate proof. The law would run a considerable risk of unleashing the settlement-inducing capacity of class certification based simply upon the say-so of one side." Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 103 (2009).

It is no answer to assert—particularly in the absence of the rigorous commonality and superiority requirements imposed by Rule 23(b)(3)—that the injury is sustained not by the individual members of a class but by the "class as a whole." Courts have rightly voiced serious due process concerns about that conception of liability in lawsuits that press, at bottom, individualized claims. See, *e.g.*, *McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008). ("[r]oughly estimating the gross damages to the class as a whole and only subsequently allowing for the processing of individual claims would inevitably alter defendants' substantive right to pay damages reflective of their actual liability" and thus offends due process); *Broussard* v. *Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 344-45 (4th Cir. 1998) (condemning class action procedure in which defendant is "forced to defend against a fictional composite" or "a 'perfect plaintiff' pieced together for litigation"); *In re Brooklyn Navy Yard Asbestos Litigation*, 971 F.2d 831, 853 (2d Cir. 1992) ("[W]e must take care that each individual plaintiff's—and defendant's—cause not be lost in the shadow of a towering mass litigation."); *Eisen* v. *Carlisle &*

Jacquelin, 479 F.2d 1005, 1018 (2d Cir. 1973) (rejecting "fluid recovery" that would replace individual damages with relief for the "class as a whole"), *rev'd on other grounds*, 417 U.S. 156 (1974). But that is precisely what improper certification of a money damages action under Rule 23(b)(2) would permit. While the theoretical "class as a whole" might benefit from injunctive or declaratory relief, it should have no need for money damages.

This case presents an ideal opportunity for the Court to provide much-needed guidance on the extent to which the Due Process Clause establishes minimum requirements for class-action adjudication. Despite this Court's repeated warnings that class actions cannot be employed to override fundamental elements of due process, see *Ortiz*, 527 U.S. at 845-848; *Amchem*, 521 U.S. at 620; *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 812 (1985), the extent to which those limits are respected in the lower courts varies widely. Compare, *e.g.*, *Wershba* v. *Apple Computer, Inc.*, 110 Cal. Rptr. 2d 145, 158 (Cal. Ct. App. 2001) (California courts "are not bound to follow the certification requirements of Rule 23") with *Amchem*, 521 U.S. at 626 n.20 (noting that the due process adequacy-of-representation requirement tends to merge with the typicality and commonality requirements of Rule 23). Disagreement on such a fundamental and practically significant constitutional question should not be tolerated. At a minimum, the Ninth Circuit should not be allowed to continue its open and notorious violation of the Rules Enabling Act by allowing class procedures to alter substantive rights. See *Hilao*, 103 F.3d at 786-787; Pet. App. 105a-110a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AMICUS
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BRIEF

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In the

Supreme Court of the United States

◆

WAL-MART STORES, INC.,

Petitioner,

v.

BETTY DUKES, et al.,

Respondents.

◆

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

◆

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

◆

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QUESTION PRESENTED

Does Federal Rule of Civil Procedure 23 authorize the certification of a class where the plaintiff alleges that the absence of an employment policy is itself a discriminatory policy that inflicts a "common injury" on the members of that class?

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Miscellaneous

Berry, Stephen, *Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action*, 80 Colum. L. Rev. 299 (1980) 17

Coffee, John C., Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343 (1995) 19

Green, Tristin K., *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 Fordham L. Rev. 659 (2003) 10-11

Handler, Milton, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 Colum. L. Rev. 1 (1971) 18-19

Kirk, Sarah, *Ninth Circuit Discrimination Case Could Change the Ground Rules for Everyone*, 14 Tex. Rev. Law & Pol. 163 (2009) 12

La Fetra, Deborah J., *Freedom, Responsibility, and Risk: Fundamental Principles Supporting Tort Reform*, 36 Ind. L. Rev. 645 (2003) 2

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La Fetra, Deborah J., *A Moving Target: Property Owners' Duty to Prevent Criminal Acts on the Premises*, 28 Whittier L. Rev. 409 (2006) 2

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioner.[1] PLF was founded more than 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF engages in research and litigation over a broad spectrum of public interest issues at all levels of state and federal courts, representing the views of thousands of supporters nationwide who believe in limited government, individual rights, and free enterprise. PLF's Free Enterprise Project engages in litigation, including the submission of amicus briefs, in cases affecting America's economic vitality, and in particular in cases involving the abuses of civil rights law and class action procedures which harm businesses, and stifle entrepreneurialism and job creation. *See, e.g., Barber v. American Airlines*, No. 110092 (Ill. filed Mar. 18, 2010); *In re Tobacco II Cases*, 207 P.3d 20 (Cal. 2009); *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301 (11th Cir. 2009). PLF participated as amicus in this case before the Ninth Circuit.

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

In addition, PLF staff have published extensively on the effects of tort liability on the business community. *See, e.g.*, Timothy Sandefur, *The Right to Earn a Living* 239-55 (2010); Deborah J. La Fetra, *Freedom, Responsibility, and Risk: Fundamental Principles Supporting Tort Reform*, 36 Ind. L. Rev. 645 (2003); Deborah J. La Fetra, *A Moving Target: Property Owners' Duty to Prevent Criminal Acts on the Premises*, 28 Whittier L. Rev. 409 (2006). PLF believes its public policy experience will assist this Court in considering the merits of this case.

SUMMARY OF REASONS FOR GRANTING THE PETITION

The decision below, in conflict with decisions in other circuits, and relying on an ambiguous sentence in a footnote of this Court's decision in *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147 (1982), upheld class certification despite the fact that the class members alleged a wide variety of *dissimilar* injuries resulting from the *absence* of a common employment policy. The Ninth Circuit allowed this because it was "well established" that a corporation's decision not to have a single policy, but to allow local store managers to make hiring and promotion decisions autonomously, qualified as a single policy. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 612 (9th Cir. 2010). Such a principle is *not* well established; indeed, it rests on ambiguous language in a single footnote which is so unclear as to have given rise to substantially different decisions in the courts of appeals and district courts.

The Fourth, Sixth, and D.C. Circuits have rejected this interpretation of the *Falcon* footnote, because the procedure allowed by the Ninth Circuit here would essentially allow class plaintiffs to evade Rule 23's commonality requirement by sweeping together a broad array of diverse injuries as a single injury. In context, *Falcon* does not appear to countenance such an approach, but this Court's review is necessary to clarify this point, and set forth the circumstances in which "excessive subjectivity" can qualify as a single injury for purposes of class certification. If upheld, the precedent established below would dramatically alter class action litigation, expose virtually every employer to unforseen—and unforeseeable—liability, increase the cost of business, and hamper innovation and job creation. The enormity of the class in this case is alone enough to warrant Supreme Court review, but the legal basis for that certification is so unprecedented and its consequences so extreme that certiorari is essential.

ARGUMENT

I

THE DECISION BELOW CONFLICTS WITH OTHER COURTS' APPLICATION OF *FALCON'S* "SUBJECTIVITY" DICTUM, GIVING THE GREEN LIGHT TO CASES SEEKING TO RESOLVE SOCIETAL GRIEVANCES

A. There Is Substantial Confusion Over the Meaning and Application of *Falcon*'s "Subjectivity" Dictum

Wal-Mart's decentralized corporate structure leaves decisions regarding hiring and promotion to be made at the local level, by managers who are in the best position to know the strengths and character of their employees. Wal-Mart essentially *has no* single corporate employment policy, choosing to rely instead on the judgment of myriad autonomous managers all over the United States, rather than demanding adherence to a single authority or rulemaker. As a district court observed in similar circumstances, the class here consists "of a large number of plaintiffs spread across a number of geographically widespread facilities," and whose complaints refer to employment decisions that "are subject to local control." *Zachery v. Texaco Exploration & Prod., Inc.*, 185 F.R.D. 230, 239 (W.D. Tex. 1999) (denying certification).

Yet by characterizing Wal-Mart's lack of any central policy as itself a central policy—a policy of "excessive subjectivity in personnel decisions"—the Ninth Circuit swept together a scattershot of completely different injuries and circumstances into one vaguely defined "common injury." This is analogous to a case in which a defendant is alleged to have committed the tort of conversion against one plaintiff, the tort of trespass against another, the tort of defamation against a third, and the crime of murder against a fourth, and in which all the plaintiffs attempt to describe themselves as victims of the defendant's single policy of "unfair conduct." Such a legal standard would be unconstitutionally vague, *Skilling v. United States*, 130 S. Ct. 2896, 2928 (2010), and would deprive the defendant of its due process right to defend itself in court. *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007). Yet thanks to the Ninth Circuit's interpretation of an ambiguous footnote in *Falcon*, 457 U.S. at 159 n.15, the court below allowed something very similar: a gargantuan class consisting of countless different people complaining of countless different incidents are permitted to assert that their injuries are a common injury from an allegedly unitary policy of unfair treatment, and thereby qualify as a class. *Dukes*, 603 F.3d at 600-13.

Like virtually every federal decision in this contentious area of the law, the Ninth Circuit's conclusion rests heavily on one sentence in footnote 15 in *Falcon*. Lower courts have interpreted that footnote in different ways, creating substantial confusion over what standards apply to the certification of class actions in employment discrimination cases. Certiorari is warranted to clarify those standards and provide lower courts with guidance in determining when the commonality element is met in cases involving corporations that allow local managers broad discretion in making hiring and promotion decisions.

Falcon rejected the certification of a class in an employment discrimination case where the plaintiff who alleged that his employer failed to promote him because he was Mexican-American, wanted also to represent Mexican-American applicants for employment who had allegedly *not been hired* because of their race. This Court held that the fact that a plaintiff is a member of a minority group alleging one type of employment discrimination does not suffice to justify certifying a class consisting of plaintiffs alleging different types of employment discrimination. This is because there is a "wide gap" between, on one hand, the (alleged) fact that a plaintiff suffered discrimination by being denied a promotion, and, on the other hand, the conclusion that the plaintiff's injuries are of the same sort as those of purported class members who had never been hired. 457 U.S. at 157. To connect these two points required the plaintiff to prove, among other things, that the alleged discrimination "is reflected in [the defendant's] other employment practices . . . in the same way it is manifested in the promotion practices." *Id.* at 158. Regarding any such inference as "tenuous," this Court then commented in a footnote that if an employer "operated under a general policy of discrimination," evidence to that effect "conceivably could justify" class certification "if the discrimination manifested itself . . . in the same general fashion, such as through entirely subjective decisionmaking processes." *Id.* at 159 n.15. The decision below interpreted this language as allowing a class to demonstrate commonality by showing the existence of "subjective decisionmaking processes."

This sentence was non-binding dictum, and provided no explanation of what types of "decision making processes" can and cannot be grouped together as a single source of injury. Moreover, an earlier sentence in the same footnote indicates that the presence of subjectivity is only relevant if it is an *aspect of a common policy* that gives rise to common injuries; if subjectivity, for example, is a feature of "a biased test[]" which all members of the class are required to take. *Id.* The test would then be the common injury, of which subjectivity was the allegedly discriminatory feature.

This Court applied *Falcon* consistent with this narrow approach in *Gratz v. Bollinger*, 539 U.S. 244, 267 (2003). There, the Court considered whether a class maintained by a student applying for transfer to the University of Michigan could include students who were applying for admission as freshmen. Relying on *Falcon*'s hypothetical "biased testing procedure to evaluate both applicants for employment and incumbent employees," the Court held that the class could encompass both types of admissions candidates because the transfer policy and the freshman admissions policy were fundamentally the same. *Id.* at 267 and 266 n.16.

Circuit courts have reached different conclusions in their attempts to apply the ambiguous language of the footnote in *Falcon*. In *Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639 (6th Cir. 2006), women working at a correctional institution sought class certification to represent women who had suffered from what they called their employers' "general policy of discrimination," a designation covering alleged discrimination in promotions, denials of leave and overtime, undesirable assignments, and being replaced by men. *Id.* at 642. The Sixth Circuit reversed the certification, noting that if a class could be certified on the mere basis that an employer's general attitude was discriminatory, "every plaintiff seeking to certify a class in a Title VII action would be entitled to that certification." *Id.* at 644. The *Reeb* plaintiffs had tried to leverage *Falcon* in the same manner as the court below, arguing that "the *Falcon* case allows for a finding of commonality whenever a plaintiff asserts that an employer's decision-making with regard to all employees in the protected group manifests itself in the same general fashion." *Id.* at 644-45. But the Sixth Circuit rejected this reading of *Falcon*, holding that "this argument ignores the fact that the same general policy of discrimination can affect many different aspects of employment, such as hiring, firing, promoting, giving benefits, providing vacation time, or delegating work assignments." *Id.* at 645. Thus, "a general policy of discrimination is not sufficient to allow a court to find commonality or typicality." *Id.* at 645.

The Fourth Circuit has also taken a narrow view of the class certification permitted under the *Falcon* decision. In *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 318 (4th Cir. 2006), the court held that "to protect . . . the right of the defendant to present facts or raise defenses that are particular to individual class members," judges should take care to ensure that members of a purported class have been injured in the same way by the same challenged policy. The purported class in that case consisted of 1.4 million insurance policy holders, *id.* at 314, who asserted that the insurance company discriminated against them on the basis of race. The court found that certification was improper because to determine whether the plaintiffs' claims were brought within the statute of limitations would "generally require individual examination of testimony from each particular plaintiff to determine what he knew and when he knew it." *Id.* at 320.

In *Love v. Johanns*, 439 F.3d 723 (D.C. Cir. 2006), the D.C. Circuit rejected class certification in a case in which a group of women farmers sued the United States Department of Agriculture for discriminating against them by denying them loans. They tried to group the various circumstances of their loan applications and denials as a single common source of injury for purposes of the commonality element in Rule 23, and asserted that this was permitted under *Falcon*. The court of appeals disagreed. The plaintiffs' allegations "differ[ed] widely, and their complaints of discrimination [were] interspersed with nondiscriminatory evidence and innocuous explanations." *Id.* at 729. Thus while the plaintiffs had standing "to bring *individual* suits," the circumstances of their loan applications and denials differed too much for the trial court to "infer the existence of a 'common policy of discrimination.' The bald allegation that the declarants and non-declarants alike are unified by a 'common policy' of gender discrimination is insufficient to show the District Court abused its discretion under . . . *Falcon*." *Id.* at 729. Likewise, in *Hartman v. Duffey*, 19 F.3d 1459, 1472 (D.C. Cir. 1994), the court of appeals concluded that *Falcon* requires plaintiffs to "make a significant showing to permit the court to infer that members of the class suffered from a common policy of discrimination that pervaded all of the employer's challenged employment decisions." By contrast, the Ninth Circuit in this case relied on *Falcon* to encompass all these disparate contentions into a single "common" claim.

B. The Decision Below Allows Plaintiffs to Sue Over General Social Grievances Instead of Actual Cases or Controversies

Jurisdictional rules like standing and the case-or-controversy requirement exist to prevent the exploitation of judicial authority by parties asserting abstract political or social grievances that are more properly addressed to the Legislature. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 218-19 (1974). But the rationale adopted by the Ninth Circuit below expands the scope of potential class action lawsuits in a way that allows plaintiffs to sue businesses for the abstract "unfairness" of their corporate structures. By allowing a class with completely different injuries under a variety of diverse circumstances to cast their claims as the result of a common "excessive subjectivity" injury, the Ninth Circuit's decision empowers plaintiffs to challenge the undesigned consequences of millions of independent transactions as if those outcomes were a single discriminatory policy. *See* Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 Fordham L. Rev. 659, 688 (2003) (lawsuits like this case "seek . . . organizational change" to eliminate "subtle, often unconscious bias in individuals").

As one district court observed, "'[e]xcessive subjectivity' . . . is a *criticism*, not an actual company-wide policy or *practice*. Without some evidence of the class-wide use of common decisional criteria or practices, Plaintiffs have failed to show the requisite commonality." *Grosz v. Boeing Co.*, No. SACV-02-71-CJC, 2003 U.S. Dist. LEXIS 25341, at *16-*17 (C.D. Cal. Nov. 7, 2003), *aff'd*, 136 Fed. Appx. 960 (9th Cir. 2005) (emphasis added, citation omitted). The class action procedure does not exist to vindicate generalized social grievances, or to allow plaintiffs to sue over "a kaleidoscope" of perceived unfair practices. *Dukes*, 603 F.3d at 652 (Kozinski, C.J., dissenting).

As Professor Green explains, *supra*, at 710-11, the "excessive subjectivity" rationale is intended to "alter the specific organizational structures or institutional practices that may continue to enable ongoing discrimination," rather than to redress a concrete and particular injury; this rationale "does not depend, in other words, on influencing individual decision makers." Although Green concedes that "modern-day organizations do not subscribe to decentralized, subjective decision-making systems to discriminate" intentionally, she contends that decentralized procedures result in disparate outcomes "because workers are influenced more subtly on a day-to-day basis by forms of cognitive and motivational bias . . . . Subjectivity in decision making in the modern workplace must be seen as part of a larger problem of organizational influence on decisions made by individuals and groups." These unconscious biases "need[] to be understood as a contextual problem that depends on cultural and structural variables that may vary from institution to institution." The "complexity" of this "problem of institutionally enabled discrimination" demands "an equally complex, contextual remedial process." *Id.* at 713-14. Whatever merit these sociological arguments may have, the very complexity and abstraction involved indicates that these concerns do not constitute "a particular injury caused by the action challenged as unlawful." *Schlesinger*, 418 U.S. at 221.

The theory applied by the Ninth Circuit in this case—which "is inevitably in tension with the class requirements of commonality and predominance"—would "permit[] sweeping challenges to company-wide practices and make[] class lawsuits more likely." Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. Rev 367, 377 (2008). Plaintiffs could sue businesses for widely different, ill-defined harms, all grouped together (strategically, but without any principled likeness) as a single common source of injury.

The purpose of class action litigation is to combine identical or nearly identical claims; not to ignore the differences between diverse claims. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 609 (1997) (denying certification where purported class members "were exposed to different asbestos-containing products, in different ways, over different periods, and for different amounts of time; some suffered no physical injury, others suffered disabling or deadly diseases"). The court below, however, reads the *Falcon* footnote as allowing precisely that: any number of different decisionmakers, overseeing an indefinite array of positions in myriad different geographical locales, are treated as a single employment policy and thus as a "common" source of injury for the members of this exceptionally large class. Such an interpretation of *Falcon's* footnote 15 is not only implausible, but abusive: it allows courts to find commonality precisely in the fact that there *is no* commonality.

Such a procedure is too vague to satisfy the requirements of due process. In cases relying on the "excessive subjectivity" argument, trial lawyers generally "argue the case to a jury using broad generalities in order to get some sweeping condemnation of the 'atmosphere' of the employer," or asserting that the business had a "discriminatory culture. It is virtually impossible to defend against abstract claims of that kind." Sarah Kirk, *Ninth Circuit Discrimination Case Could Change the Ground Rules for Everyone*, 14 Tex. Rev. Law & Pol. 163, 166 (2009).

II

THE DECISION BELOW CONFLICTS WITH DECISIONS DENYING CLASS CERTIFICATION FOR PLAINTIFFS ALLEGED TO HAVE SUFFERED A VARIETY OF INJURIES FROM A VARIETY OF CAUSES

The purpose of class action lawsuits is to provide a mechanism whereby a large group of people who have suffered the same injury or similar injuries on account of the defendant's conduct to pool their right of recovery and sue, in circumstances where each person's injury is too small to make it feasible for a particular individual to sue. *See Califano v. Yamasaki*, 442 U.S. 682, 701 (1979). The prototypical case is one in which a flawed product or fraudulent service is used by many people, inflicting the same, small injury on each of them. The victims would normally not invest the time and money needed to bring a lawsuit. But the class action device enables them to obtain representation together and recover for their common injuries. *See Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997).

Title VII does allow a plaintiff who "demonstrate[s] to the court that the elements of a [defendant's] decisionmaking process are not capable of separation for analysis" to characterize "decisionmaking process . . . as one employment practice." 42 U.S.C. § 2000e-2(k)(B)(i). But as the D.C. Circuit pointed out in *Garcia v. Johanns*, 444 F.3d 625, 633 n.10 (D.C. Cir. 2006), this statute sets forth the elements for a cause of action, and does not alter Rule 23's "commonality" requirement. *Accord*, *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 572 (6th Cir.

2004). The two must not be conflated. Rule 23 still requires a plaintiff to "show that the putative class members have something in common—they all suffered an adverse effect from *the same facially neutral policy*—and their showing must be 'significant.'" *Garcia*, 444 F.3d at 633 n.10 (emphasis added, citations omitted).

The *Garcia* court observed that it was "particularly difficult" to certify a class that alleges that it was harmed by "multiple decisionmakers with significant local autonomy." *Id.* at 632. Other Circuit Courts of Appeals have likewise refused to certify classes in which the defendant decisionmakers enjoyed broad autonomy, were geographically separated, and where the hiring and promotion decisions at issue included the assessment of many different factors. In *Bacon*, 370 F.3d at 571, the Sixth Circuit found no abuse of discretion in denying certification of a class of 800 past and present African-American employees alleging discrimination in promotions at four separate facilities of defendant over a twenty-year period. The court noted,

> Plaintiffs failed to show how hourly wage earners and salaried employees would have the same interests, especially in terms of promotion procedures in which at least some of the nonexempt employees would be competing to join the ranks of exempt management. They also did not demonstrate how differing promotion criteria for jobs as diverse as welding, accounting, and engine-building could discriminate against each African-American employee.

Id. Similarly, in *Cooper v. Southern Co.*, 390 F.3d 695, 714-15 (11th Cir. 2004), *overruled in part on other grounds*, *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 458 (2006), the Eleventh Circuit found no abuse of discretion in denying class certification where "the compensation and promotion decisions affecting each of the named plaintiffs were made by individual managers in disparate locations, based on the individual plaintiffs' characteristics, including their educational backgrounds, experiences, work achievements, and performance in interviews, among other factors." *See also Stastny v. S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 278-79 & nn.17, 19 (4th Cir. 1980) (class certification denied to employees working in twenty-four different facilities throughout the state, with a "general pattern of local autonomy").

In *Gutierrez v. Johnson & Johnson*, 467 F. Supp. 2d 403 (D.N.J. 2006), the district court refused to certify a large class of employees in an employment discrimination case for similar reasons. Like the plaintiffs in this case, the plaintiffs in *Gutierrez*

> [did] not challenge an express policy of [the corporate defendant]. Nor do they dispute that the employment policies and practices varied widely from operating company to company. Rather, Plaintiffs' theory of commonality is that Johnson & Johnson's policy of delegating discretion to the operating companies to implement general employment guidelines resulted in excessively subjective employment practices.

Id. at 409. But this was insufficient to satisfy the commonality requirement because, under *Falcon*, "Plaintiffs must identify a specific policy or practice of discrimination that was excessively subjective." *Id.* at 410.

Other district courts have also refused to certify classes in circumstances like this, concluding that "a decision by a company to give managers the discretion to make employment decisions, and the subsequent exercise of that discretion by some managers in a discriminatory manner, is not tantamount to a decision by a company to pursue a systematic, companywide policy of intentional discrimination." *Sperling v. Hoffman-La Roche, Inc.*, 924 F. Supp. 1346, 1363 (D.N.J. 1996); *see also Webb v. Merck & Co., Inc.*, 206 F.R.D. 399 (E.D. Pa. 2002); *Wright v. Circuit City Stores, Inc.*, 201 F.R.D. 526, 541 (N.D. Ala. 2001) ("The purported class is comprised of a large group of diverse and differently situated employees whose highly individualized claims of discrimination do not lend themselves to class-wide proof."); *Lott v. Westinghouse Savannah River Co., Inc.*, 200 F.R.D. 539, 552-53 (D.S.C. 2000) ("the true nature of the suit is a consolidation of 99 separate accounts of individualized disparate treatment"); *Abram v. UPS of Am., Inc.*, 200 F.R.D. 424, 430 (E.D. Wis. 2001) ("The decision to permit some consideration of subjective factors is not, in and of itself, a discriminatory practice that provides the unifying thread necessary for 'commonality' to exist.").

Class certification in this case conflicts with the decisions cited above because it allows Plaintiffs to satisfy the commonality requirement of Rule 23 by alleging that the employer's *lack of* a general policy *is a kind of* discriminatory policy—that is, to prove commonality by the very fact that they lack commonality. By christening their grab-bag of diverse alleged harms as a common consequence of a single policy, the Plaintiffs are able to essentially sue Wal-Mart for having an "unfair" corporate structure, skimming over the manifold differences between each incident of alleged discrimination.

III

RULE 23'S BALANCE OF PUBLIC POLICY CONCERNS IS UNDERMINED BY THE OVERLY EXPANSIVE CLASS CERTIFIED IN THIS CASE

The class certification decision below calls for this Court's review now, rather than later, because in class action lawsuits the certification decision often qualifies as a *de facto* guilty verdict. Particularly in cases involving exceptionally large classes, defendants cannot afford the risk of an award of damages, and are essentially forced to settle the case to survive. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165 (3d Cir. 2001) ("[A]n adverse certification decision will likely have a dispositive impact on the course and outcome of the litigation."); *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle."). *See also* Stephen Berry, *Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action*, 80 Colum. L. Rev. 299, 300-01 (1980) ("The enormous potential damage exposure that flows from a certification decision often pressures defense counsel into early settlements regardless of their perception of the merits of the case."); John K. Rabiej, *The Making of Class Action Rule 23: What Were We Thinking?*, 24 Miss. C. L. Rev. 323, 354 (2005) ("Even though the defendant would likely prevail if the class action went to trial, defendants often [are] not willing to accept the small risk of defeat, which might ruin their companies.").

Armed with the enormous advantage of class status, a plaintiff need not prove a case or even provide any evidence of duty, breach, causation, or damages before obtaining a windfall settlement from a business defendant that cannot afford the risk of offering even meritorious defenses and incurring the expense of litigation in addition to damages. As the Fourth Circuit observed, class treatment can hide the weaknesses in the claims of individual plaintiffs because the plaintiffs collectively are "able to litigate not on behalf of themselves but on behalf of a 'perfect plaintiff' pieced together for litigation." *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 344 (4th Cir. 1998). Moreover, "[i]f claims are not subject to some level of individual attention, defendants are more likely to be held liable to claimants to whom they caused no harm." *Sw. Ref. Co., Inc. v. Bernal*, 22 S.W.3d 425, 438 (Tex. 2000).

This abuse weakens the rule of law and drives up the costs of living for consumers. "Any device which is workable only because it utilizes the threat of unmanageable and expensive litigation to compel settlement is not a rule of procedure—it is a form of legalized blackmail." Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust*

Suits—The Twenty-Third Annual Antitrust Review, 71 Colum. L. Rev. 1, 9 (1971). The justice system—including class action procedures—was created to allow injured parties an opportunity for redress, not to empower profiteering plaintiffs' attorneys to enrich themselves. *Deposit Guar. Nat'l Bank of Jackson, Miss. v. Roper*, 445 U.S. 326, 339 (1980) ("That there is a potential for misuse of the class-action mechanism is obvious. Its benefits to class members are often nominal and symbolic, with persons other than class members becoming the chief beneficiaries.").

In certifying the class here, the Ninth Circuit gave in to "well-nigh irresistible pressure to bend the normal rules." *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1304 (7th Cir. 1995). Once bent, legal rules tend to stay bent, and legal rationalizations tailor-made for one context will inevitably be cited and, to a considerable extent, followed in other cases as well. John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1462-63 (1995). This case should be reviewed now, before the certification order coerces Wal-Mart into a settlement that deprives this Court of the opportunity to address the important issues of Rule 23's commonality requirement.

◆

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: September, 2010.

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AMICUS
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BRIEF

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IN THE

Supreme Court of the United States

WAL-MART STORES, INC.,
Petitioner,
v.
BETTY DUKES, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RETAIL LITIGATION CENTER, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER WAL-MART STORES, INC.

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STATEMENT OF INTEREST AND INTRODUCTION[1]

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and engages in legal proceedings which affect the retail industry. The RLC, whose members include some of the country's largest retailers, was formed to provide courts with retail industry perspectives on significant legal issues, and highlight the potential industry-wide consequences of legal principles that may be determined in pending cases.

RLC's members employ many thousands of persons in several states, multiple regions, and myriad stores across the nation. They endeavor to honor and abide by the laws that govern their activities, including laws that prohibit discrimination on the basis of gender and other protected grounds. They have and enforce policies forbidding discrimination. And they take pride in the talented and diverse workforces they employ.

Nonetheless, RLC's members can find themselves vulnerable to unjustified class action litigation that can have debilitating effects on their businesses and reputations. The large size and national scope of many retailers make them attractive targets to aggregated suits, whatever the strength of a given individual claim. The Ninth Circuit's misguided and expansive interpretation of the class action rules paves the way for enterprising plaintiffs and their counsel to seek and obtain certification of potentially significant class sizes with little evidence to establish a discriminatory practice by the employer. Once certified, a class can exert tremendous and unjustifiable leverage on the retailers to settle, with the resulting reputational harm. RLC's members cannot afford to pay exorbitant settlements for class actions that should not be certified in the first place. Nor should they have to

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[1] Pursuant to Supreme Court Rule 37.2(a), *amicus curiae* states that the parties received timely notice of the intent to file this brief, and that the parties consented to its filing. Pursuant to Rule 37.6, *amicus curiae* further states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or their counsel made such a monetary contribution.

The risk that RLC's members will suffer such harm becomes markedly higher if this Court does not correct the decision below. Many retail companies base employment decisions on subjective, as well as objective, measures that help them to identify workers whose creativity, diligence, and other intangible qualities may not show up in standardized evaluation methods. Similarly, many retail companies delegate part of their promotion and other employment decisions to on-site managers who are closest to workers, and so are also best able to identify employees whose advancement will most help the company. This Court's decisions recognize that those employment practices are entirely appropriate. RLC's members are therefore troubled by the Ninth Circuit's unprecedented certification of a class of over one million employees based on allegations that the use of subjective criteria in employment may mask discrimination in individual cases.

Specifically, the Ninth Circuit crucially erred in disregarding the standard that this Court established in *General Telephone Company of the Southwest* v. *Falcon*, 457 U.S. 147 (1982), for certifying classes in cases alleging violations of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq.* Under *Falcon*, the fact that one or more employees sharing a common protected trait allege discrimination does not justify class certification under Federal Rule of Civil Procedure 23. A plaintiff must provide "[s]ignificant proof that an employer operated under a general policy of discrimination." The Ninth Circuit disregarded that instruction, finding instead that "[p]laintiffs here need not meet" the "significant proof" standard. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 595 (9th Cir. 2010). Instead, the Ninth Circuit affirmed the district court's superficial review of the plaintiffs' thin evidence. In so doing, the Ninth Circuit allowed a handful of plaintiffs to claim that allegations of isolated discrimination in a fraction of Wal-Mart's stores entitled them to represent roughly a million women who work or once worked at every Wal-Mart store in the country, in a wide range of positions, and at all levels of salary. RLC members are especially concerned that the Ninth Circuit ignored *Falcon*'s instruction on class actions, because this Court directed its language at precisely the sort of situation at issue in this litigation, in which an employer uses subjective standards as part of its promotion system.

Finally, with this decision, the Ninth Circuit has turned its back on the "significant proof" standard that other circuits have embraced, and therefore is in direct conflict with other circuit courts. This conflict concerns RLC's members because it opens the door for plaintiffs to bring similarly massive class actions throughout the populous Ninth Circuit against large national retailers, even where there is no "significant proof" of common elements between class members and those who claim to serve as their representatives.

Falcon warned that "[i]f one allegation of specific discriminatory treatment were sufficient to support an across-the-board attack, every Title VII case would be a potential companywide class action." 457 U.S. at 159. This case proves that point. Before the Ninth Circuit's decision permits massive class actions to wreak havoc on retailers, this Court should grant Wal-Mart's petition for certiorari and reverse the decision below.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT FAILED TO REQUIRE SIGNIFICANT PROOF OF A GENERAL POLICY OF DISCRIMINATION BEFORE CLASS CERTIFICATION, AS REQUIRED BY *FALCON*.

Falcon forecloses class certification in this case. *Falcon* held that a plaintiff could not act as a class representative for a wide-ranging "across-the-board" class action consisting of all Mexican-American persons who worked for the employer, or who had applied to work for the employer. 457 U.S. at 160-161. The Court explained that certification conflicted with the conceptually "wide gap" between the individual's claim of discrimination and a class that shares the same protected trait. *Id.* at 157. "[T]o bridge that gap," the Court held, the class representative must make a "specific presentation identifying the questions of law or fact" that the putative class representative has in common with the putative class. *Id.* at 158.

Falcon further concluded that a higher showing was necessary if the plaintiff asserts that the employer used "subjective decision-making processes." *Id.* at 159 n.15. In such situations, certification was conceivable only if there is "[s]ignificant proof that an employer operated under a general policy of discrimination." *Id.* That heightened standard applies because "Title VII prohibits discriminatory employment *practices*, not an abstract policy of discrimination." *Id.* (emphasis in original). It follows that "[t]he mere fact that an aggrieved private plaintiff is a member of an identifiable class of persons of the same race or national origin is insufficient to establish his standing to litigate on their behalf." *Id.*

As Judge Ikuta's dissent below points out, *Falcon* had no occasion to define with precision the "significant proof" required for class certification in these circumstances. *Dukes*, 603 F.3d at 632 (IKUTA, J., dissenting). Nonetheless, *Falcon* forecloses the Ninth Circuit's expansive and unprecedented certification in this case. *Falcon* requires courts to perform a "rigorous analysis" and "evaluate carefully" a plaintiff's claim that he is an appropriate class representative, and the decision further instructs that "it may be necessary for the court to probe behind the pleadings." *Falcon*, 457 U.S. at 160-161. As Judge Ikuta stated, *Falcon* at the very least makes clear that "[e]vidence of discrete instances of discrimination are insufficient to sustain an inference of an employer's general policy and do not rise to the level of 'significant proof.'" *Dukes*, 603 F.3d at 632 (IKUTA, J., dissenting).

Rather than conscientiously apply this standard, the Ninth Circuit disregarded it. The majority below held that a requirement of "significant proof" "is an unusually high standard that Plaintiffs here need not meet." *Dukes*, 603 F.3d at 595. The majority offered up a litany of reasons to ignore this Court's instructions: the standard is allegedly merely dicta; it is limited to the "distinct legal theories of recovery" that the plaintiff in *Falcon* itself alleged; and it is only "a demonstrative example." *Id.* at 595-596. These do not persuade, given that *Falcon's* "significant proof" standard is the Supreme Court's only discussion of the standard for class actions in Title VII cases, especially when plaintiffs allege excessive subjectivity in making employment decisions. Even the majority admits that it may not "shrug[] off" statements of this Court "because they were not a holding." *Dukes*, 603 F.3d at 595 n.15 (internal punctuation and citation omitted).

More important, aside from the fact that they worked for Wal-Mart, the only commonality that could justify a class here between the seven class representatives and the over one million class members is their sex. Certification here thus makes a mockery of the Court's admonishment, mentioned above, that the fact a putative class representative and members of the putative class are "persons of the same race or national origin is insufficient to establish his standing to litigate on their behalf." *Falcon*, 457 U.S. at 159 n.15.

Perhaps because it understood the significance of this Court's instruction in *Falcon*, the majority at one point confusingly claimed that the "[p]laintiffs here *have* introduced 'significant proof.'" *Id.* at 597 (emphasis added). But they have not. As Judge Ikuta's dissent points out, the plaintiffs' evidence is deeply flawed. The purported class representatives offer disturbingly few affidavits for the size of the class they purport to represent, and their experts' findings are superficial. *Dukes*, 603 F.3d at 634-642 (IKUTA, J., dissenting). For example, one of the plaintiffs' experts claimed to have found a trend of discrimination at Wal-Mart's stores, even though the expert failed to analyze data at the level of each store, instead looking to more generalized data that encompassed whole regions of Wal-Mart's structure. *Id.* at 636. The district court's failings were equally serious. As Judge Ikuta convincingly explained, the district court accepted the plaintiffs' evidence without conducting a sufficiently close independent examination, as required by *Falcon*. The district court also inexplicably barred Wal-Mart from challenging the plaintiffs' evidence, improperly claiming that Wal-Mart's examination concerned questions related to the merits of the case. *Ibid.* That is hardly the "rigorous analysis" required by *Falcon*.[illegible]

II. "SIGNIFICANT PROOF" IS REQUIRED WHERE EMPLOYERS USE SUBJECTIVE JUDGMENTS IN MAKING EMPLOYMENT DECISIONS.

The Ninth Circuit's refusal to apply *Falcon's* "significant proof" standard is especially egregious because the plaintiffs' claims in this case involve precisely the sort of subjective decision-making that *Falcon* makes clear requires a heightened showing. As discussed above, the "significant proof" standard applies where the plaintiff claims that the employer used "subjective decisionmaking processes." *Falcon*, 457 at 159 n.15. That is unquestionably the situation

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[illegible] *Amicus* also fears that by disregarding the "significant proof" standard in the Title VII context, as occurred here, the Ninth Circuit may be setting a precedent that could spill over to other areas of law. If that were to occur, then plaintiffs' lawyers would have even more opportunities to force the aggregation of huge classes based on the claims of just a few individuals, even where they could not satisfy the commonality and typicality tests that Federal Rule of Civil Procedure 23 require.

here. The majority below acknowledged "the absence of a specific discriminatory policy promulgated by Wal-Mart." *Dukes*, 603 F.3d at 603. That should have prompted the majority to apply *Falcon's* heightened standard, applicable to claims alleging excessively subjective employment practices, to hold that class certification was plainly improper.

A "significant proof" test that applies to cases of subjective hiring is particularly apt in light of the Court's later confirmation that "an employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct." *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 990 (1988). Using subjective criteria is a perfectly legitimate, and effective, means of making employment decisions. "[E]mployment decisions are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify." *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 604 (2008). But instead of accepting the legitimacy of subjective hiring procedures, the Ninth Circuit disparaged them. The majority relied on the findings of one of the plaintiffs' experts who claimed that "substantial decisionmaker discretion tends to allow people to seek out and retain stereotyping-confirming information and ignore or minimize information that defies stereotypes." *Dukes*, 603 F.3d at 601. In casting aspersions on subjective decision-making in this manner, the majority disregarded this Court's instructions in *Falcon*, *Watson*, and *Engquist*.

In short, this Court has made clear that subjective decision-making is valid, and that class actions alleging discrimination on that basis must meet a high threshold of "significant proof." But the majority below went in the opposite direction by questioning the legitimacy of subjective decision-making and by refusing to apply the appropriate heightened standard. Because such a decision threatens to turn every subjective employment decision into a massive class action, this Court should grant review.

III. THE NINTH CIRCUIT DECISION CONFLICTS WITH MANY CIRCUITS THAT HAVE EMBRACED THE "SIGNIFICANT PROOF" STANDARD.

By refusing to follow the "significant proof" standard, the Ninth Circuit has glaringly split with other circuits. As is discussed above, the Ninth Circuit declined to rigorously apply the "significant proof" test to this case, or to facts that vary at all from what that this Court discussed in *Falcon*. Other circuits have not given this Court's statement so miserly an interpretation, and have used it to defeat class certification. Those courts' decisions include:

- **D.C. Circuit:** *Garcia* v. *Johanns*, 444 F.3d 625, 631-632 (D.C. Cir. 2006) ("Following *Falcon*, we have required a plaintiff seeking to certify a disparate treatment class under Title VII to make a significant showing to permit the court to infer that members of the class suffered from a common policy of discrimination that pervaded all of the employer's challenged employment decisions." (internal quotation marks omitted)).
- **Third Circuit:** *Goodman* v. *Lukens Steel Co.*, 777 F.2d 113, 124 (3d Cir. 1985) ("The findings of the district court, which rejected some of the plaintiffs' claims, belie the existence of a 'general policy' of discrimination and plaintiffs

did not produce 'significant proof' of such a scheme.").

- **Fourth Circuit:** *Holsey* v. *Armour & Co.*, 743 F.2d 199, 216 (4th Cir. 1984) ("[W]e conclude that the significant proof for . . . class treatment required by *Falcon* is lacking in this case, and thus the plaintiffs cannot adequately represent the outside applicants for sales and supervisory positions.").
- **Fifth Circuit:** *Vuyanich* v. *Republic Nat'l Bank of Dallas*, 723 F.2d 1195, 1200 (5th Cir. 1984) ("Footnote fifteen of *Falcon* observed that if significant proof of a general policy of discrimination was present, it would justify an across-the-board class action. Such proof was not present here.").
- **Sixth Circuit:** *Reeb* v. *Ohio Dep't of Rehab. and Corr.*, 435 F.3d 639, 644 (6th Cir. 2006) ("[T]he Supreme Court's decision in [*Falcon*] requires plaintiffs requesting class certification in a case raising generalized Title VII discrimination claims to allege 'significant proof'") (some internal punctuation omitted).
- **Eleventh Circuit**: *Griffin* v. *Dugger*, 823 F.2d 1476, 1490 (11th Cir. 1987) (requiring "Significant proof that an employer makes both discriminatory hiring and promotion decisions using an entirely subjective decisionmaking process for each employment practice [which] is a manifestation of a general policy of discrimination.").

While circuit splits generally create risks for potential defendants, this one is particularly dangerous. If it stands uncorrected, the decision below will undoubtedly turn the Ninth Circuit into a favored forum for plaintiffs. The Ninth Circuit should not serve as a platform for massive class action suits against companies with operations across the country that do not meet the standards for certification.

*   *   *   *   *

Certiorari review is appropriate when an opinion disregards this Court's decisions, and also when an opinion conflicts with the decisions of other circuit courts. See Supreme Court Rule 10. The opinion below contains both of these flaws. Under it, retailers with nationwide operations face an unwarranted risk of massive class-actions arising in Ninth Circuit courts, even where there is no "significant proof" of a general policy of discrimination. This Court should reaffirm *Falcon*.

CONCLUSION

The petition for a writ of certiorari should be granted.

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AMICUS CURIAE BRIEF

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BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, KAREN WILLIAMSON, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, and CLEO PAGE, on behalf of themselves and all others similarly situated,
Respondents.

**On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit**

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QUESTION PRESENTED

More than a decade ago, this Court set forth a uniform standard for determining the reliability and admissibility of expert testimony in federal courts in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In certifying the largest employment class action in history, the district court, as affirmed by the Ninth Circuit, rejected application of the standard to plaintiff's expert offered in support of class certification. *Amicus curiae* addresses the following narrow question:

Whether this Court's mandate to rigorously analyze the requirements of Fed. R. Civ. P. 23 before certifying a class requires district courts to apply *Daubert* and ensure the reliability of expert testimony offered at the class certification stage.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation ("WLF") is a public interest law and policy center headquartered in Washington, D.C., with supporters nationwide.[1] WLF's primary mission is the defense and promotion of free enterprise, individual rights, and a limited and accountable government. In particular, WLF devotes a substantial portion of its resources to advocating and litigating against excessive and improperly certified class action lawsuits. Among the many federal and state court cases in which WLF has appeared to express its views on the proper scope of class action litigation are *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), *cert. denied*, 552 U.S. 941 (2007); *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996); *Conn. Retirement Plans and Trust Funds v. Amgen, Inc.*, No. 09-56965 (9th Cir., dec. pending); and *Gilchrist v. State Farm Mut. Auto. Ins. Co.*, 390 F.3d 1327 (11th Cir. 2004). WLF also filed briefs in this case when it was before the Ninth Circuit.

WLF is submitting this brief because it believes that the en banc panel committed legal error when it affirmed the district court's consideration of testimony from plaintiff's expert in support of class certification without determining whether the expert's opinions were reliable under the standards articulated by the Supreme Court in *Daubert*. WLF submits this brief because it is concerned that failing to test the reliability of expert testimony at class certification runs afoul of this Court's mandate that district courts conduct a "rigorous analysis" of whether Rule 23's prerequisites are met. Certifying a class on untested expert testimony casts aside the carefully crafted balance of plaintiffs' interests, defendant's interests, and judicial efficiency embedded in Rule 23.

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Ten days prior to the due date, counsel for WLF provided counsel for Respondents with notice of its intent to file this brief. All parties have consented to the filing of this brief, by lodging with the Court letters granting blanket consent to all *amicus curiae* briefs.

WLF has no direct interest, financial or otherwise, in the outcome of this case. Because of its lack of a direct interest, WLF believes that it can provide the Court with a perspective that is distinct from that of the parties.

STATEMENT OF THE CASE

Six women brought a nationwide class action on behalf of 1.5 million women alleging that Wal-Mart has across-the-board discriminatory policies and practices in all of its 3,400 stores, and that this discrimination is common to all women who work or have worked in a Wal-Mart store over the past decade. In support of class certification, plaintiffs and the district court relied in part on the testimony of Dr. William Bielby, a sociology expert who opined that gender stereotyping likely exists at Wal-Mart. As he has done against many other companies, Dr. Bielby testified that Wal-Mart's organizational structure made it "vulnerable" to gender stereotyping, but he could not say how often such stereotyping occurred in connection with employment decisions at the company. Pet. App. 195a. Indeed, as noted by the district court, *Dukes v. Wal-Mart*, 222 F.R.D. 189, 192 (N.D. Cal. 2004), Dr Bielby could not say that gender stereotyping occurred 95% or 0.5% of the time. Nonetheless, Dr. Bielby's testimony was crucial to plaintiffs' attempts to demonstrate how millions of discretionary and subjective decisions made by thousands of individual managers at the local level could meet Rule 23's commonality and typicality requirements.

Wal-Mart moved to strike Dr. Bielby's testimony under Rule 702 of the Federal Rules of Evidence and pursuant to *Daubert*, but the district court refused to test the reliability of expert testimony at the class certification stage. The district court reasoned that it was prohibited from applying the full *Daubert* standard under *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). *Dukes*, 222 F.R.D. at 191. Although the Ninth Circuit did not agree that *Eisen* precluded a court from delving into the merits at class certification if those merits overlapped with the Rule 23 inquiry, the court nevertheless rejected the necessity of applying the *Daubert* standard at the class certification stage. Pet. App. 57a n.22; *see also id.* at 133a-137a (Ikuta, J., dissenting) (discussing majority's failure to require the appropriate level of scrutiny of expert opinion in support of class certification as required by *Daubert*).

REASONS FOR GRANTING THE PETITION

In 2003, the Civil Rules Advisory Committee amended Fed. R. Civ. P. 23 to remove the provision that class certification "may be conditional." The amendment reflected the growing consensus among federal appellate courts that class certification should be denied unless a critical evaluation of the evidence supported findings that each of the Rule 23 requirements had been met. This often requires the judge to step into the role of fact finder and resolve disputed factual issues pertinent to determining whether Rule 23's requirements are met, even when those issues overlap with the ultimate merits of the case. The Ninth Circuit's approach in affirming class certification – deferring an evaluation of plaintiff's expert's opinions pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) – effectively resurrects conditional certification in the largest employment class action in history.

Such an approach falls far short of the rigorous class certification analysis mandated by this Court and followed by other circuits across the country. If not reversed, the court's implicit adoption of a lower admissibility threshold for expert opinion on class certification could have far-reaching, adverse effects, including making the district courts in the Ninth Circuit a magnet for the filing of class actions, certification a nearly foregone conclusion, and defendants a target of specious classwide claims. In addition, it could have serious adverse consequences on absent class members. The fundamental importance of the question of what evidentiary standards should be applied to class certification justifies this Court accepting Wal-Mart's petition for a writ of certiorari.

I. REVIEW IS WARRANTED BECAUSE RIGOROUS ANALYSIS OF THE RULE 23 REQUIREMENTS COMPELS EVALUATION OF THE RELIABILITY OF EXPERT TESTIMONY AT THE CLASS CERTIFICATION STAGE

This Court has mandated that trial courts conduct a "rigorous analysis" of the Rule 23 requirements, which "generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's causes of action." *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982). A "rigorous analysis" requires courts to make factual determinations and to not merely accept plaintiff's allegations as true. *Id.*; *see also* Pet. App. 13a ("district courts are not only at liberty to, but must, perform a rigorous analysis to ensure that the prerequisites of Rule 23 have been satisfied, and this will often, though not always, require looking behind the pleadings to issues overlapping with the merits of the underlying claims"); *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 677 (7th Cir. 2001) ("The proposition that a district judge must accept all of the complaint's allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it.").

Evidence proffered in support of the Rule 23 requirements must be carefully scrutinized and weighed against competing evidence or argument. "A district judge may not duck hard questions by observing that each side has some support . . . . Tough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives." *West v. Prudential Securities, Inc.*, 282 F.3d 935, 938 (7th Cir. 2002); *see also Tardiff v. Knox County*, 365 F.3d 1, 4 (1st Cir. 2004) ("in our view a court has the power to test disputed premises early on if and when the class action would be proper on one premise but not on another"); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir 2004); *Blades v. Monsanto Co.*, 400 F.3d 562, 575 (8th Cir. 2005) ("a court may be required to resolve disputes concerning the factual setting of the case," which "extends to the resolution of expert disputes concerning the import of evidence"); *Cooper v. Southern Co.*, 390 F.3d 695, 712 (11th Cir. 2004).

Expert testimony is no different than any other form of evidence relevant to a Rule 23 inquiry. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 323 (3d Cir. 2008); *In re Public Offering Securities Litig. ("IPO")*, 471 F.3d 24, 42 (2d Cir. 2006); *West*, 282 F.3d at 938. But before a court may even begin to evaluate whether expert testimony supports a finding that Rule 23's requirements are met, it must first determine whether the expert testimony is reliable. As the Fifth Circuit observed, "[i]n order to consider Plaintiffs' motion for class certification with the appropriate amount of scrutiny, the Court must first determine whether Plaintiffs' expert testimony supporting class certification is reliable." *Unger v Amedisys Inc.*, 401 F.3d 316, 325 (5th Cir 2005) (citation omitted) (court "must engage in a thorough [class certification] analysis, weigh the relevant factors, require both parties to justify their allegations, and base its ruling on admissible evidence"); *see also Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 816 (7th Cir 2010) (per curiam) ("The court must also resolve any challenge to the reliability of information provided by an expert if that information is relevant to establishing any of the Rule 23 requirements for class certification.").

The Seventh Circuit similarly endorsed a rigorous review of expert opinion testimony in *West* when it held that it would "amount[] to a delegation of judicial power to the plaintiffs" to permit them class certification merely because they have the support of an expert. *West*, 282 F.3d at 938; *see also Polymedica Corporate Securities Litigation*, 432 F.3d 1, 17 (1st Cir. 2005) (holding that court "must evaluate the plaintiff's evidence . . . critically"). And now that *Falcon* has made clear that *Eisen* does not bar consideration of issues on class certification that overlap with merits issues – such as the reliability of an expert's testimony – there is no justification for not requiring the same scrutiny of expert testimony by the district courts in the Ninth Circuit.

This Court has established a standard for evaluating the reliability of expert testimony in federal court – *Daubert*. *Daubert* established a non-exhaustive list of guideposts to evaluate the reliability, and thus admissibility, of an expert's opinions, including whether the theory has been tested and subjected to peer review and publication, and whether it is generally accepted in the relevant scientific or technical community. *Daubert*, 509 U.S. at 593-94. In addition, the 2000 Advisory

Committee's Notes to Rule 702 recommended additional benchmarks, including whether the expert's opinions resulted from independent research or are a product of litigation; whether the expert has accounted for alternative explanations; and whether the expert was as careful in forming his opinions for litigation as he would be in his non-testifying professional work. There is no justification for requiring a lower standard at the class certification stage and every reason to apply the same standard for testing the reliability of expert testimony at every step of the litigation.

It is no wonder then that the Ninth Circuit's opinion in this case is an outlier. Every Circuit Court of Appeal to publish an opinion addressing this issue has determined that expert testimony must be carefully scrutinized during class certification. *See, e.g., Unger*, 401 F.3d at 324 ("[R]eliance on unverifiable evidence [in determining class certification] is hardly better than relying on bare allegations."); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 323 (noting that expert testimony should not be "uncritically accepted" even if it is found reliable under *Daubert*). Just a few months ago, the Seventh Circuit reversed class certification where the lower court relied on expert testimony without first resolving whether the testimony would be admissible under *Daubert*. *Am. Honda Motor Co.*, 600 F.3d at 815-16. Although the district court had "definite reservations" about the reliability of the expert's opinions, the court declined to conduct a full *Daubert* analysis at the early stage of the proceedings. *Id.* at 814-16. This, the Seventh Circuit determined, was an abuse of discretion. *Id.* at 816. Holding that "a district court must make the necessary factual and legal inquiries and decide all relevant contested issues prior to certification," the Seventh Circuit determined that the lower court's failure to evaluate plaintiff's expert's opinions pursuant to *Daubert* was a return to "provisional" class certification, a practice it has roundly rejected. *Id.* at 817.

The district court here refused to properly scrutinize Dr. Bilby's testimony, believing that *Eisen* prohibited such a review for purposes of class certification. *See Dukes*, 222 F.R.D. at 191. While it purported to determine that Dr. Bielby's opinions were not "fatally flawed," the Second Circuit in *IPO* expressly rejected the "fatally flawed" standard as an appropriate reliability standard. 471 F.3d at 42. The Ninth Circuit correctly rejected the district court's reading of *Eisen* as prohibiting an inquiry into facts overlapping with the merits of the case in analyzing the Rule 23 requirements, but it nevertheless erroneously adopted the mistaken corollary that *Daubert* should not apply at class certification because it is a merits-type inquiry. *See* Pet. App. 22a-25a, 31a, 57a n.22.

The Ninth Circuit's view is not supported by reason or the jurisprudence of this Court and marks a departure from other federal Courts of Appeal. If left undisturbed, the *Dukes* opinion will have far-reaching and adverse consequences on defendants and absent class members.

II. PERMITTING COURTS TO CONSIDER EXPERT TESTIMONY IN SUPPORT OF CLASS CERTIFICATION WITHOUT TESTING ITS RELIABILITY UNDER *DAUBERT* IS INEFFICIENT AND PREJUDICES DEFENDANTS AND ABSENT CLASS MEMBERS

Failure to test the reliability of plaintiff's expert testimony at the class certification stage as compelled by *Daubert* is inefficient at best and at worst prejudices the parties. Class certification dramatically raises the stakes in the litigation for defendants, often creating "insurmountable pressure . . . to settle" even weak claims (a situation tantamount to "judicial blackmail"). *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996). Defendants who bow under this pressure may never get the opportunity to compel the required scrutiny of plaintiffs' experts' testimony. *See Szabo*, 249 F.3d at 676 ("[A]n order certifying the class usually is the district judge's last word on the subject; there is no later test of the decision's factual premises (and if the case is settled, there could not be such an examination . . .)."). Moreover, forcing defendants to conduct classwide discovery and expend the resources necessary to reach the merits phase of a class action only to have it determined that the expert testimony on which the court based its class certification decision is unreliable is fundamentally unfair.

Finally, and perhaps more importantly, absent class members' rights may be substantially impaired or lost altogether when a class is certified based on unreliable expert testimony that is ultimately excluded following a full *Daubert* review. This is precisely why Rule 23 requires courts to probe beyond the pleadings and scrutinize the evidence to ensure that absent class members' interests are adequately represented and their rights are preserved.

As this Court observed in *Falcon*, in Title VII class actions, plaintiffs must bridge the gap between their individual claims of discrimination and "the existence of a class of persons who have suffered the same injury . . . such that the individual's claim and the class claims will share common questions of law and fact and that the individual's claim will be typical of the class claims." *Falcon*, 457 U.S. at 157. Here, plaintiffs offered Dr. Bielby's testimony to "bridge the gap" between their individual claims of gender discrimination and those of more than *1.5 million women in 3,400 stores*. Pet. App. 115a-117a (Ikuta, J., dissenting). The district court relied on this evidence, without even considering whether the testimony was reliable under *Daubert* to determine that plaintiffs satisfied the requirements of Rule 23.

This same evidence will be critical to carrying plaintiffs' burden of proof at trial. If, after conducting the reliability and admissibility analysis required by *Daubert* prior to trial, the court determines that Dr. Bielby's testimony should be excluded, it could have "catastrophic consequences" to absent class members. While the loss of such evidence could lead to decertification of the class, it may also be deemed a failure of proof on the class claims, resulting in a defense verdict:

> Envision the hypothetical attorney with a single client, filing a class action to halt all racial discrimination in all the numerous plants and facilities of one of America's mammoth corporations. One act, or a few acts, at one or a few places, can be charged to be part of a practice or policy quickening an injunction against all racial discrimination by the employer at all places. It is tidy, convenient for the courts fearing a flood of Title VII cases, and dandy for the employees if their champion wins. But what of the catastrophic consequences if the plaintiff loses and carries the class down with him, or proves only such limited facts that no practice or policy can be found, leaving him afloat but sinking the class?

Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1126 (5th Cir. 1969) (Godbold, J., concurring specially). *Daubert* affords another level of protection to absent class members in the Rule 23 inquiry by exposing, at a preliminary stage, expert testimony that is unreliable and would not likely be admissible at trial. For this reason, it is important that this Court affirmatively rule that *Daubert*, and not a lesser standard of review, must apply at class certification.

CONCLUSION

For the foregoing reasons, *amicus curiae* Washington Legal Foundation requests that the Court grant Wal-Mart's petition for a writ of certiorari.

Respectfully submitted,

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JOINT APPENDIX

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IN THE

Supreme Court of the United States

WAL-MART STORES, INC.,

Petitioner,

v.

BETTY DUKES, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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Declaration of Sheila Joyce in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 975a

Declaration of Gayle Kellems in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 980a

Declaration of Martha Kettle in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 992a

Declaration of Christine Kwapnoski in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 997a

Declaration of Jaime Lanois in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1007a

Declaration of Darlene Leadingham in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1011a

Declaration of Phyllis Lehman in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1016a

Declaration of Van Le-Kohler in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1022a

Declaration of Lorrina Letterer in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1027a

Declaration of Gail Lovejoy in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1030a

Declaration of Kathleen MacDonald in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1035a

Declaration of Barbara Mack in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1040a

Declaration of Sandra Marshall in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1048a

Declaration of Nancy Martin in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1053a

Declaration of Irma Mathis in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1059a

Declaration of Lori B. McCarthy in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1064a

Declaration of Alix McKenna in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1072a

Declaration of Kim McLamb in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1077a

Declaration of Umi Jean Minor in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1081a

Declaration of Michella Minton in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1088a

Declaration of Elizabeth Monroe in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1093a

Declaration of Joyce Moody in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1097a

Declaration of Denise Mott in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1104a

Declaration of Stephanie Odle in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1112a

Declaration of Cleo Page in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1124a

Declaration of Carolyn Perkins in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1131a

Declaration of Lori Pidich in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1136a

Declaration of Sue McFarland Ramirez in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1144a

Declaration of Sandra Ratliff in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1158a

Declaration of Donna Reed in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1165a

Declaration of Claudia Renati in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1168a

Declaration of Karla Rojas in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1174a

Declaration of Kathleen Schmeida in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1183a

Declaration of Ramona Scott in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1186a

Declaration of Dawnia Self in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1190a

Declaration of Susan Servatius in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1195a

Declaration of Jody Shearer in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1211a

Declaration of Barbara Steele in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1215a

Declaration of Sandra Stevenson in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1222a

Declaration of Anna Stumpf in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1228a

Declaration of Patricia Surgeson in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1242a

Declaration of Dawn Sweeny in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1248a

Declaration of Andrea Tallent in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1254a

Declaration of Sandra Thomas in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1258a

Declaration of Vicki Thornton in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1261a

Declaration of Melodie Underwood in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1268a

Declaration of Dawn White in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1274a

Declaration of Deanna Willard in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1279a

Declaration of Jenny Williams in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1285a

Declaration of Lorie Williams in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1292a

Declaration of Karen Williamson in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1298a

Declaration of Jan Wolsleger in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1302a

Declaration of Wei Wu-Emmert in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1306a

Declaration of Detrix Young in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1311a

Declaration of Tamara Zumbrun in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) 1315a

Declaration of Wei Ming Bogardus in Support of Defendant's Opposition to Motion for Class Certification (June 12, 2003) 1322a

Declaration of Joan G. Haworth, Ph.D. in Support of Defendant's Opposition to Class Certification (June 12, 2003) 1330a

Declaration of Charlyn Jarrells-Porter in Support of Defendant's Opposition to Motion for Class Certification (June 12, 2003) 1576a

Declaration of Jina Jordan in Rebuttal to Declaration of Designated Class Member Katheryn Johnson (June 12, 2003) 1597a

Declaration of Marie Perkins in Rebuttal to Declaration of Designated Class Member Earnestine Gordon (June 12, 2003) 1601a

Declaration of Margaret Daniel in Support of Defendant's Opposition to Motion for Class Certification (June 12, 2003) 1606a

Declaration of Sandy Ellison in Support of Defendant's Opposition to Motion for Class Certification (June 12, 2003) 1612a

Declaration of Victoria Howard in Support of Defendant's Opposition to Motion for Class Certification (June 12, 2003) 1618a

Declaration of Julie Jeneane Murphy in Support of Defendant's Opposition to Motion for Class Certification (June 12, 2003) 1630a

Declaration of Janice Tree in Support of Defendant's Opposition to Motion for Class Certification (June 12, 2003) 1637a

Declaration of Stacey Wiggins in Support of Defendant's Opposition to Motion for Class Certification (June 12, 2003) 1647a

Declaration of Linda Donath in Rebuttal to Declaration of Designated Class Member Sheila Acree (June 12, 2003) 1652a

Declaration of Sandra Jean Ellison in Support of Defendant's Opposition to Motion for Class Certification (Ellison Decl. II) (June 25, 2003) 1655a

Supplemental Declaration of Christine Kwapnoski in Reply to Defendant's Opposition to Motion for Class Certification (July 3, 2003) 1659a

Supplemental Declaration of Dr. Richard Drogin in Support of Plaintiffs' Reply Brief in Support of Motion to Strike Portions of Haworth Declaration for Failure to Comply with Fed. R. Civ. Pro. 26(a)(2) (July 11, 2003) 1662a

The following documents have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the petition for a writ of certiorari:

Opinion of the United States Court of Appeals for the Ninth Circuit 1a

Order of the United States District Court for the Northern District of California Granting in Part and Denying in Part Motion for Class Certification 162a

Order of the United States Court of Appeals for the Ninth Circuit Granting Rehearing En Banc 284a

General Docket
United States Court of Appeals
for the Ninth Circuit

Court of Appeals Docket #: 04-16688
Nature of Suit: 3442 Jobs
Dukes, et al v. Wal-Mart Stores
Appeal From: U.S. District Court for Northern California, San Francisco
Fee Status: Paid

Docketed: 08/30/2004
Termed: 04/26/2010

Case Type Information:
1) civil
2) private
3) null

Originating Court Information:
District: 0971-3 : CV-01-02252-MJJ
Trial Judge: Martin J. Jenkins, District Judge
Date Filed: 06/08/2001
Date Order/Judgment: 06/21/2004
Date NOA Filed: 08/13/2004

Prior Cases:
02-80008
Date Filed: 01/23/2002 **Date Disposed:** 03/18/2001 **Disposition:** Denied – Judge Order

Current Cases:

Lead	**Member**	**Start**	**End**
Cross-Appeal			
04-16688	04-16720	09/01/2004	

* * *

08/30/2004	6	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): NO. setting schedule as follows: Fee payment is due 9/13/04 ; ap-

		pellant's designation of RT is due 8/23/04; appellee's designation of RT is due 9/2/04,, ; appellant shall order transcript by 9/13/04; court reporter shall file transcript in DC by 10/13/04; certificate of record shall be filed by 10/20/04 ; appellant's opening brief is due 11/29/04; appellees' brief is due 12/29/04,, ; appellants' reply brief is due 1/12/05; [04-16688] (MF)

* * *

08/31/2004	13	Filed MOATT order (Mary M. SCHROEDER, CONSUELO M. CALLAHAN,): The crt, in its discretion, grants the cross petition for permission to appeal the dc's 6/22/04, class action order. Within 10 days of this order, aples/respondents shall perfect the x-appeal in accordance with FRAP 5(d). After the x-appeal is perfected, the clk is directed to expedite the briefing & hearing of the x-appeal in accordance with appeal 04-16688. The provisios of 9th Cir. 31-2.2(a) shall not apply to this briefing schedule. [04-16688, 04-80057] (MF)

* * *

09/01/2004	21	DOCKETED CAUSE AND

		ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): y. setting cross appeal briefing schedule as follows: CADS is past due; CADS must be filed no later than 9/8/04; first cross-appeal brief is due 11/29/04; second cross-appeal brief is due 12/29/04 ; third cross-appeal brief is due 1/28/04 ; optional cross-appeal reply brief is due 2/11/04 [04-16720, 04-16688] (KKW)

* * *

11/29/2004	41	Filed original and 15 copies Appellant Cross Appellee Wal-Mart, Inc.'s first brief on cross-appeal, (Informal: No) of 61 pages; 5 vols. of EOR; served on 11/29/04 [04- 16688, 04-16720] (RT)

* * *

01/03/2005	48	Filed original and 15 copies Appellees Cross Appellants Betty Dukes et al. second brief on cross-appeal (Informal: No) of 61 pages; 3 vols. of Supp EOR; served on 12/29/04 [04-16688, 04-16720] (RT)

* * *

01/28/2005	53	Filed original and 15 copies Appellant Cross Appellee Wal-Mart, Inc.'s third brief on cross-appeal (Informal: No) of 59 pages; 1 vol. of Supp EOR; served on 1/28/05 [04-16688, 04-16720] (RT)
02/14/2005	54	Filed original and 15 copies Appellees Cross Appellants Betty Dukes et al. cross appeal reply brief. (Informal: No) of 32 pages; 1 vol. of Supp EOR; served on 2/11/05 [04-16688, 04-16720] (RT)

* * *

08/08/2005	72	ARGUED AND SUBMITTED TO Harry PREGERSON, Andrew J. KLEINFELD, Michael D. HAWKINS. [04-16688, 04-16720] (EL)

* * *

02/06/2007	95	FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Harry PREGERSON, author; Andrew J. KLEINFELD, dissenting; Michael D. HAWKINS.) FILED AND ENTERED JUDGMENT. [04-16688, 04-16720] (GV)
02/20/2007	97	[6094962] Filed original & 50 copies Appellant Wal-Mart,

		Inc.'s petition for rehearing en banc of 18 pages [4,199 words]; served on 2/20/07 (PANEL AND ALL ACTIVE JUDGES AND ALL INTERESTED SENIOR JUDGES) [04-16688, 04-16720] (GV)
02/23/2007	98	Filed order (Harry PREGERSON, Andrew J. KLEINFELD, Michael D. HAWKINS,): Plaintfiff appellees are directed to file a response to appellant's peition for rehearing en banc. Said response shall be filed with the Court within twenty one (21) days of the date of filing of this order. (phoned counsel for parties: 4:10 pm) [04-16720, 04-16688] (RT)

* * *

03/16/2007	115	Filed Appellees x-appellants Betty Dukes et al.'s opposition to appellant xappellee's petition for rehearing en banc; served on 3/15/07 (PANEL & ALL ACTIVE & INTERESTED SENIOR JUDGES) [04-16688, 04-16720] (RT)

* * *

03/27/2007	117	Received Aplt's Reply brief in support of petition for rehearing

		en banc; served on 3/27/07 (PANEL AND ALL ACTIVE JUDGES AND ALL INTERESTED SENIOR JUDGES) [04-16688] (GV)

* * *

07/20/2007	137	Filed order (Harry PREGERSON, Andrew J. KLEINFELD, Michael D. HAWKINS, Circuit Judges): The motions for exemption from Circuit Rule 45-5 filed on behalf of Julia Campins and Jaime Byrnes are GRANTED. Motions for leave to file following documents are GRANTED: California Employment Law Council's proposed amicus curiae brief in support of Wal-Mart's petition for rehearing; Equal Employment Advisory Council's amicus curiae letter brief in support of Wal Mart's petition for rehearing en banc; Chamber of Commerce of USA' amicus curiae brief in support of Wal Mart's petition for rehearing en banc; Product Liability Advisory Council's amicus curiae brief in support of Wal Mart's petition for rehearing en banc; Retail Industry Leaders Association's amicus curiae brief in support of Wal Mart's petition for rehear-

		ing en banc; Washington Legal Foundation's amicus curiae brief in support of Wal Mart's petition for rehearing en banc; The Employer's Group's amicus curiae brief in support of Wal Mart's petition for rehearing en banc; Lawyers' Committee for Civil Rights Under Law et al.'s amici curiae brief in support of Duke's opposition to the petition for rehearing en banc; Wal Mart, Inc.'s reply brief in support of its petition for rehearing en banc; US Women's Chamber of Commerece's amicus curiae letter brief in support of Dukes's opposition to the petition for rehearing en banc; The National Employment Lawyers Association et al.'s amici curiae brief in support of Dukes's opposition to the petition for rehearing en banc; Consumers Union's et al.'s proposed amici curiae brief in opposition to Wal Mart's petition for rehearing en banc; American Association of Retired Person's amici curiae brief in support of Duke's opposition to the petition for rehearing en banc; Public Justice's amicus brief in opposition to Wal Mart's petition for rehearing en banc. [04-16688, 04-16720] (RT)
12/11/2007	141	FILED ORDER AND OPINION:

		vacating opinion AFFIRMED [95] in 04-16688, 04- 16720, denying petition for enbanc rehearing [97] AFFIRMED. (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Harry PREGERSON, author; Andrew J. KLEINFELD, dissenting; Michael D. HAWKINS). FILED AND ENTERED JUDGMENT. [04-16688, 04-16720] (GV)

* * *

01/08/2008	147	Filed original and 50 copies Appellant Wal-Mart, Inc. in 04-16688 petition for panel rehearing and petition for rehearing en banc. p.pages, served on 1/8/08 (PANEL AND ALL ACTIVE JUDGES AND ANY INTERESTED SENIOR JUDGES) [04- 16688, 04-16720] (JE)

* * *

01/09/2008	150	Filed original and 3 copies Appellees Betty Dukes, Patricia Surgeson, Edith Arana, Karen Williamson, Deborah Gunter, Christine Kwapnoski, Page Cleo in 04-16688, cross-Appellants Betty Dukes, Patricia Surgeson, Edith Arana, Karen Williamson,

		Deborah Gunter, Christine Kwapnoski, Page Cleo in 04-16720 petition for rehearing, 13 p.pages, served on 1/8/08 (FEDEX TO PANEL) [04-16688, 04- 16720] (LA)

* * *

06/23/2008	164	Filed order (HARRY PREGERSON, ANDREW J. KLEINFELD and MICHAEL DALY HAWKINS): Plaintiffs are hereby ordered to file a response to Defendant's Petition for Panel Rehearing and Petition for Rehearing En Banc. Defendant is hereby ordered to file a response to Plaintiffs' Petition for Panel Rehearing. See FED. R. APP. P. 35(e) and 40(a)(3); Circuit Rule 40-1(a). Responses must be received within 21 days of the date of this order. [04-16688, 04-16720] (AF)
07/14/2008	165	Filed original and 3 copies of Appellant/ Cross-Appellee Wal-Mart, Inc.'s response to Appellee/ Cross-Appellant's petition for panel rehearing, 17 pages; served on 07/14/2008. (PANEL) PLEASE NOTE: THE ATTACHED DOCUMENT IS A DOCUMENT INTERNAL TO THE COURT AND IS NOT ACCESSIBLE ON PACER OR

		ECF. [04-16688, 04-16720] (LC)
07/14/2008	166	Filed original and 50 copies of Appellee/ Cross-Appellant' Betty Dukes, et al's opposition to Appellant/ Cross-Appellee's petition for rehearing en banc; 18 pages; served on 06/11/2008. (PANEL-ACTIVE JUDGES-ANY INTERESTED SENIOR JUDGES) PLEASE NOTE: THE ATTACHED DOCUMENT IS A DOCUMENT INTERNAL TO THE COURT AND IS NOT ACCESSIBLE ON PACER OR ECF. [04-16688, 04-16720] (LC)

* * *

07/28/2008	170	Filed Appellant Wal-Mart, Inc.'s motion to file reply in support of petition for rehearing en banc. Served on 07/28/2008. [04-16688, 04-16720] (fed-ex PANEL) (LC)
07/28/2008	171	Received Appellant Wal-Mart, Inc.'s reply brief in support of petition for rehearing en banc. Served on 07/28/2008 [04-16688, 04-16720] (motion pending w/ PANEL) (fed-ex PANEL) (LC)

* * *

09/08/2008	174	Filed order (HARRY PREGERSON, ANDREW J. KLEINFELD and MICHAEL

		DALY HAWKINS)Defendant's Motion for Leave to File Reply Brief in Support of Petition for Rehearing En Banc is hereby GRANTED. Defendant's Reply Brief, received on July 28, 2008, is hereby ordered FILED. [04-16688, 04-16720] (KKW)
09/09/2008	175	Filed original and 50 copies of Appellant Wal-Mart, Inc.'s reply brief in support of petition for rehearing en banc, 9 pages; Served on 07/28/2008. (PANEL - ALL ACTIVE JUDGES - ANY INTERESTED SENIOR JUDGES) [04-16688, 04-16720] (LC)

* * *

02/13/2009	186	Filed En Banc Order for PUBLICATION KOZINSKI, Chief Judge: Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit. Judges McKeown, Rawlinson and Bybee did not participate in the deliberations or vote in this case. [04-16688, 04-16720] (PH)

* * *

03/24/2009	262	ARGUED AND SUBMITTED TO Judges ALEX KOZINSKI, STEPHEN R. REINHARDT, PAMELA ANN RYMER, MICHAEL DALY HAWKINS, BARRY G. SILVERMAN, SUSAN P. GRABER, RAYMOND C. FISHER, RICHARD A. PAEZ, MARSHA S. BERZON, CARLOS T. BEA and SANDRA S. IKUTA. (AT)

* * *

04/26/2010	301	FILED OPINION (ALEX KOZINSKI, STEPHEN R. REINHARDT, PAMELA ANN RYMER, MICHAEL DALY HAWKINS, BARRY G. SILVERMAN, SUSAN P. GRABER, RAYMOND C. FISHER, RICHARD A. PAEZ, MARSHA S. BERZON, CARLOS T. BEA and SANDRA S. IKUTA) AFFIRMED IN PART; REMANDED IN PART. Each party shall bear its own costs on appeal. Judge: AK Dissenting, Judge: MDH Authoring, Judge: SPG Concurring, Judge: SSI Dissenting. FILED AND ENTERED JUDGMENT. [7313593] [04-16688, 04-16720] (RP)

* * *

07/09/2010	303	Received letter from the Supreme Court dated 07/07/2010 re: The application for an ext of time to file a petition for writ of certiorari has be granted to and including 8/25/10. [7401551] [04-16688, 04-16720] (LC)
08/26/2010	304	Received notice from the Supreme Court: petition for certiorari filed on 08/25/2010. Supreme Court Number 10-277. [7453259] [04-16688, 04-16720] (LC)
10/20/2010	305	MANDATE ISSUED.(AK, SR, PAR, MDH, BGS, SPG, RCF, RAP, MSB, CTB and SSI) [7516125] [04-16688, 04-16720] (LC)
12/08/2010	306	Received notice from the Supreme Court. Petition for certiorari GRANTED on 12/06/2010 Supreme Court Number 10-277. [7571647] [04-16688, 04-16720] (SW)

General Docket
United States Court of Appeals
for the Ninth Circuit

Court of Appeals Docket #: 04-16720
Nature of Suit: 3442 Jobs
Wal-Mart Stores Inc., et al v. Dukes
Appeal From: U.S. District Court for Northern California, San Francisco
Fee Status: Paid

Docketed: 09/01/2004
Termed: 04/26/2010

Case Type Information:
1) civil
2) private
3) null

Originating Court Information:
District: 0971-3 : CV-01-02252-MJJ
Trial Judge: Martin J. Jenkins, District Judge
Date Filed: 06/08/2001
Date Order/Judgment: 06/21/2004
Date NOA Filed: 08/31/2004

Prior Cases:
None

Current Cases:

	Lead	**Member**	**Start**	**End**
Cross-Appeal				
	04-16688	04-16720	09/01/2004	

* * *

09/01/2004	1	Case No. 04-16688 and 04-80057. Order filed. Before SCHROEDER, Chief Judge, and CALLAHAN, Circuit Judge. The court, in its discretion, grants the cross-petition for permission to appeal the district court's 6/22/04,

		class action certification order. See FRCP 23(f). Within 10 days of this order, aples/res shall perfect the cross-appeal in accordance with FRAP 5(d). After the cross-appeal is perfrected, the clerk is directed to expedite the briefing and hearing of the cross appeal in accordance with appeal no. 04-16688. The provisions of 9th Cir. Rule 31-2.2 (as) shall not apply to this briefing schedule. [04-16720] (KKW)
09/01/2004	2	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): y. setting cross appeal briefing schedule as follows: CADS is past due; CADS must be filed no later than 9/8/04; first cross-appeal brief is due 11/29/04 ; second cross-appeal brief is due 12/29/04; third cross-appeal reply brief is due 2/11/04 [04-16720, 04-16688] (KKW)

* * *

11/29/2004	9	Filed original and 15 copies Appellant Cross Appellee Wal-Mart, Inc.'s first brief on cross-appeal, (Informal: No) of 61 pages; 5 vols. of EOR; served on 11/29/04 [04-16688, 04-16720] (RT)

* * *

01/03/2005	16	Filed original and 15 copies Appellees Cross Appellants Betty Dukes et al. second brief on cross-appeal (Informal: No) of 61 pages; 3 vols. of Supp EOR; served on 12/29/04 [04-16688, 04-16720] (RT)

* * *

01/28/2005	21	Filed original and 15 copies Appellant Cross Appellee Wal-Mart, Inc.'s third brief on cross-appeal (Informal: No) of 59 pages; 1 vol. of Supp EOR; served on 1/28/05 [04-16688, 04-16720] (RT)
02/14/2005	22	Filed original and 15 copies Appellees Cross Appellants Betty Dukes et al. cross appeal reply brief, (Informal: No) of 32 pages; 1 vol. of Supp EOR; served on 2/11/05 [04-16688, 04-16720] (RT)

* * *

08/08/2005	34	ARGUED AND SUBMITTED TO Harry PREGERSON, Andrew J. KLEINFELD, Michael D. HAWKINS. [04-16688, 04-16720] (EL)

* * *

02/06/2007	53	FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Harry

		PREGERSON, author; Andrew J. KLEINFELD, dissenting; Michael D. HAWKINS.) FILED AND ENTERED JUDGMENT. [04-16688, 04-16720] (GV)
02/20/2007	55	[6094962] Filed original & 50 copies Appellant Wal-Mart, Inc.'s petition for rehearing en banc of 18 pages [4,199 words]; served on 2/20/07 (PANEL AND ALL ACTIVE JUDGES AND ALL INTERESTED SENIOR JUDGES) [04-16688, 04-16720] (GV)
02/23/2007	56	Filed order (Harry PREGERSON, Andrew J. KLEINFELD, Michael D. HAWKINS,): Plaintfiff appellees are directed to file a response to appellant's peition for rehearing en banc. Said response shall be filed with the Court within twenty one (21) days of the date of filing of this order. (phoned counsel for parties: 4:10 pm) [04-16720, 04- 16688] (RT)

* * *

03/16/2007	71	Filed Appellees x-appellants Betty Dukes et al.'s opposition to appellant x-appellee's petition for rehearing en banc; served on 3/15/07 (PANEL & ALL ACTIVE & INTERESTED SENIOR JUDGES) [04-16688, 04-16720]

		(RT)

* * *

07/20/2007	90	Filed order (Harry PREGERSON, Andrew J. KLEINFELD, Michael D. HAWKINS, Circuit Judges): The motions for exemption from Circuit Rule 45-5 filed on behalf of Julia Campins and Jaime Byrnes are GRANTED. Motions for leave to file following documents are GRANTED: California Employment Law Council's proposed amicus curiae brief in support of Wal-Mart's petition for rehearing; Equal Employment Advisory Council's amicus curiae letter brief in support of Wal Mart's petition for rehearing en banc; Chamber of Commerce of USA' amicus curiae brief in support of Wal Mart's petition for rehearing en banc; Product Liability Advisory Council's amicus curiae brief in support of Wal Mart's petition for rehearing en banc; Retail Industry Leaders Association's amicus curiae brief in support of Wal Mart's petition for rehearing en banc; Washington Legal Foundation's amicus curiae brief in support of Wal Mart's petition for rehearing en banc; The Employer's Group's amicus curiae

		brief in support of Wal Mart's petition for rehearing en banc; Lawyers' Committee for Civil Rights Under Law et al.'s amici curiae brief in support of Duke's opposition to the petition for rehearing en banc; Wal Mart, Inc.'s reply brief in support of its petition for rehearing en banc; US Women's Chamber of Commerece's amicus curiae letter brief in support of Dukes's opposition to the petition for rehearing en banc; The National Employment Lawyers Association et al.'s amici curiae brief in support of Dukes's opposition to the petition for rehearing en banc; Consumers Union's et al.'s proposed amici curiae brief in opposition to Wal Mart's petition for rehearing en banc; American Association of Retired Person's amici curiae brief in support of Duke's opposition to the petition for rehearing en banc; Public Justice's amicus brief in opposition to Wal Mart's petition for rehearing en banc. [04-16688, 04-16720] (RT)
12/11/2007	92	FILED ORDER AND OPINION: vacating opinion AFFIRMED [53] in 04-16688, 04- 16720, denying petition for enbanc rehearing [55] AFFIRMED. (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Pub-

		lished. Harry PREGERSON, author; Andrew J. KLEINFELD, dissenting; Michael D. HAWKINS). FILED AND ENTERED JUDGMENT. [04-16688, 04-16720] (GV)

* * *

01/08/2008	97	Filed original and 50 copies Appellant Wal-Mart, Inc. in 04-16688 petition for panel rehearing and petition for rehearing en banc. p.pages, served on 1/8/08 (PANEL AND ALL ACTIVE JUDGES AND ANY INTERESTED SENIIOR JUDGES) [04- 16688, 04-16720] (JE)

* * *

01/09/2008	99	Filed original and 3 copies Appellees Betty Dukes, Patricia Surgeson, Edith Arana, Karen Williamson, Deborah Gunter, Christine Kwapnoski, Page Cleo in 04-16688, cross-Appellants Betty Dukes, Patricia Surgeson, Edith Arana, Karen Williamson, Deborah Gunter, Christine Kwapnoski, Page Cleo in 04-16720 petition for rehearing. 13 p.pages, served on 1/8/08 (FEDEX TO PANEL) [04-16688, 04-16720] (LA)

* * *

06/23/2008	113	Filed order (HARRY PREGERSON, ANDREW J. KLEINFELD and MICHAEL DALY HAWKINS): Plaintiffs are hereby ordered to file a response to Defendant's Petition for Panel Rehearing and Petition for Rehearing En Banc. Defendant is hereby ordered to file a response to Plaintiffs' Petition for Panel Rehearing. See FED. R. APP. P. 35(e) and 40(a)(3); Circuit Rule 40-1(a). Responses must be received within 21 days of the date of this order. [04-16688, 04-16720] (AF)
07/14/2008	114	Filed original and 3 copies of Appellant/ Cross-Appellee Wal-Mart, Inc.'s response to Appellee/ Cross-Appellant's petition for panel rehearing, 17 pages; served on 07/14/2008. (PANEL) PLEASE NOTE: THE ATTACHED DOCUMENT IS A DOCUMENT INTERNAL TO THE COURT AND IS NOT ACCESSIBLE ON PACER OR ECF. [04-16688, 04-16720] (LC)
07/14/2008	115	Filed original and 50 copies of Appellee/ Cross-Appellant' Betty Dukes, et al's opposition to Appellant/ Cross-Appellee's petition for rehearing en banc; 18 pages; served on 06/11/2008. (PANEL-

		ACTIVE JUDGES-ANY INTERESTED SENIOR JUDGES) PLEASE NOTE: THE ATTACHED DOCUMENT IS A DOCUMENT INTERNAL TO THE COURT AND IS NOT ACCESSIBLE ON PACER OR ECF. [04-16688, 04-16720] (LC)

* * *

07/28/2008	119	Filed Appellant Wal-Mart, Inc.'s motion to file reply in support of petition for rehearng en banc. Served on 07/28/2008. [04-16688, 04-16720] (fed-ex PANEL) (LC)
07/28/2008	120	Received Appellant Wal-Mart, Inc.'s reply brief in support of petition for rehearing en banc. Served on 07/28/2008 [04-16688, 04-16720] (motion pending w/ PANEL) (fed-ex PANEL) (LC)

* * *

09/08/2008	122	Filed order (HARRY PREGERSON, ANDREW J. KLEINFELD and MICHAEL DALY HAWKINS)Defendant's Motion for Leave to File Reply Brief in Support of Petition for Rehearing En Banc is hereby GRANTED. Defendant's Reply Brief, received on July 28, 2008, is hereby ordered FILED. [04-16688, 04-16720] (KKW)

09/09/2008	123	Filed original and 50 copies of Appellant Wal-Mart, Inc.'s reply brief in support of petition for rehearing en banc, 9 pages; Served on 07/28/2008. (PANEL - ALL ACTIVE JUDGES - ANY INTERESTED SENIOR JUDGES) [04-16688, 04-16720] (LC)

* * *

02/13/2009	133	Filed En Banc Order for PUBLICATION KOZINSKI, Chief Judge: Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit. Judges McKeown, Rawlinson and Bybee did not participate in the deliberations or vote in this case. [04-16688, 04-16720] (PH)

* * *

03/24/2009	244	ARGUED AND SUBMITTED TO ALEX KOZINSKI, STEPHEN R. REINHARDT, PAMELA ANN RYMER, MICHAEL DALY HAWKINS, BARRY G. SILVERMAN, SUSAN P. GRABER, RAYMOND C.

		FISHER, RICHARD A. PAEZ, MARSHA S. BERZON, CARLOS T. BEA and SANDRA S. IKUTA. [7323734] (JD)

* * *

04/26/2010	242	FILED OPINION (ALEX KOZINSKI, STEPHEN R. REINHARDT, PAMELA ANN RYMER, MICHAEL DALY HAWKINS, BARRY G. SILVERMAN, SUSAN P. GRABER, RAYMOND C. FISHER, RICHARD A. PAEZ, MARSHA S. BERZON, CARLOS T. BEA and SANDRA S. IKUTA) AFFIRMED IN PART; REMANDED IN PART. Each party shall bear its own costs on appeal. Judge: AK Dissenting, Judge: MDH Authoring, Judge: SPG Concurring, Judge: SSI Dissenting. FILED AND ENTERED JUDGMENT. [7313593] [04-16688, 04-16720] (RP)

* * *

07/09/2010	245	Received letter from the Supreme Court dated 07/07/2010 re: The application for an ext of time to file a petition for writ of certiorari has be granted to and including 8/25/10. [7401551] [04-16688, 04-16720] (LC)

08/26/2010	246	Received notice from the Supreme Court: petition for certiorari filed on 08/25/2010. Supreme Court Number 10-277. [7453259] [04-16688, 04-16720] (LC)
10/20/2010	247	MANDATE ISSUED.(AK, SR, PAR, MDH, BGS, SPG, RCF, RAP, MSB, CTB and SSI) [7516125] [04-16688, 04-16720] (LC)
12/08/2010	248	Received notice from the Supreme Court. Petition for certiorari GRANTED on 12/06/2010 Supreme Court Number 10-277. [7571647] [04-16688, 04-16720] (SW)

General Docket
United States Court of Appeals
for the Ninth Circuit

Court of Appeals Docket #: 04-80057 Wal-Mart Stores, Inc, et al v. Dukes **Appeal From:** U.S. District Court for Northern California, San Francisco **Fee Status:** -	**Docketed:** 07/07/2004 **Termed:** 08/13/2004

Case Type Information:

1) 1292(b) petition

2) private

3) null

Originating Court Information:

District: 0971-3 : CV-01-02252-MJJ

Trial Judge: Martin J. Jenkins, District Judge

Date Filed: 06/08/2001

Date Order/Judgment: 06/21/2004

Prior Cases:

None

Current Cases:

None

* * *

07/07/2004	1	FILED ON 7/6/04 ORIGINAL AND 4 PETITIONS FOR PERMISSION TO APPEAL PURSUANT TO RULE 23(f); served on 7/6/04 (MOATT) (BY)

* * *

07/19/2004	4	Received Respondent's opposition to the petition for permission to

		appeal from order granting class certification and conditional cross-petition; served on 7/19/04 (MOATT) (FT)
07/19/2004	9	Filed Respondent Betty Dukes, Respondent Patricia Surgeson, Respondent Cleo Page, Respondent Deborah Gunter, Respondent Karen Williamson, Respondent Christine Kwapnoski, Respondent Edith Arana response in opposition to the petition for permission to apepal; served on 7/19/04[04-80057] (FT)
07/26/2004	5	Filed Petitioner Wal-Mart Stores, Inc's motion for leave to file reply and reply in support of petition for permission to appeal from order granting class certification; [04-80057] served on 7/26/04 [5129800] (MOATT) [04-80057] (FT)
08/13/2004	6	Order filed: The clerk shall file the letter brief of amicus curiae EEAC rec'd 7/7/04. The motion of Chamber of Commerce of the U.S. for leave to file an amicus curiae brief is granted. The Clerk shall file the amicus curiae brief rec'd 7/14/04. The Clerk shall file respondent's opposition to the petition for permission to appeal rec'd 7/19/04. Petitioners motion for leave to file a reply ro respondents' opposition is granted. The court, in its discretion, grants the petition for permission to appeal the dc's 6/22/04,

		order granting class action certification. Within 10 days of this order, petitioner shall perfect the appeal in accordance with FRAP 5(d). After the appeal is perfected, the Clerk is directed to expedite the briefing and hearing of the appeal. The provisions of Ninth Circuit Rule 31-2.2(a) shall not apply to this briefing schedule. (Terminated on the Merits after Submission Without Oral Hearing; Other; Written, Unsigned Without Comment, Mary M. SCHROEDER, CONSUELO M. CALLAHAN) [04-80057] (Phoned and faxed; 12:10) (FT)
08/31/2004	10	Filed MOATT order (Mary M. SCHROEDER, CONSUELO M. CALLAHAN,): The crt, in its discretion, grants the cross petition for permission to appeal the dc's 6/22/04, class action order. Within 10 days of this order, aples/respondents shall perfect the x-appeal in accordance with FRAP 5(d). After the x-appeal is perfected, the clk is directed to expedite the briefing & hearing of the x-appeal in accordance with appeal 04-16688. The provisios of 9th Cir. 31-2.2(a) shall not apply to this briefing schedule. [04-16688, 04-80057] (MF)

* * *

U.S. District Court
California Northern District (San Francisco)
CIVIL DOCKET FOR CASE #:
3:01-cv-02252-VRW

Dukes et al v. Wal-Mart Stores, Inc. Assigned to: Hon. Vaughn R. Walker Referred to: Magistrate Judge Edward M. Chen Member case: (View Member Case) Cause: 28:1332 Diversity-Employment Discrimination	Date Filed: 06/08/2001 Jury Demand: Plaintiff Nature of Suit: 442 Civil Rights: Jobs Jurisdiction: Federal Question

* * *

Date Filed	#	Docket Text
06/08/2001	1	COMPLAINT ; *summons issued* against Wal-Mart Stores, Inc. (Filing fee $150.00 receipt number 3323026). Filed by pro se Betty Dukes. (slh,) (Entered: 06/11/2001)

* * *

06/19/2001	3	FIRST AMENDED COMPLAINT against Wal-Mart Stores, Inc. Filed by Micki Earwood, Kimberly Miller, Stephanie Odle, Sandra Stevenson, Patricia Surgeson, Betty Dukes. (slh) (Entered: 06/20/2001)

* * *

08/10/2001	16	MOTION to Dismiss, or in the alternative, Motion to Transfer Case *with Memorandum of Points and Authorities* filed by Wal-Mart Stores, Inc.. Motion Hearing set for 9/25/2001 09:30 AM. (slh) (Entered: 08/13/2001)

* * *

09/04/2001	28	Memorandum in Opposition re 16 *defendant's Motion to Dismiss* filed by Betty Dukes, Micki Earwood, Kimberly Miller, Stephanie Odle, Sandra Stevenson, Patricia Surgeson. (slh,) (Entered: 09/07/2001)

* * *

09/12/2001	30	Reply to Opposition re 16 *Motion to Dismiss* filed by Wal-Mart Stores, Inc.. (slh,) (Entered: 09/14/2001)

* * *

12/03/2001	36	ORDER by Judge Martin J. Jenkins GRANTING IN PART and DENYING IN PART defendant's Motion to Dismiss or alternatively to Transfer Case 16 ; the Court elects to dismiss the improperly venued plaintiffs pursuant to Rule 21,

		allowing the named California class representatives to litigate this action in this forum; Status Conference set for 12/17/01 at 1:30 PM; Joint status conference statement due not later than 5 days prior to conference. (slh) (Entered: 12/04/2001)

* * *

12/26/2001	40	SECOND AMENDED COMPLAINT against Wal-Mart Stores, Inc. Filed by Betty Dukes, Patricia Surgeson. (slh) (Entered: 01/09/2002)

* * *

01/31/2002	46	ANSWER to Second Amended Complaint by Wal-Mart Stores, Inc. (slh) (Entered: 02/01/2002)

* * *

09/12/2002	82	AMENDED COMPLAINT *(THIRD)* against Wal-Mart Stores, Inc.. Filed by Edith Arana, Karen Williamson, Deborah Gunter, Christine Kwapnoski, Cleo Page, Betty Dukes, Patricia Surgeson. (slh,) (Entered: 09/13/2002)

* * *

11/25/2002	90	ANSWER to Amended

		Complaint *(Third)* by Wal-Mart Stores, Inc.. (slh,) (Entered: 11/25/2002)

* * *

04/28/2003	99	MOTION to Certify Class *and Memorandum of Points and Authorities* filed by Edith Arana, Betty Dukes, Deborah Gunter, Christine Kwapnoski, Cleo Page, Patricia Surgeson, Karen Williamson. Motion Hearing set for 7/25/2003 10:00 AM. (slh,) (slh, COURT STAFF). (Entered: 04/29/2003)

* * *

06/12/2003	223	Memorandum in Opposition re 99 *plaintiff's Motion for Class Certification* filed by Wal-Mart Stores, Inc.. (slh,) (slh, COURT STAFF). (Entered: 06/16/2003)

* * *

06/12/2003	232	MOTION to Strike *Portions of the Declarations of the Named Plaintiffs and Designated Class Members Filed in Support of Plaintiff's Motion for Class Certification* filed by Wal-Mart Stores, Inc.. Motion Hearing set for 7/25/2003 10:00 AM. (slh,) (Entered: 06/16/2003)

* * *

06/12/2003	263	MOTION to Strike *declaration, opinion, and testimony of plaintiffs' expert William T. Bielby, Ph.D.* filed by Wal-Mart Stores, Inc.. Motion Hearing set for 7/25/2003 10:00 AM. (slh,) (Entered: 06/16/2003)

* * *

06/12/2003	265	MOTION to Strike *declaration of Marc Bendick, Jr., Ph.D.* filed by Wal- Mart Stores, Inc.. Motion Hearing set for 7/25/2003 10:00 AM. (slh,) (Entered: 06/16/2003)

* * *

06/20/2003	538	MOTION to Strike *Declarations of Ten Undisclosed Witnesses* filed by Edith Arana, Betty Dukes, Deborah Gunter, Christine Kwapnoski, Cleo Page, Patricia Surgeson, Karen Williamson. Motion Hearing set for 7/25/2003 10:00 AM. (mmt, COURT STAFF) (Entered: 06/25/2003)

* * *

06/20/2003	540	MOTION to Strike *Store Manager Declarations and Portions of Declaration of Joan*

		Haworth filed by Edith Arana, Betty Dukes, Deborah Gunter, Christine Kwapnoski, Cleo Page, Patricia Surgeson, Karen Williamson. Motion Hearing set for 7/25/2003 10:00 AM. (mmt, COURT STAFF) (Entered: 06/25/2003)

* * *

06/20/2003	542	MOTION to Strike *Portions of Haworth Declaration for Failure to Comply with Fed.R.Civ.P. 26(a)(2)* filed by Edith Arana, Betty Dukes, Deborah Gunter, Christine Kwapnoski, Cleo Page, Patricia Surgeson, Karen Williamson. Motion Hearing set for 7/25/2003 10:00 AM. (mmt, COURT STAFF) (Entered: 06/25/2003)

* * *

07/03/2003	546	Memorandum in Opposition re 540 *plaintiff's Motion to Strike Store Manager Declarations and Portions of Declaration of Joan Haworth* filed by Wal-Mart Stores, Inc.. (slh,) (Entered: 07/10/2003)

* * *

07/03/2003	549	Memorandum in Opposition re 538 *plaintiff's Motion to Strike*

		Declarations of Ten Undisclosed Witnesses filed by Wal-Mart Stores, Inc.. (slh,) (Entered: 07/10/2003)

* * *

07/03/2003	551	Memorandum in Opposition re 542 *plaintiff's Motion to Strike Portions of Haworth Declaration for Failure to Comply with Fed.R. Civ.P.26(a)(2)* filed by Wal-Mart Stores, Inc.. (slh,) (Entered: 07/10/2003)

* * *

07/03/2003	557	Memorandum in Opposition re 232 *defendant's Motion to Strike Portions of the Declarations of the Named Plaintiffs and Designated Class Members Filed in Support of Motion for Class Certification* filed by Edith Arana, Betty Dukes, Deborah Gunter, Christine Kwapnoski, Cleo Page, Patricia Surgeson, Karen Williamson. (slh,) (Entered: 07/10/2003)

* * *

07/03/2003	559	Memorandum in Opposition re 263 *defendant's Daubert Motion Strike declaration, opinion, and testimony of plaintiffs' expert William T. Bielby, Ph.D.* filed by

		Edith Arana, Betty Dukes, Deborah Gunter, Christine Kwapnoski, Cleo Page, Patricia Surgeson, Karen Williamson. (slh,) (Entered: 07/10/2003)

* * *

07/03/2003	562	Reply Memorandum to Motion re 99 *Motion for Class Certification* filed by Edith Arana, Betty Dukes, Deborah Gunter, Christine Kwapnoski, Cleo Page, Patricia Surgeson, Karen Williamson. (slh,) (Entered: 07/10/2003)

* * *

07/03/2003	567	Memorandum in Opposition re 265 *defendant's Motion to Strike declaration of Marc Bendick, Jr., Ph.D.* filed by Edith Arana, Betty Dukes, Deborah Gunter, Christine Kwapnoski, Cleo Page, Patricia Surgeson, Karen Williamson. (slh,) (Entered: 07/10/2003)

* * *

07/11/2003	570	Memorandum in Opposition re 99 : *SURREPLY in Opposition to Motion for Class Certification* filed by Wal-Mart Stores, Inc.. (slh,) (Entered: 07/14/2003)

* * *

07/11/2003	575	MOTION to Strike *Portion of declaration of Dr. Richard Drogin in support of plaintiff's Reply Brief in support of class certification* filed by Wal-Mart Stores, Inc.. Motion Hearing set for 7/25/2003 10:00 AM. (slh,) (Entered: 07/14/2003)
07/11/2003	576	Reply Memorandum to Motion re 265 *Motion to Strike declaration of Marc Bendick, Jr. Ph.D.* filed by Wal-Mart Stores, Inc.. (slh,) (Entered: 07/14/2003)

* * *

07/11/2003	578	Reply Memorandum to Motion re 263 *Motion to Strike declaration, opinion, and testimony of plaintiffs' expert William T. Bielby, Ph.D* filed by Wal-Mart Stores, Inc.. (slh,) (Entered: 07/14/2003)

* * *

07/11/2003	580	Reply Memorandum to Motion re 232 *Motion to Strike Portions of the Declarations of the Named Plaintiffs and Designated Class Members Filed in Support of Plaintiff's Motion for Class Certification* filed by Wal-Mart Stores, Inc.. (slh,) (Entered:

		07/14/2003)

* * *

07/11/2003	582	ERRATA re 551 *Opposition to plaintiff's Motion to Stirke Portions of Haworth declaration for failure to comply with Fed.R.Civ.P.26(a)(2)* by Wal-Mart Stores, Inc.. (slh,) (Entered: 07/14/2003)

* * *

07/11/2003	586	Reply Memorandum to Motion re 538 *Motion to Strike Declarations of Ten Undisclosed Witnesses* filed by Edith Arana, Betty Dukes, Deborah Gunter, Christine Kwapnoski, Cleo Page, Patricia Surgeson, Karen Williamson. (slh,) (Entered: 07/14/2003)

* * *

07/11/2003	588	Reply Memorandum to Motion re 542 *Motion to Strike Store Manager Declarations and Portions of Declaration of Joan Haworth* filed by Edith Arana, Betty Dukes, Deborah Gunter, Christine Kwapnoski, Cleo Page, Patricia Surgeson, Karen Williamson. (slh,) (Entered: 07/14/2003)

* * *

07/11/2003	590	Reply Memorandum to Motion re 542 *Motion to Strike Portions of Haworth Declaration for Failure to Comply with Fed.R.Civ.P. 26(a)(2)* filed by Edith Arana, Betty Dukes, Deborah Gunter, Christine Kwapnoski, Cleo Page, Patricia Surgeson, Karen Williamson. (slh,) (Entered: 07/14/2003)

* * *

07/14/2003	595	Memorandum in Opposition re 575 *defendant's Motion to Strike* filed by Edith Arana, Betty Dukes, Deborah Gunter, Christine Kwapnoski, Cleo Page, Patricia Surgeson, Karen Williamson. (slh,) (Entered: 07/15/2003)

* * *

09/24/2003	613	Minute Entry: Motion Hearing held on 9/25/2003 before Judge Jenkins; that the Motion for Class Certification 99 is submitted; Court to issue Order. (Court Reporter - Sahar Demos.) (slh, COURT STAFF) (Entered: 09/26/2003)

* * *

10/29/2003	618	TRANSCRIPT for dates 9/24/03 (C/R: Sahar McVickar). (slh, COURT STAFF) (Entered: 10/30/2003)

* * *

06/21/2004	634	ORDER by Judge Martin J. Jenkins GRANTING IN PART AND DENYING IN PART plaintiff's Motion for Class Certification 99 ; the Court certifies the following class for purposes of liability, injunctive and declaratory relief, punitive damages, and lost pay, except that class members for whom there is no available objective data documenting their interest in challenged promotions shall be limited to injunctive and declaratory relief with respect to plaintiffs' promotion claim: All women employed at any Wal-Mart domestic retail store at any time since 12/26/98, who have been or may be subjected to Wal-Mart's challenged pay and management track promotions policies and practices; this action shall be bifurcated into separate liability and remedy phases; the individual racial discrimination claims asserted by named plaintiffs Betty Dukes and Cleo Page shall be severed from the class case;

		Status Conference set for 7/28/04 at 2:00 PM; Joint Status Statmement due 10 days prior to conference. (slh, COURT STAFF) (Filed on 6/21/2004) (Entered: 06/22/2004)

* * *

06/21/2004	635	ORDER by Judge Martin J. Jenkins GRANTING IN PART AND DENYING IN PART plaintiffs' and defendant's Motions to Strike Expert and Non-Expert Testimony; DENYING defendant's Motion to Strike portions of the declarations of the named plaintiffs and designated class members 232 ; DENYING defendant's Motion to Strike declaration of plaintiffs' expert William T. Bielby 263 ; DENYING defendant's Motion to Strike declaration of Marc Bendick Jr. 265 ; DENYING plaintiff's Motion to Strike store manager declarations 540 ; GRANTING IN PART AND DENYING IN PART plaintiff's Motion to Strike portions of Joan Haworth declaration 542 ; GRANTING defendant's Motion to Strike portion of declaration of Dr. Richard Drogin 575 . (slh, COURT STAFF) (Filed on 6/21/2004) (Entered: 06/22/2004)

* * *

07/26/2004	640	MOTION to Stay Disclosures and Discovery Pending Appellate Resolution of Walmart's Petition for permission to appeal from order granting class certification filed by Wal-Mart Stores, Inc.. Motion Hearing set for 8/31/2004 09:30 AM. (slh, COURT STAFF) (Filed on 7/26/2004) (Entered: 07/29/2004)

* * *

08/26/2004	647	ORDER of USCA granting the petition for permission to appeal the District Court's 6/22/04 order 635 granting class action certification. (slh, COURT STAFF) (Filed on 8/26/2004) (Entered: 08/30/2004)

* * *

09/03/2004	648	Memorandum in Opposition re 640 MOTION to Stay filed by Edith Arana, Betty Dukes, Deborah Gunter, Christine Kwapnoski, Cleo Page, Patricia Surgeson, Karen Williamson. (slh, COURT STAFF) (Filed on 9/3/2004) (Entered: 09/10/2004)

* * *

09/15/2004	654	Reply Brief in support of 640

		Motion to Stay filed by Wal-Mart Stores, Inc.. (slh, COURT STAFF) (Filed on 9/15/2004) (Entered: 09/20/2004)

* * *

09/27/2004	665	ORDER Staying Disclosures and Discovery Pending Appellate Resolution by Judge Martin J. Jenkins granting. (mat, COURT STAFF) (Filed on 9/27/2004) (Entered: 09/27/2004)

* * *

02/23/2009	707	ORDER of USCA as to 647 Notice of Appeal filed by Wal-Mart Stores, Inc., 667 Notice of Cross Appeal filed by Edith Arana, Christine Kwapnoski, Betty Dukes, Karen Williamson, Cleo Page, Patricia Surgeson, Deborah Gunter (slh, COURT STAFF) (Filed on 2/23/2009) (Entered: 02/23/2009)
03/19/2009	708	ORDER of USCA as to 647 Notice of Appeal filed by Wal-Mart Stores, Inc., 667 Notice of Cross Appeal, filed by Edith Arana, Christine Kwapnoski, Betty Dukes, Karen Williamson, Cleo Page, Patricia Surgeson, Deborah Gunter (slh, COURT STAFF) (Filed on 3/19/2009) (Entered: 03/19/2009)

06/19/2009	709	Record on Appeal Certified and Transmitted to US Court of Appeals re 647 Notice of Appeal (slh, COURT STAFF) (Filed on 6/19/2009) (Entered: 06/19/2009)
05/10/2010	710	USCA Opinion as to 647 Notice of Appeal filed by Wal-Mart Stores, Inc., 667 Notice of Cross Appeal, filed by Edith Arana, Christine Kwapnoski, Betty Dukes, Karen Williamson, Cleo Page, Patricia Surgeson, Deborah Gunter. (slh, COURT STAFF) (Filed on 5/10/2010) (Entered: 05/10/2010)

* * *

06/04/2010	713	Appeal Record Returned (far, COURT STAFF) (Filed on 6/4/2010) (Entered: 06/08/2010)

* * *

09/07/2010	718	SUPREME COURT LETTER.(far, COURT STAFF) (Filed on 9/7/2010) (Entered: 09/07/2010)
09/07/2010	719	WRIT OF CERTIORARI. (far, COURT STAFF) (Filed on 9/7/2010) (Entered: 09/07/2010)
09/16/2010	720	Joint MOTION to Stay *Joint Motion to Extend Stay of All Proceedings Pending Supreme Court Review* filed by Wal-Mart Stores, Inc.. Motion Hearing set

		for 9/30/2010 10:00 AM in Courtroom 6, 17th Floor, San Francisco. (Attachments: #1 Proposed Order Proposed Order Granting Joint Motion to Extend Stay of All Proceedings Pending Supreme Court Review) (Boutrous, Theodore) (Filed on 9/16/2010) (Entered: 09/16/2010)

* * *

09/17/2010	724	ORDER by Judge Vaughn R. Walker granting 720 Motion to Extend Stay of all proceedings. (rbe, COURT STAFF) (Filed on 9/17/2010) (Entered: 09/17/2010)
12/21/2010	725	JOINT MOTION to Extend Stay of All Proceedings Pending Supreme Court Review filed by Wal-Mart Stores, Inc.. Motion Hearing set for 12/30/2010 10:00 AM in Courtroom 6, 17th Floor, San Francisco before Hon. Vaughn R. Walker. (Attachments: #1 Proposed Order Proposed Order)(Boutrous, Theodore) (Filed on 12/21/2010) Modified on 12/22/2010 (far, COURT STAFF). (Entered: 12/21/2010)

* * *

12/23/2010	728	ORDER granting 725 Motion to

		Stay. Accordingly, all proceedings in this case shall remain stayed until the earlier of: 30 days after the Supreme Court's ruling on Wal-Mart's appeal or 8/26/2011. (vrwlc3, COURT STAFF) (Filed on 12/23/2010) (Entered: 12/23/2010)

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiffs, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **PLAINTIFFS' THIRD AMENDED COMPLAINT** [CLASS ACTION] DEMAND FOR JURY TRIAL

INTRODUCTION

1. Wal-Mart is the largest retailer in the world and the largest private employer in the United States. Through its Wal-Mart and Sam's Club divisions, it is the industry leader not only in size, but also in its failure to advance its female employees. There are two workforces at Wal-Mart. By far the largest workforce is female, which comprises over 72% of the hourly sales employees, yet only one-third of management positions. This workforce is predominantly assigned to the lowest paying positions with the least chance of advancement. The other workforce is male. This workforce is the reverse image of the female workforce – it comprises less than

28% of the hourly sales workers, yet holds two-thirds of all store management positions and over 90% of the top Store Manager positions. This disparate distribution of the genders is the result of purposeful discrimination and of practices that serve no reasonable business purpose yet have a disproportionate impact on women.

2. This class action is accordingly brought by present and former Wal-Mart employees on behalf of themselves and all other similarly situated women who have been subjected to Wal-Mart's continuing policies and practices of gender discrimination. Plaintiffs, and the class that they represent, charge that Wal-Mart discriminates against its female employees by advancing male employees more quickly than female employees, by denying female employees equal job assignments, promotions, training and compensation, and by retaliating against those who oppose its unlawful practices.

3. This action seeks an end to Wal-Mart's discriminatory practices, make whole relief for the class, and punitive damages.

JURISDICTION AND VENUE

4. Plaintiffs' claims arise under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq. This Court has jurisdiction over this matter pursuant to 42 U.S.C. § 2000e5(f), 28 U.S.C. §§ 1331 and 1343(a)(4). The Court has supplemental jurisdiction pursuant to 28 U.S.C. 1367 over claims under the California Fair Employment & Housing Act, Government Code § 12920, et. seq.

5. Venue is proper in this district pursuant to 42 U.S.C. § 2000e5(f) and 28 U.S.C. § 1391(b) & (c). Named plaintiffs' claims arose in California. Mem

bers of the plaintiffs' class reside throughout the United States, including the Northern District of California. Many of the acts complained of herein occurred in this District and gave rise to the claims alleged. Wal-Mart operates over 140 stores and Sam's Clubs in California where it employs more than 40,000 workers. It operates at least 18 stores in the Northern District of California.

PARTIES

6. Plaintiff Betty Dukes is an African American woman and a resident of Contra Costa County, California. She is currently employed by Wal-Mart Stores, Inc.

7. Plaintiff Patricia Surgeson is a woman and a resident of Solano County, California. She was employed by Wal-Mart Stores, Inc. from August 1997 to March 2001. Plaintiffs are informed and believe she is eligible for rehire.

8. Plaintiff Cleo Page is an African American woman and a resident of Tulsa, Oklahoma. She was employed by Wal-Mart Stores, Inc. in Livermore, California from approximately December 1999 to November 2000. Plaintiffs are informed and believe she is eligible for rehire.

9. Plaintiff Christine Kwapnoski is a woman and a resident of Concord, California. She has been employed by Wal-Mart Stores, Inc. since 1986, and has worked for a Sam's Club in Concord, California since 1994. She continues to work at that Sam's Club.

10. Plaintiff Deborah Gunter is a woman and a resident of Riverside County, California. She was employed by Wal-Mart Stores, Inc. from April 1996

until August 1999. Plaintiffs are informed and believe she is eligible for rehire.

11. Plaintiff Karen Williamson is a woman and a resident of Butte County, California. She was employed by Wal-Mart from 1995 to October 1999 at the Wal-Mart store in Pleasanton, California.

12. Plaintiff Edith Arana is an African American woman and a resident of Los Angeles County. She was employed by Wal-Mart from 1995 until October 2001.

13. Defendant Wal-Mart Stores, Inc. is a Delaware corporation with stores throughout California. Its corporate headquarters are located in Arkansas. Wal-Mart Stores, Inc. operates retail stores doing business as Wal-Mart, Wal-Mart Supercenters and Sam's Club Stores.

CLASS ALLEGATIONS

14. Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of a class of all past, present and future female employees of Wal-Mart's retail stores (including Wal-Mart discount, supercenter and neighborhood markets and Sam's Club stores, hereinafter collectively referred to as "Wal-Mart") in the United States. Plaintiffs are members of the class they seek to represent.

15. The members of the class are sufficiently numerous that joinder of all members is impracticable. Plaintiffs are informed and believe that the class exceeds 700,000 present and former female employees of Wal-Mart.

16. There are questions of law and fact common to the class and these questions predominate over

individual questions. Such questions include, without limitation, whether defendant's common operating practices and procedures discriminate against its female employees; whether defendant's policies have an adverse impact upon the class and, if so, whether this impact can be justified by business necessity; whether defendant has a policy and practice of retaliating against class members who object to or oppose unlawful employment practices; and whether injunctive and other equitable remedies and punitive damage relief for the class is warranted.

17. The claims alleged by the plaintiffs are typical of the claims of the class.

18. The named plaintiffs will fairly and adequately represent and protect the interests of the class.

19. This action is properly maintainable under both Federal Rule of Civil Procedure Rule 23(b)(2) and (3) because defendant has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declarative relief with respect to the class as a whole; and because questions of law and fact common to the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of this case. This action is also properly maintainable under Rule 23(c)(4)(A) for all class issues alleged herein.

WAL-MART'S OPERATION AND ITS GENERAL PRACTICE OF DISCRIMINATION

20. Wal-Mart is the largest private employer in the United States and the world's largest retailer. Through its Wal-Mart and Sam's Club divisions, it

operates over 3000 stores across the country, encompassing every state. There are so many Wal-Mart locations in the United States that, according to Wal-Mart, the average store is within 30 miles of the next Wal-Mart store. In the United States, Wal-Mart employs nearly one million "associates," Wal-Mart's term for its hourly employees. In its last fiscal year, it had sales exceeding $200 billion. It claims that it has 100 million customers each week.

21. Wal-Mart employs uniform employment and personnel policies throughout the United States. All of its stores are linked by state-of-the-art electronic and video communications, through which all stores regularly report payroll, labor and other employment data. Regardless of division, there are uniform policies for employees, uniform "orientation" procedures, uniform salary, assignment, pay, training, and promotion policies. All stores are regularly audited for compliance with these uniform, company-wide policies and procedures.

22. The vast majority of Wal-Mart store employees are hourly paid sales associates, who report to department heads. Each store has a number of assistant managers who have different functional responsibilities, one or more co-managers and a store manager. District and regional managers supervise the stores.

23. Few objective requirements or qualifications for specific store assignments, promotions, or raises exist. Salaries are supposed to conform to general company guidelines, but store management has substantial discretion in setting salary levels within salary ranges for each employee. Salaries are also adjusted based on performance reviews, which are largely based on subjective judgments of per-

formance. Plaintiffs are informed and believe that Wal-Mart policy prohibits employees from exchanging information about their salary levels.

24. The hourly sales workforce at Wal-Mart is predominantly female, representing over 72% of all hourly employees. Yet, male and female employees are not evenly distributed among the departments in the store. In some departments and positions, such as furniture, garden, electronics, hardware, sporting goods, guns, produce, paper goods and chemicals, and stocking, males are disproportionately assigned. In other departments and positions, such as cashier, customer service, health and beauty aids, cosmetics, house wares, stationery, toys, layaway, fabrics and clothes, women are disproportionately assigned. Plaintiffs are informed and believe that the male-dominated departments and jobs are better paid and offer greater opportunities for advancement than the female-dominated positions and departments.

25. Male employees are more likely than female employees to obtain "cross-training" in other departments or to receive training and support to enter into departments that would aid their advancement.

26. Plaintiffs are informed and believe that female employees are paid less than male employees who perform substantially similar work, with similar or lesser skills and experience. Plaintiffs are further informed and believe that segregated assignment patterns exacerbate such unequal pay, because men are more likely to be assigned to departments that pay better than departments to which women are assigned.

27. Although women comprise the substantial majority of all hourly employees, the source from which most managers are drawn, their representa-

tion in management is the polar opposite. Women hold only about one-third of the positions that Wal-Mart identifies as management. However, even this figure overstates the proportion of female managers in true management positions. Thus the "one third" of management positions held by women includes traditionally "female" positions, such as assistant managers whose primary responsibility is supervising cashiers, and the lowest level of managers. Plaintiffs are informed and believe that women comprise less than 10% of all Store Managers and approximately 4% of all District Managers. There are very few female Regional Managers. There is only one woman among the 20 executive officers of the company. Plaintiffs are informed and believe that even when women are promoted, on average they are advanced later, and then more slowly, than similarly situated male employees.

28. The workforce profile of Wal-Mart does not reflect the industry or the profile of its largest competitors. In fact, although it is the largest discount retailer in the country, it lags far behind its competitors in the promotion of women. Thus, while Wal-Mart's store management is only about one-third female, among its 20 top competitors women comprise over 56% of management, even though the proportion of hourly workers that are female at these companies is comparable to Wal-Mart. These differences are consistently found around the country. Moreover, these differences are longstanding. In fact, female representation among managers at Wal-Mart is at a substantially lower level today than the level of representation among Wal-Mart's competitors in 1975.

29. This pattern of unequal assignments, pay, training, and advancement opportunities is not the result of random or non-discriminatory factors. Rather, it is the result of an on-going and continuous pattern and practice of intentional sex discrimination in assignments, pay, training and promotions, and reliance on policies and practices that have an adverse impact on female employees that cannot be justified by business necessity, and for which alternative policies and practices with less discriminatory impact could be utilized that equally serve any asserted justification. Plaintiffs are informed and believe that such policies and practices include, without limitation:

a. Failure to consistently post job and promotional openings to ensure that all employees have notice of and an opportunity to seek advancement or more desirable assignments and training.

b. Reliance upon unweighted, arbitrary and subjective criteria utilized by a nearly all male managerial workforce in making assignments, training, pay, performance review and promotional decisions. Even where Wal-Mart policy states objective requirements, these requirements are often applied in an inconsistent manner and ignored at the discretion of management.

c. Reliance on gender stereotypes in making employment decisions such as assignments, promotions, pay and training.

d. Pre-selection and "grooming" of male employees for advancement, favorable assignments and training.

e. Maintenance of largely sex-segregated job categories and departments.

f. Deterrence and discouragement of female employees from seeking advancement, training, and favorable assignments and pay.

g. Paying female employees lower compensation than similarly situated men.

h. Assigning women to lower paying positions, and positions with lesser advancement potential than those given to men, and advancing women more slowly than similarly situated male employees.

i. Providing less training and support to female employees and managers than that given to male employees and managers.

j. Harassing female employees interested in advancement and subjecting them to a hostile work environment.

k. Requiring, as a condition of promotion to management jobs, that employees be willing to relocate, often to significantly distant stores, and applying this policy to require frequent and substantial relocations of its managers without any reasonable business justification. Plaintiffs are further informed and believe that the relocation policy is applied disparately between male and female employees, to the disadvantage of female employees.

l. Retaliating against female employees who have complained either internally or externally about Wal-Mart's treatment of its female employees. Wal-Mart maintains a company-wide, toll free telephone number, which it encourages employees to use if they have a problem or complaint in their store or with store management. Plaintiffs are informed and believe that Wal-Mart retaliates against women who use this number to report discrimination, sexual harassment or other unfair working conditions.

ALLEGATIONS OF NAMED PLAINTIFFS

BETTY DUKES

30. Betty Dukes is an African American woman currently employed in Wal-Mart store #1615, located in Pittsburg, California. She was hired as a part-time front-end cashier at the Pittsburg store in May 1994. Within one year after her hire date, Ms. Dukes received an excellent 90-day review, a promotion to full-time status and a merit pay raise. She was promoted to Customer Service Manager in June 1997, which also included an increase in salary.

31. In September 1997, Ms. Dukes began to experience harsh and discriminatory treatment from head Customer Service Manager Leilani (Lonnie) Barrett and male Store Manager Ken Cagle. In November 1997, she complained to male District Manager Chuck Salby about the discriminatory treatment.

32. After she complained, Ms. Dukes experienced retaliation from Wal-Mart store management, beginning with a disciplinary write-up on February 13, 1998, for returning late from her breaks, even though male and/or Caucasian employees returned late from their breaks or failed to clock out for breaks and were not disciplined. Ms. Dukes was also written up on March 31, 1998, for having a front-end

cashier cover her lunch break, even though she had used this procedure many times before without incident and Caucasian employees used this procedure without being reprimanded. Ms. Dukes complained to male District Manager Jay King but he simply referred her back to the store manager.

33. On June 29, 1999, Ms. Dukes called in sick. Store Manager Cagle reacted in a highly negative and unprofessional way towards her request, even though she was entitled to use sick leave. Ms. Dukes called the district management office about Cagle and, ultimately, she spoke with the male Loss Prevention District Manager Charles Chibante. Only after she threatened to make a complaint to the Wal-Mart home office in Arkansas did she receive a reluctant apology from Store Manager Cagle. However, Cagle's apology only served to escalate the retaliation.

34. In July of 1999, Ms. Dukes expressed interest in becoming a department manager by requesting of Ken Cagle that she receive training for that position, but she was never given the opportunity to be trained. Rather, shortly thereafter on August 14, 1999, Plaintiff was demoted from Customer Service Manager to cashier and falsely accused of violating company policy while performing a transaction that had been performed many times by Plaintiff and other employees without incident. The demotion was Wal-Mart's retaliation for Plaintiff's numerous complaints of discrimination.

35. On August 18, 1999, Ms. Dukes traveled to the Wal-Mart District Office in Livermore and made a complaint to male Wal-Mart District Manager John Scatlin about her demotion and her concerns about employment discrimination at the Pittsburg

Wal-Mart store. Wal-Mart took no steps to address Dukes' concerns.

36. As a result of the demotion, Plaintiff became ineligible for several promotions to positions that she was qualified to perform from August 1999 to August 2000, the year following the demotion. For example, a support manager position was filled in July or August 2000 by Rosa Trevino (Hispanic female). Between July and September 2000, the position of Domestics Department Manager was open and filled by Joseph Topasna (Filipino male). As a result of the demotion, Ms. Dukes' hours and hourly wage were reduced.

37. After August 14, 2000, when Ms. Dukes once again became eligible for promotion, at least four department manager and/or support manager positions at the Pittsburg store were filled by men. None of these positions was posted. Between October and December 2000, Richard Morales (Hispanic male) was promoted from night receiving stocker to night support manager. In November 2000, Joseph Topasna (Filipino male) was promoted to support manager. Between October and December 2000 Robert (Aaron) Mendez (Hispanic male) was promoted to support manager. In December 2000 or January 2001, Will Martines (Caucasian male) filled the position of Department Manager for Tire Lube Express (TLE).

38. After the demotion, Ms. Dukes was discouraged from seeking other positions because of the way she and other women had been treated by Wal-Mart. Dukes did not apply for three department manager positions open after August 14, 2000 (Hardware, Over The Counter Pharmacy and Stationery) because she was discouraged after the discriminatory

treatment she and other women received from Wal-Mart managers.

39. Furthermore, Ms. Dukes' knowledge of Wal-Mart's discriminatory practices against other women at the Pittsburg store also discouraged her from seeking a promotion. In June of 2000, Brooke Terrell (African American female) was demoted from department manager to a sales floor position, although she continued to fulfill the responsibilities of a department manager until a replacement was found. The department manager position vacated by Terrell was filled by Kevin Sims (African American male). In 2000, Trina Wallace (African American female) was demoted from a department manager position to a sales floor position and later terminated. The department manager position vacated by Wallace was ultimately filled by Kendall Dimery (African American male). In 1999, Darla Harper (Caucasian woman) was denied a department manager job in which she had expressed an interest. Without posting this position, Wal-Mart selected Spencer Ostrom (Caucasian male) to fill this position.

40. On or about June 1, 2000, Dukes filed a charge of discrimination with the California Department of Fair Employment & Housing (DFEH), a copy of which is attached hereto as Exhibit 1 and incorporated by reference. On June 15, 2000, she received a right to sue letter, and commenced this action in a timely manner.

41. On or about May 2, 2001, Dukes submitted a charge of discrimination to the United States Equal Opportunity Commission (EEOC), a copy of which is attached as Exhibit 2 and incorporated by reference. She received a right to sue letter on or

about May 22, 2001 and commenced this action in a timely manner.

PATRICIA SURGESON

42. Patricia Surgeson was hired by Wal-Mart in Vacaville, California in August 1997 as a sales associate. She was assigned to the Tire and Lube Express department and, within two weeks of her hire, was subjected to sexually harassing remarks and touching by a co-worker. After reporting the harassment, she was transferred to the health and beauty aids department. She repeatedly applied to transfer to other positions but was denied.

43. In November 1998, Surgeson was assigned to the Lay-Away Department. In approximately May 1999, she was made the Lay-Away Department manager. Because she was assuming additional responsibilities, her Store Manager promised her a raise. Despite repeated requests, Surgeson was never given the promised raise.

44. In late 1999, the Store Manager decided that the Lay-Away Department no longer needed a manager. Ms. Surgeson's department manager title was taken away but she was expected to continue performing manager responsibilities. When she left the department, a male employee who was given the position and title of Lay-Away Department Manager replaced her. He was paid more than Ms. Surgeson had been paid for working in the same position with the same responsibilities.

45. In June or July 2000, Ms. Surgeson was moved to a position in the Cash Office. Although she assumed greater responsibilities, she again did not receive a raise. She was expected to work overtime without lunches or breaks, locked in the cash office.

In her position, she became aware that many male employees were being paid more than she was, although they had worked at Wal-Mart for less time and had less responsibility.

46. In January 2001, she requested a merit increase. Her request was ignored for two months.

47. Ms. Surgeson was interested in attending the assistant manager-training program and in being promoted to assistant manager. She asked one of her managers for information about how to qualify for the program, as she had not seen any information posted about such opportunities. The manager provided only a vague response.

48. As a result of the discriminatory pay and working conditions, Ms. Surgeson resigned in March 2001.

49. On or about May 14, 2001, Surgeson filed a charge of discrimination with the EEOC, a copy of which is attached hereto as Exhibit 3 and incorporated by reference. The EEOC issued a notice of right to sue on May 31, 2001, and this action was timely commenced thereafter.

CLEO PAGE

50. Cleo Page worked at the Wal-Mart store in Livermore, California from approximately October 1998 to late November 2000. Before joining the Livermore store, Page had worked as a cashier and Customer Service Manager at a Wal-Mart Supercenter store in Tulsa, Oklahoma and, briefly, as a sales associate in the Returns Department at a Wal-Mart store in Union City, California. Page had substantial retail experience before joining Wal-Mart.

51. Page initially worked as an associate in the Returns Department at the Livermore store but, within weeks, was promoted to Customer Service Manager.

52. In late December 1999, Page applied for a Department Manager position in the Men's Department. She was interviewed by an Assistant Manager. During the interview, the Assistant Manager stated to Page that it was a man's world and that men control managerial positions at Wal-Mart. Although Page was offered the Department Manager position, Wal-Mart later rescinded the offer and selected a Caucasian female.

53. Page complained to her Store Manager that she was denied the Department Manager position. Page informed her Store Manager that she wanted to make Wal-Mart her career and that she wanted to be promoted to a management position. The Store Manager informed Page that she needed to obtain more training and promised to assist her in obtaining that training. Despite this promise, at no time during her employment at Wal-Mart did Page receive training to become a manager. Shortly thereafter, the Department Manager position for which Page was rejected reopened and Page was promoted into that position. Three weeks later, Page was transferred to Department Manager in the Boy's Department.

54. In approximately June 2000, Page applied for a Support Manager position. Despite her previous retail experience, Page was not selected. Instead, Wal-Mart selected a Caucasian male for that position.

55. In approximately August 2000, Page learned that there were two Support Manager positions that were open. Page informed her Store Man-

ager that she had previously applied for the position and was interested in being considered again. Once again, Page was not selected for a Support Manager position. Instead, a Latina and a Caucasian female were selected. The Store Manager explained to Page that the reason she was not selected was because she needed training and experience working in a larger department. At no time did the Store Manager assist Page in obtaining training to become a manager.

56. In approximately October 2000, Page asked for but did not receive assistance from other employees to complete a project that she was unable to complete on her own. When Page left work at the end of her shift without completing the project, a male Caucasian Assistant Manager threatened to terminate her. Another Caucasian male employee informed Page that he had done something similar for which he had never been reprimanded.

57. In approximately November 2000, Page became aware that there was an opening for a Department Manager in Sporting Goods. Page was discouraged from applying for the position because the Store Manager told Page that she wanted a man in that position because customers felt more comfortable buying sporting goods from a man. A Caucasian male was selected as the new Department Manager in Sporting Goods.

58. In approximately November 2000, Page learned that she was earning at least $4 an hour less than the male Department Manager in Sporting Goods, despite the fact that Page had more seniority than he.

59. Throughout her employment at Wal-Mart, Page expressed her interest in being promoted to management. Despite her interest and experience,

she was never considered for an Assistant Manager position or given training to become a manager.

60. During Page's employment at the Livermore Wal-Mart store, male employees, including an Assistant Manager, made derogatory remarks about women, such as complaining that men were "outnumbered by women" and that "women were taking over." In addition, male employees often asked other male employees whether they knew of men who would be interested in working at Wal-Mart.

61. On or about August 31, 2001, Ms. Page filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) and with the California Department of Fair Employment and Housing (DFEH), a copy of which is attached hereto as Exhibit 4 and incorporated by reference. The DFEH issued a right to sue letter on or about September 12, 2001. She also received a right to sue letter from the EEOC on or about February 14, 2002.

CHRIS KWAPNOSKI

62. Chris Kwapnoski was hired by Wal-Mart in 1986, and was originally assigned to a Sam's Club in Missouri. Ms. Kwapnoski worked as a cashier in the cash office and in claims.

63. While at the Sam's Club in Missouri, Ms. Kwapnoski was sent to help open a new Sam's Club in Concord, California. Ms. Kwapnoski was encouraged to transfer permanently to the Concord store. Both her abilities and her work ethic were praised.

64. In 1994, Ms. Kwapnoski transferred to the Sam's Club in Concord, California. She worked in auditing, freezer departments, claims, and in receiving. She repeatedly made it known to the general managers at the Sam's Club and to the District Op

erations Manager that she sought a team leader position and an area manager position. These jobs were not posted to permit formal applications. Instead, these positions, as they became open, were repeatedly given to men who were less qualified than Ms. Kwapnoski. Ms. Kwapnoski was required to train several of these men in order for them to assume the responsibilities of the position. Ms. Kwapnoski also observed men receiving higher rates of pay and more frequent increases in their pay rates.

65. Ms. Kwapnoski was told by the store manager that she "needed to blow the cobwebs off" her make-up and "doll up". When Ms. Kwapnoski questioned why a male employee received a large raise, she was told it was because he had a family to support.

66. Ms. Kwapnoski has requested upon more than one occasion the opportunity to join the "Management-in-Training" program, but has been denied this opportunity. In 1999, she was finally made a team leader, an hourly position. In June 2001, Ms. Kwapnoski was made a receiving area coach/manager. Since that date, she has continued to request an opportunity to assume greater managerial positions and receive managerial training, as well as attend management meetings. These requests had been denied.

67. Ms. Kwapnoski filed a Charge of Discrimination with the EEOC on or about February 15, 2002, a copy of which is attached hereto as exhibit 5 and incorporated by reference. She received a right to sue notice in March 2002.

DEBORAH GUNTER

68. Deborah Gunter was hired in April 1996 as a Photo Lab Clerk in Wal-Mart Store #2028 in Riverside, California. She had 30 years of prior retail experience.

69. While employed at Store #2028, Ms. Grunter applied several times for the position of Pets Department Manager between the time she began her employment in 1996 and approximately March 1998. Ms. Gunter was particularly interested in this position because of her extensive experience breeding and raising show dogs. She never received the promotion, although the store Night Manager recommended her for the position. The first time Ms. Gunter applied, a male employee with less experience was given the position. The second time she applied, a male employee with less experience was given the position.

70. In the fall of 1996, Ms. Gunter was transferred to the position of Night Stocker. While employed as a Night Stocker, Ms. Gunter learned that the male employees in the Receiving Department earned a higher wage than the female employees in the department.

71. In March 1998, Ms. Gunter transferred to a position as Service Clerk in the Tire Lube Express Department of Store #1747 in Perris, California after the Perris Store Manager requested that she transfer there.

72. While employed at the Perris store from March 1998 until March 1999, Ms. Gunter performed the duties of Support Manager to the Tire Lube Express Department without the title or salary for that position. On numerous occasions, she requested

training from the Tire Lube Express Manager and from the District Manager. She never received the training. The Tire Lube Express Manager told her she did not have sufficient training to fill the position of Support Manager. She again requested additional training and was denied it. Ms. Gunter requested a promotion and pay increase from the Tire Lube Express Manager, but did not receive the promotion.

73. Ms. Gunter trained two male employees in the job responsibilities of Support Manager for the Tire Lube Express Department. After training each male employee, the male employee was promoted to Support Manager. Beginning in the summer of 1998, Ms. Gunter was subjected to sexually harassing remarks by the Tire Lube Express Manager. She complained to the Store Manager in December 1998 and January 1999. However, corrective action was not taken and Ms. Gunter's complaints were ignored. Subsequently, her hours were reduced.

74. Ms. Gunter transferred to Store #2077 in Lake Elsinore, California in March 1999 with the belief that she would get more hours. At the Lake Elsinore store, Ms. Gunter was employed as a Cashier/Clerk in the Tire Lube Express Department. As she had done in the Perris store, she trained a male employee in the job responsibilities of Support Manager for the Tire Lube Express Department. After she trained him, the male employee was promoted to Support Manager, whereas Ms. Gunter's hours were reduced yet again.

75. Ms. Gunter complained to the Tire Lube Express Manager after her hours were reduced. She also requested a meeting with the District Manager to complain about the discriminatory treatment. In August 1999, on the day that the meeting was sched-

uled, the Store Manager informed her that she had been terminated and handed Gunter her remaining wages and vacation pay.

76. On at least one occasion, Ms. Gunter called Wal-Mart headquarters to request assistance with the difficulties she was having on the job. She never received a reply.

KAREN WILLIAMSON

77. Karen Williamson was hired by Wal-Mart in 1995 to work at the Wal-Mart store in Pleasanton, California, where she remained employed until October 21, 1999. She was hired before the store was opened, and her original job assignment was to help prepare the store for opening. As a part of that assignment, Ms. Williamson was one of eight employees selected to review all merchandise as it arrived, and one of four employees selected to do a computerized scan and inventory of the entire store. Accordingly, Ms. Williamson was one of the first of the hourly employees at the Pleasanton store to be trained on the handheld computer used for such operations and for departmental inventories, orders, and controls.

78. Upon the opening of the new store, Ms. Williamson was assigned to work in three departments: Infants, Boys, and Girls. She was trained to operate the cash register.

79. At her initial evaluation, Ms. Williamson was told she would receive training and become a department manager at some time in the future. During her employment at Wal-Mart, she was interested in obtaining departmental and higher management positions.

80. Ms. Williamson was assigned to several departments over the course of her tenure at Wal-Mart, including Electronics, Housewares and Small Appliances. She also worked in Health and Beauty Aids, Cosmetics, Seasonal Products, Foods, Paper Goods, Pets, and Household Chemicals, helping as needed. She occasionally worked on the cash register. The last department to which she was assigned was Stationery, Books/Greeting Cards and Party Supplies [hereinafter "Stationery"]. During the time in which Ms. Williamson was assigned to Stationery, there was more than one extended period of time in which there was no department manager, and Ms. Williamson was expected to and did perform all the tasks of the department manager.

81. Ms. Williamson made it known repeatedly throughout her employment at Wal-Mart that she sought the position of department manager. She expressed this orally and in writing to the Store Manager on several occasions. She applied through the Wal-Mart computerized procedure. Despite these repeated requests for promotion, Ms. Williamson never received a promotion.

82. Ms. Williamson was qualified to be a department manager. She was often called upon to train recently promoted department managers, and to help out wherever needed. She was recognized on the Wal-Mart "Honor Roll". She had good performance evaluations. Ms. Williamson was never promoted and instead watched men with equal or lesser seniority and equal or lesser qualifications receive promotions. Ms. Williamson did not have the opportunity to apply for some of the promotions, which men received, because the positions were not posted.

EDITH ARANA

83. Edith Arana is an African-American woman who was hired by Wal-Mart Store #2401 in Duarte, California, on September 5, 1995. During her employment, she held the positions of Personnel Manager, Closing Sales Associate, and Inventory Clerk. Prior to working at Wal-Mart, Ms. Arana had nine years of retail experience.

84. In December 1997, Ms. Arana told the Store Manager that she wanted to apply for the assistant manager-training program. He informed Ms. Arana that he would recommend her to the District Manager for the training program. However, he did not give Ms. Arana's name to the District Manager. The Store Manager then said he would recommend Ms. Arana the next time the District Manager asked for names for the training program. However, to her knowledge, he never submitted her name.

85. In October 1999, Ms. Arana applied for the position of Paper Goods and Chemicals Department Manager. Although Ms. Arana understood that Wal-Mart's policy is to interview every applicant, she was not interviewed. A male employee was selected to fill the position.

86. Ms. Arana applied a second time for the position of Paper Goods and Chemicals Department Manager between January and August 2000. She was not interviewed, and a male employee was selected to fill the position.

87. In approximately June 2000, Ms. Arana told the new Store Manager that she wanted to be promoted and that she was interested in the assistant manager-training program. The Store Manager gave only a vague response. On another occasion, the

Store Manager told Ms. Arana that he did not want women in the assistant manager-training program. Ms. Arana is not aware of any woman recommended by that Store Manager for the assistant manager-training program.

88. During the months after Ms. Arana told the Store Manager that she wanted to apply for the assistant manager-training program, she also informed various Assistant Store Managers of her desire for a promotion. Ms. Arana also complained to several Assistant Managers about the Store Manager's discriminatory treatment of her. Ms. Arana also wrote a letter to an Assistant Manager expressing her desire to join the assistant manager-training program. That Assistant Manager suggested to Ms. Arana that she write a letter directly to the District Manager.

89. In December 2000, Ms. Arana wrote a letter to the District Manager expressing her interest in the assistant manager-training program. The District Manager replied via letter that Ms. Arana's letter would be forwarded to the new District Manager. Despite her repeated expressions of interest in the assistant manager-training program, Ms. Arana was never considered for that program.

90. In January 2001, Ms. Arana called Wal-Mart's toll free number to complain about the Store Manager's discriminatory refusal to interview women who applied for department manager positions in certain departments. Ms. Arana was informed that her complaint would be forwarded to the Regional Manager. However, to Ms. Arana's knowledge, no steps were taken in response to her complaint.

91. After Ms. Arana complained about the Store Manager's discriminatory treatment, she was trans-

ferred in February 2001 to the less desirable position of inventory traveler. Ms. Arana repeatedly told the Store Manager and two Assistant Managers that she did not want to be an inventory traveler because it was not a desirable position.

92. On October 19, 2001, Ms. Arana was falsely accused of "stealing time" and terminated in retaliation for her complaints regarding Wal-Mart's discriminatory failure to promote women.

93. During her six years of employment at Wal-Mart, Ms. Arana observed that few women were promoted to management positions. Women were often put in traditionally "female" departments, whereas men were placed in departments such as Paper Goods and Chemicals, Garden, and Hardware that increased their advancement opportunities.

94. On or about December 11, 2001, Ms. Arana filed a charge of discrimination with the Equal Employment Opportunity Commission and the DFEH, a copy of which is attached hereto as Exhibit 6 and incorporated by reference. The DFEH issued a right to sue notice on these charges on or about December 28, 2001. Ms. Arana has requested a right to sue notice from the EEOC on these charges.

FIRST CLAIM FOR RELIEF

(Violation of Title VII)

95. Plaintiffs incorporate Paragraphs 1 through 94.

96. This claim is brought on behalf of all Plaintiffs and the class they represent.

97. On or about October 22, 1999, January 4, 2000 and April 3, 2000, class member and former plaintiff Stephanie Odle filed charges of sex dis-

crimination against Wal-Mart with the United States Equal Employment Opportunity Commission, copies of which are attached hereto as exhibits 7-9 and incorporated by reference. Ms. Odle thereafter received a right to sue notice and commenced this action as a named plaintiff in a timely fashion. From the filing of her EEOC complaints through the initiation of this action, the class-wide nature of Ms. Odle's charges has been communicated to defendant.

98. On or about November 13, 2000, class member and former plaintiff Kimberly Miller filed a charge of discrimination with the EEOC, a copy of which is attached hereto as exhibit 10 and incorporated by reference. Ms. Miller thereafter received a right to sue notice and commenced this action as a named plaintiff in a timely fashion. From the filing of her EEOC complaints through the initiation of this action, the class-wide nature of Ms. Miller's charges has been communicated to defendant.

99. On or about March 15, 2001, class member and former plaintiff Sandra Stevenson filed a charge of discrimination with the EEOC, a copy of which is attached hereto as exhibit 11 and incorporated by reference. Ms. Stevenson thereafter received a right to sue notice and commenced this action as a named plaintiff in a timely fashion. From the filing of her EEOC complaints through the initiation of this action, the class-wide nature of Ms. Stevenson's charges has been communicated to defendant.

100. On or about May 17, 2001 class member and former plaintiff Micki Earwood filed a charge of discrimination with the EEOC, a copy of which is attached hereto as exhibit 12 and incorporated by reference. Ms. Earwood thereafter received a right to sue notice and commenced this action as a named

plaintiff in a timely fashion. From the filing of her EEOC complaints through the initiation of this action, the class-wide nature of Ms. Earwood's charges has been communicated to defendant.

101. The foregoing conduct violates Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e), et seq.

102. Wal-Mart has maintained a system for making decisions about promotions, assignments, transfers and compensation which is excessively subjective and which has had a disparate impact on female employees. This system is not and cannot be justified by business necessity, but even if it could be so justified, less discriminatory alternatives exist that could equally serve any alleged necessity.

103. Wal-Mart has maintained a 'willingness to relocate' prerequisite for promotion to management which has had a disparate impact on plaintiffs and the class they represent. This requirement is not and cannot be justified by business necessity, but even if it could be so justified, less discriminatory alternatives exist which could equally serve any alleged necessity.

104. Wal-Mart has intentionally discriminated against the class and maintained a system for making decisions about promotions, transfers, assignments and compensation that is excessively subjective and through which Wal-Mart discriminates against female employees by denying them the same opportunities for job assignments, upward mobility and compensation afforded to similarly situated male employees.

105. Defendant's discriminatory practices described above have denied female employees promo-

tional opportunities, transfers, assignments and compensation to which they are entitled, which has resulted in the loss of past and future wages and other job benefits.

106. Wal-Mart has systematically retaliated against women who have complained about discrimination and unfair treatment.

107. Defendant's retaliatory practices have resulted in the loss of past and future wages and other job benefits for class members.

108. Plaintiffs request relief as provided in the Prayer for Relief below.

SECOND CLAIM FOR RELIEF
(*Violation of Title VII*)

109. Paragraphs 1-108 are incorporated by reference. This claim is brought on behalf of the named plaintiffs individually for their non-class claims.

110. Defendant discriminated against named plaintiffs on the basis of their gender by demoting, terminating, and/or by retaliating against them and by subjecting them to a hostile work environment.

111. Defendant's discriminatory and retaliatory practices have resulted in the loss of past and future wages and other job benefits, and have caused plaintiffs to suffer humiliation, embarrassment and emotional distress.

112. Plaintiffs request relief as provided in the Prayer for Relief below.

THIRD CLAIM FOR RELIEF

(Violation of California Fair Employment and Housing Act-Race Discrimination)

113. Plaintiffs incorporate by reference Paragraphs 30-41 and 50-61.

114. This claim for relief is brought on behalf of Plaintiffs Dukes and Page only.

115. Defendant discriminated against plaintiff Dukes and Page on the basis of their race, African American. The foregoing conduct violates the California Fair Employment and Housing Act, Government Code §§ 12940, et. seq.

116. Defendant's discriminatory and retaliatory practices have resulted in the loss of past and future wages and other job benefits, and have caused plaintiffs to suffer humiliation, embarrassment and emotional distress.

117. Plaintiffs Dukes and Page request relief as provided in the Prayer for Relief below.

RELIEF ALLEGATIONS

118. Plaintiffs and the class they represent have no plain, adequate or complete remedy at law to redress the wrongs alleged herein, and the injunctive relief sought in this action is the only means of securing complete and adequate relief. Plaintiffs and the class they represent are now suffering and will continue to suffer irreparable injury from Defendant's discriminatory acts and omissions.

119. The actions on the part of Defendant have caused and continue to cause Plaintiffs and all class members substantial losses in earnings, promotional opportunities and other employment benefits, in an amount to be determined according to proof.

120. Defendant acted or failed to act as herein alleged with malice or reckless indifference to the protected rights of Plaintiffs' and class members. Plaintiffs and class members are thus entitled to recover punitive damages in an amount to be determined according to proof.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs and the class pray for relief as follows:

1) Certification of the case as a class action on behalf of the proposed Plaintiff class and designation of Plaintiffs as representatives of the class and their counsel of record as Class Counsel;

2) All damages which individual Plaintiffs and the class have sustained as a result of Defendant's conduct, including back pay, front pay, general and special damages for lost compensation and job benefits that they would have received but for the discriminatory practices of Defendant;

3) For Plaintiffs' individual, non-class claims, all damages they have sustained as a result of defendant's conduct, including back pay, front pay, general and specific damages for lost compensation and job benefits they would have received but for the discriminatory practices of defendant, damages for emotional distress, and punitive damages, according to proof;

4) Exemplary and punitive damages in an amount commensurate with Defendant's ability to pay and to deter future conduct;

5) A preliminary and permanent injunction against Defendant and its directors, officers, owners, agents, successors, employees and representatives,

and any and all persons acting in concert with them, from engaging in each of the unlawful practices, policies, customs and usages set forth herein;

6) A declaratory judgment that the practices complained of in this first amended complaint are unlawful and violate 42 U.S.C. § 2000(e), et. seq., Title VII of the Civil Rights Act of 1964;

7) An order restoring class members to their rightful positions at Wal-Mart;

8) An assignment of Plaintiffs and the class to those jobs they would now be occupying but for Defendant's discriminatory practices;

9) An adjustment of the wage rates and benefits for Plaintiffs and the class to that level which Plaintiffs and the class would be enjoying but for Defendant's discriminatory practices;

10) Costs incurred, including reasonable attorneys' fees, to the extent allowable by law;

11) Pre-Judgment and Post-Judgment interest, as provided by law; and

12) Such other and further legal and equitable relief as this Court deems necessary, just and proper.

Dated: September 12, 2002

Respectfully submitted,

THE IMPACT FUND

By: /s/ Jocelyn D. Larkin
JOCELYN D. LARKIN

Attorneys for Plaintiffs

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a jury trial as provided by Rule 38(a) of the Federal Rules of Civil Procedure.

By: /s/ Jocelyn D. Larkin
JOCELYN D. LARKIN

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, et al., **Plaintiffs,** **v.** **WAL-MART STORES, INC.,** **Defendant.**	Case No. C 01-2252 MJJ **DEFENDANT WAL-MART STORES, INC.'S ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFFS' THIRD AMENDED COMPLAINT**

Defendant Wal-Mart stores, Inc., for its answer and affirmative defenses to plaintiffs' Third Amended Complaint ("Complaint"), states as follows:

ANSWER

1. Answering paragraph 1 of the Complaint, admits only that Wal-Mart is the largest retailer in the world and the largest private employer in the United States. Wal-Mart denies all remaining allegations contained in paragraph 1 of the Complaint.

2. Answering paragraph 2 of the Complaint, admits only that plaintiffs purport to represent a class of similarly situated women. Wal-Mart denies all remaining allegations contained in paragraph 2 of the Complaint.

3. Answering paragraph 3 of the Complaint, denies the allegations contained therein and denies that plaintiffs are entitled to the requested relief or to any relief.

4. Answering paragraph 4 of the Complaint Wal-Mart denies the allegations contained therein.

5. Answering paragraph 5 of the Complaint, admits that venue is proper in this district.

6. Answering paragraph 6 of the Complaint, admits only that Betty Dukes is an African American woman who is currently employed by Wal-Mart. Further answering, states that it is without knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph 6 and therefore denies same.

7. Answering paragraph 7 of the Complaint, admits only that Patricia Surgeson is a woman; that she was employed by Wal-Mart from August 1997 to March 2001; and that her exit interview form indicates that she is "eligible to reapply." Further answering, states that it is without knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph 7 and therefore denies same.

8. Answering paragraph 8 of the Complaint, admits only that Cleo Page is an African-American woman who was employed by Wal-Mart from December 1999 to November 2000.

9. Answering paragraph 9 of the Complaint, admits only that Christine Kwapnoski is a woman who is currently employed by Sam's Club, and that Ms. Kwapnoski, who was hired in 1986, transferred to a Sam's Club in Concord, CA in 1994. Further answering, states that it is without knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph 9 and therefore denies same.

10. Answering paragraph 10 of the Complaint, admits only that Deborah Gunter is a woman who was employed by Wal-Mart from April 1996 until August 1996. Further answering, states that it is without knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph 10 and therefore denies same.

11. Answering paragraph 11 of the Complaint, admits only that Karen Williamson is a woman who was employed by Wal-Mart from September 1995 to October 1999. Further answering, states that it is without knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph 11 and therefore denies same.

12. Answering paragraph 12 of the Complaint, admits only that Edith Arana is an African-American woman who was employed at Wal-Mart from 1995 to October 2001.

13. Answering paragraph 13 of the Complaint, admits that it is a Delaware corporation headquartered in Arkansas with stores in California, but denies that it operates Wal-Mart Supercenters in California.

14. Answering paragraph 14 of the Complaint, admits only that plaintiffs purport to represent a class of past, present, and future female employees of Wal-Mart. Wal-Mart denies all remaining allegations contained in paragraph 14 of the Complaint. Further answering, affirmatively states that plaintiffs cannot properly maintain this case as a class action under Federal Rule of Civil Procedure 23.

15. Answering paragraph 15 of the Complaint, denies the allegations contained therein.

16. Answering paragraph 16 of the Complaint, denies the allegations contained therein.

17. Answering paragraph 17 of the Complaint, denies the allegations contained therein.

18. Answering paragraph 18 of the Complaint, denies the allegations contained therein.

19. Answering paragraph 19 of the Complaint, denies the allegations contained therein.

20. Answering paragraph 20 of the Complaint, admits only that Wal-Mart is the world's largest retailer, that Wal-Mart is the largest private employer in the United States, with over 1 million employees; that more than 100 million customers visit Wal-Mart stores around the world each week; and that it operates over 3,000 stores.

21. Answering paragraph 21 of the Complaint, denies the allegations contained therein.

22. Answering paragraph 22 of the Complaint, admits that the vast majority of employees in any particular store or club are non-exempt, hourly employees; that each store or club has several different salaried management positions; and that different parts of stores or clubs are organized into different districts and/or regions. Wal-Mart denies all remaining allegations contained in paragraph 22 of the Complaint.

23. Answering paragraph 23 of the Complaint, admits that individual store or club managers have discretion in making job assignments and in setting compensation levels within their stores or clubs, and that performance levels impact compensation. Wal-Mart denies that few objective criteria are applied

and denies all remaining allegations contained in paragraph 23 of the Complaint.

24. Answering paragraph 24 of the Complaint, denies the allegations contained therein.

25. Answering paragraph 25 of the Complaint, denies the allegations contained therein.

26. Answering paragraph 26 of the Complaint, denies the allegations contained therein.

27. Answering paragraph 27 of the Complaint, denies the allegations contained therein.

28. Answering paragraph 28 of the Complaint, denies the allegations contained therein.

29. Answering paragraph 29 of the Complaint (including subparts), denies the allegations contained therein.

30. Answering paragraph 30 of the Complaint, admits only that Betty Dukes is an African-American woman currently employed in Wal-Mart store #1615 located in Pittsburgh, California; that Dukes was hired as a part-time front end cashier at the Pittsburgh store in May 1994; and that Dukes was promoted to customer service manager in June 1997. Wal-Mart denies all remaining allegations contained in paragraph 30 of the Complaint.

31. Answering paragraph 31 of the Complaint, admits only that in November 1997, Dukes utilized the company's open door policy and contacted district manager Chuck Salby. Wal-Mart denies all remaining allegations contained in paragraph 31 of the Complaint.

32. Answering paragraph 32 of the Complaint, admits only that Dukes received written coachings in

February 1998 for returning late from breaks and on March 31, 1998 for failing to follow proper procedures in performing her duties as a customer service manager; and that Dukes contacted district manager Jay King regarding the March 31, 1998 written coaching. Wal-Mart denies all remaining allegations contained in paragraph 32 of the Complaint.

33. Answering paragraph 33 of the Complaint, admits only that Dukes called in sick on numerous occasions and had frequent absences from work; that, on one occasion when Dukes called in sick, Cagle, the store manager of the Pittsburgh store at the time, contacted Dukes and advised her that she should set a better example regarding attendance; that Dukes contacted Charles Chibante, District Loss Prevention Manager, about Cagle; and that Cagle apologized to Dukes for any comments regarding her absences that may have been misconstrued by her. Wal-Mart denies all remaining allegations contained in paragraph 33 of the Complaint.

34. Answering paragraph 34 of the Complaint, admits only that on August 14, 1999, Wal-Mart demoted Dukes from the Customer Service Manager position to cashier. Further answering, affirmatively states that, prior to her demotion, Dukes inquired of Cagle regarding what was required for promotion into management and that Cagle advised her generally that she should first strive to serve successfully as a department manager and then she seek advancement into the management training program. Wal-Mart denies all remaining allegations contained in paragraph 34 of the Complaint.

35. Answering paragraph 35 of the Complaint, admits only that in August 1999, Dukes met with John Scantlin at the District Office and complained

about her demotion and about alleged race discrimination. Wal-Mart denies all remaining allegations contained in paragraph 35 of the Complaint.

36. Answering paragraph 36 of the Complaint, admits only that, as a result of the misconduct that led to her demotion, Dukes became ineligible to apply for promotions for a period of one year; that in August 2000 an open support manager position was filled by the promotion of Rosa Trevino; that Joseph Topasana was promoted to a department manager position in July 2000; and that, as a result of Dukes' demotion in August 1999, her wage rate was reduced. Wal-Mart denies the remaining allegations contained in paragraph 36 of the Complaint.

37. Answering paragraph 37 of the Complaint, admits only that, as of August 14, 2000 Dukes once again became eligible to apply for promotions; and that, in January 2001, Will Martines was transferred from one department manager position to the position of department manager for Tire Lube Express. Wal-Mart denies the remaining allegations contained in paragraph 37 of the Complaint.

38. Answering paragraph 38 of the Complaint, denies the allegations contained therein.

39. Answering paragraph 39 of the Complaint, admits only that Brooke Terrell chose to step down from the position of department manager to a sales floor position; that Kevin Sims filed the position vacated by Terrell; that Trina Wallace was terminated on or about June 30, 2000; and that Kendall Dimery replaced Wallace. Wal-Mart denies all remaining allegations contained in paragraph 39 of the Complaint.

40. Answering paragraph 40 of the Complaint, admits only that a charge of discrimination for Dukes is attached as an exhibit to the Complaint. Further answering, states that it is without knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph 40 and therefore denies same.

41. Answering paragraph 41 of the Complaint, admits only that a charge of discrimination for Dukes is attached as an exhibit to the Complaint. Further answering, states that it is without knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph 41 and therefore denies same.

42. Answering paragraph 42 of the Complaint, admits only that Patricia Surgeson was hired by Wal-Mart in Vacaville in August 1997 as a sales associate, that her initial assignment was in the Tire and Lube Express Department, and that she transferred to the Health and Beauty Aids Department. Wal-Mart denies the remaining allegations contained in paragraph 42 of the Complaint.

43. Answering paragraph 43 of the Complaint, admits only that, in November 1998, Surgeson was assigned to the Layaway Department. Wal-Mart denies the remaining allegations contained in paragraph 43 of the Complaint.

44. Answering paragraph 44 of the Complaint, denies the allegations contained therein.

45. Answering paragraph 45 of the Complaint, admits only that in July 2000, Surgeson applied for and was given a position in the cash office. Wal-Mart denies the remaining allegations contained in paragraph 45 of the Complaint.

46. Answering paragraph 46 of the Complaint, admits only that in January 2001, Surgeson inquired about a raise in pay. Wal-Mart denies the remaining allegations contained in paragraph 46 of the Complaint.

47. Answering paragraph 47 of the Complaint, states that it is without knowledge or information sufficient to form a belief as to whether Surgeson was interested in the management training program and therefore denies same. Wal-Mart denies the remaining allegations contained in paragraph 47 of the Complaint.

48. Answering paragraph 48 of the Complaint, denies the allegations contained therein.

49. Answering paragraph 49 of the Complaint, admits that a charge of discrimination for Patricia Surgeson is attached as an exhibit to the Complaint. Further answering, states that it is without knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph 49 and therefore denies same.

50. Answering paragraph 50 of the Complaint, admits only that Page worked at Wal-Mart store #1972 located in Livermore, CA from October 19, 1998 to November 27, 2000; that Page worked at Wal-Mart store #2031 located in Union City, CA from August 19, 1998 to October 19, 1998 as a Courtesy Desk associate; and that Page worked at Wal-Mart store #992 located in Tulsa, OK from July 5, 1997 to July 31, 1998 as a cashier and Courtesy Desk associate. Further answering, states that it is without knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph 50 and therefore denies same.

51. Answering paragraph 51 of the Complaint, admits only that Page worked as a Courtesy Desk associate at Wal-Mart store #1972 located in Livermore, CA from October 19, 1998 to December 12, 1998 and that Page became a Customer Service Manager on December 12, 1998.

52. Answering paragraph 52 of the Complaint, denies the allegations contained therein.

53. Answering paragraph 53 of the Complaint, admits only that Page became Men's Wear Department Manager on November 27, 1999 and became Boys Wear Department Manager on January 29, 2000. Further answering, states that it is without knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph 53 and therefore denies same.

54. Answering paragraph 54 of the Complaint, denies the allegations contained therein.

55. Answering paragraph 55 of the Complaint, admits only that on September 14, 2000, Patricia (Alene) Sellen, white female, and Anita Perez, Hispanic female, were selected as Support Managers. Wal-Mart denies all remaining allegations contained in paragraph 55 of the Complaint.

56. Answering paragraph 56 of the Complaint, admits only that Page received a written warning on October 7, 2000 for leaving work for the day on October 5, 2000 leaving 15 shopping carts full of fixtures, merchandise, and trash, leaving 32' of counter space empty, and leaving the department unshoppable. Further answering, states that it is without knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph 56 and therefore denies same.

57. Answering paragraph 57 of the Complaint, admits only that Curtis Koonce became Sporting Goods Department Manager on or about November 2000. Wal-Mart denies all remaining allegations contained in paragraph 57 of the Complaint.

58. Answering paragraph 58 of the Complaint, states that it is without knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph 58 and therefore denies same.

59. Answering paragraph 59 of the Complaint, states that it is without knowledge or information sufficient to form a belief as to whether Page had "interest in being promoted to management" and therefore denies same. Wal-Mart denies all remaining allegations contained in paragraph 59 of the Complaint.

60. Answering paragraph 60 of the Complaint, denies the allegations contained therein.

61. Answering paragraph 61 of the Complaint, admits only that a charge of discrimination for Page is attached as an exhibit to the Complaint.

62. Answering paragraph 62 of the Complaint, admits the statements contained in paragraph 62.

63. Answering paragraph 63, admits that while employed at a Sam's Club in Missouri, Ms. Kwapnoski was sent to Concord, California to assist in converting a newly acquired store to a Sam's Club. Further answering, states that it is without knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph 63 and therefore denies same.

64. Answering paragraph 64, admits that while employed at the Sam's Club in Concord, California, Kwapnoski worked in auditing, freezer/cooler department, claims and receiving. Wal-Mart denies the remaining allegations contained in paragraph 64 of the Complaint.

65. Answering paragraph 65, denies the allegations contained therein.

66. Answering paragraph 66, admits that Kwapnoski was made a Team Leader in 1999, and that in 2001, Kwapnoski was promoted to Receiving Area Manager. Wal-Mart denies the remaining allegations contained in paragraph 66 of the Complaint.

67. Answering paragraph 67, admits that a charge of discrimination for Christine Kwapnoski is attached as an exhibit to the Complaint. Further answering, states that it is without knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph 67 and therefore denies same.

68. Answering paragraph 68 of the Complaint, admits only that Deborah Gunter was hired in April 1996 at Wal-Mart store #2028 located in Riverside, California; and that Gunter worked as a sales associate in the Photo Lab for part of her employment at #2028. Further answering, states that it is without knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph 68 and therefore denies same.

69. Answering paragraph 69 of the Complaint, states that it is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 69 and therefore denies same.

70. Answering paragraph 70 of the Complaint, admits only that Gunter worked as a stocker in the receiving area for part of her employment at Wal-Mart store #2028 in Riverside, California. Further answering, states that it is without knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph 70 and therefore denies same.

71. Answering paragraph 71 of the Complaint, admits only that Gunter transferred to Wal-Mart store #1747 located in Perris, California in 1998. Further answering, states that it is without knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph 71 and therefore denies same.

72. Answering paragraph 72 of the Complaint, states that it is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 72 and therefore denies same.

73. Answering paragraph 73 of the Complaint, states that it is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 73 and therefore denies same.

74. Answering paragraph 74 of the Complaint, admits only that Gunter transferred to Wal-Mart store #2077 located in Lake Elsinore, California in 1999; and that Gunter was employed as a sales associate in the Tire Lube Express Department. Further answering, states that it is without knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph 74 and therefore denies same.

75. Answering paragraph 75 of the Complaint, admits only that Gunter terminated her employment

with Wal-Mart in August 1999. Further answering, states that it is without knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph 75 and therefore denies same.

76. Answering paragraph 76 of the Complaint, states that it is without knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph 76 and therefore denies same.

77. Answering paragraph 77 of the Complaint, admits only that Williamson was hired by Wal-Mart in September 1995 to work at Wal-Mart store #2161 located in Pleasanton, California; that her employment with Wal-Mart was terminated in October 1999; and that store #2161 opened in November 1995. Further answering, states that it is without knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph 77 and therefore denies same.

78. Answering paragraph 78 of the Complaint, admits only that Williamson completed CBL training for Cash Drawer Maintenance, Bagging, Check Tendering, and Customer Service while employed at Wal-Mart store #2161 located in Pleasanton, California. Further answering, states that it is without knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph 78 and therefore denies same.

79. Answering paragraph 79 of the Complaint, states that it is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 79 and therefore denies same.

80. Answering paragraph 80 of the Complaint, admits only that Williamson worked as a sales associate in the stationary department during part of her employment at store #2161. Further answering, states that it is without knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph 80 and therefore denies same.

81. Answering paragraph 81 of the Complaint, states that it is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 81 and therefore denies same.

82. Answering paragraph 82 of the Complaint, admits only that Williamson received a "meets expectations" evaluation on August 20, 1999; received a standard evaluation on August 1, 1998; received an above standard evaluation on August 16, 1997; received a standard evaluation on August 15, 1996; and received an above standard evaluation on January 21, 1996. Further answering, states that it is without knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph 82 and therefore denies same.

83. Answering paragraph 83 of the Complaint, admits only that Edith Arana is an African-American woman who was hired on September 5, 1995 at Wal-Mart store #2401 located in Dnarte, California; that she was hired as a Personnel Manager, and that during her employment she worked as Personnel Manager, UPC associate, Stocker, Sales associate, Inventory Control associate, and Greeting Card associate.

84. Answering paragraph 84 of the Complaint, denies the allegations contained therein.

85. Answering paragraph 85 of the Complaint, admits only that on November 12, 1999, Arana applied for a Stationary and Books Department Manager position. Wal-Mart denies all remaining allegations contained in paragraph 85 of the Complaint.

86. Answering paragraph 86 of the Complaint, admits only that on February 28, 2000 Arana applied for a Household Paper Good Department Manager position and that the position was filled by a male associate. Wal-Mart denies all remaining allegations contained in paragraph 86 of the Complaint.

87. Answering paragraph 87 of the Complaint, admits only Arana and Store Manager John Kocharian had general conversations about the management training program and denies the remaining allegations contained in paragraph 87 of the Complaint.

88. Answering paragraph 88 of the Complaint, denies the allegations contained therein.

89. Answering paragraph 89 of the Complaint, admits only that Arana contacted District Manager Judy Evans regarding the assistant manager training program and denies all remaining allegations contained therein.

90. Answering paragraph 90 of the Complaint, denies the allegations contained therein.

91. Answering paragraph 91 of the Complaint, admits only that on September 18, 1999 Arana began working on the Inventory Control team, and denies the remaining allegations contained in paragraph 91 of the Complaint.

92. Answering paragraph 92 of the Complaint, admits only that Arana's employment was termi-

nated on October 19, 2001 for gross misconduct and denies all remaining allegations contained in paragraph 92 of the Complaint.

93. Answering paragraph 93 of the Complaint, denies the allegations contained therein.

94. Answering paragraph 94 of the Complaint, admits that a charge of discrimination for Arana is attached as an exhibit to the Complaint. Further answering, states that it is without knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph 94 and therefore denies same.

95. Wal-Mart incorporates paragraphs 1 through 94 above.

96. Answering paragraph 96 of the Complaint, admits only that plaintiffs purport to represent a class. Wal-Mart denies all remaining allegations contained in paragraph 96 of the Complaint. Further answering, affirmatively states that plaintiffs cannot properly maintain this case as a class action under Federal Rule of Civil Procedure 23.

97. Answering paragraph 97 of the Complaint, admits only that a charge of discrimination for Stephanie Odle is attached as an exhibit to the Complaint. Further answering, Wal-Mart states that it is without knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph 97 and therefore denies same.

98. Answering paragraph 98 of the Complaint, admits only that a charge of discrimination for Kimberly Miller is attached as an exhibit to the Complaint. Further answering, Wal-Mart states that it is without knowledge or information sufficient to

form a belief as to the remaining allegations contained in paragraph 98 and therefore denies same.

99. Answering paragraph 99 of the Complaint, admits only that a charge of discrimination for Sandra Stevenson is attached as an exhibit to the Complaint. Further answering, Wal-Mart states that it is without knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph 99 and therefore denies same.

100. Answering paragraph 100 of the Complaint, admits only that a charge of discrimination for Micki Earwood is attached as an exhibit to the Complaint. Further answering, Wal-Mart states that it is without knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph 100 and therefore denies same.

101. Answering paragraph 101 of the Complaint, denies the allegations contained therein.

102. Answering paragraph 102 of the Complaint, denies the allegations contained therein.

103. Answering paragraph 103 of the Complaint, denies the allegations contained therein.

104. Answering paragraph 104 of the Complaint, denies the allegations contained therein.

105. Answering paragraph 105 of the Complaint, denies the allegations contained therein.

106. Answering paragraph 106 of the Complaint, denies the allegations contained therein.

107. Answering paragraph 107 of the Complaint, denies the allegations contained therein.

108. Answering paragraph 108 of the Complaint, denies the allegations contained therein as denies that plaintiffs are entitled to any relief.

109. Wal-Mart incorporates paragraph 1 through 108 above. Further answering, admits only that plaintiffs purport to bring individual claims under Title VII.

110. Answering paragraph 110 of the Complaint, denies the allegations contained therein.

111. Answering paragraph 111 of the Complaint, denies the allegations contained therein.

112. Answering paragraph 112 of the Complaint, denies the allegations contained therein and denies that plaintiffs are entitled to any relief.

113. Wal-Mart incorporates paragraphs 30 through 41 and 50 through 61 above.

114. Answering paragraph 114 of the Complaint, admits only that Plaintiffs Dukes and Page purport to bring a claim under the California Fair Employment and Housing Act on their own behalf only.

115. Answering paragraph 115 of the Complaint, denies the allegations contained therein.

116. Answering paragraph 116 of the Complaint, denies the allegations contained therein.

117. Answering paragraph 117 of the Complaint, denies the allegations contained therein and denies that Plaintiff Dukes or Plaintiff Page is entitled to any relief.

118. Answering paragraph 118 of the Complaint, denies the allegations contained therein.

119. Answering paragraph 119 of the Complaint, denies the allegations contained therein.

120. Answering paragraph 120 of the Complaint, denies the allegations contained therein.

121. Answering the unnumbered prayer for relief (including subparts) on pages 24 and 25 of the Complaint, denies that plaintiffs are entitled to the relief requested or to any relief.

122. Denies each and every allegation set forth in the Complaint not expressly admitted herein.

AFFIRMATIVE DEFENSES

123. To the extent Plaintiffs seek relief under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., and/or the California Fair Employment and Housing Act, Government Code § 12940 et seq., for employment decisions or actions which were not included in a charge timely filed with the appropriate administrative agency, such claims are barred because of the failure to exhaust administrative remedies and/or the failure to satisfy the statutory prerequisites and the Court therefore lacks subject matter jurisdiction over such claims.

124. To the extent Plaintiffs seek relief under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., and/or the California Fair Employment and Housing Act, Government Code § 12940 et seq., from or for employment decisions which were not made the subject of a timely charge with the appropriate agency, such claims are barred.

125. To the extent Plaintiffs seek relief under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., and/or the California Fair Employment and Housing Act, Government Code § 12940 et seq., such claims are barred by the applicable statute of limitations.

126. All of Wal-Mart's employment decisions with respect to Plaintiffs were based on legitimate, nondiscriminatory business reasons and were not pretexts for discrimination.

127. All of Wal-Mart's employment decisions with respect to Plaintiffs were job-related and consistent with business necessity.

128. All of Wal-Mart's employment decisions with respect to Plaintiffs were based on bona fide factors other than sex or race, including but not limited to a bona fide merit system.

129. Plaintiffs' claims are barred in whole or in part by their failure to mitigate, or reasonably attempt to mitigate, their damages.

130. Plaintiffs' claims for exemplary or punitive damages are barred in whole or in part by the provisions of the United States Constitution.

131. Plaintiffs' claims for punitive damages are barred on the grounds that Wal-Mart's actions were not undertaken with malice or reckless indifference to the Plaintiffs' federally protected rights.

132. Plaintiffs are not entitled to recover any punitive or exemplary damages and any allegations with respect thereto should be stricken because:

a. Plaintiffs have failed to plead facts sufficient to support allegations of oppression, fraud and/or malice. Cal. Civ. Code § 3294(a);

b. Plaintiffs have failed to plead facts sufficient to support allegations of gross or reckless disregard for the rights of Plaintiffs or that Defendants were motivated by evil motive or intent;

c. Neither Defendants nor any of their officers, directors or managing agents committed any alleged oppressive, fraudulent or malicious act, authorized or ratified such an act, or had advance knowledge of the unfitness, if any, of any employee or employees who allegedly committed such an act or employed any such employee or employees with a conscious disregard of the rights or safety of others. Cal. Civ. Code § 3294(b); and

d. California's laws regarding the alleged conduct in question in this action are too vague to permit the imposition of punitive damages, and California's laws, rules and procedures regarding punitive damages, as applied to the facts in this case, would violate Defendant's constitutional rights under provisions of the United States and California Constitutions, including, but not limited to, the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and the excessive fines and cruel and unusual punishment clauses of the Eighth Amendment to the United States Constitution.

133. Wal-Mart exercised reasonable care to prevent and promptly correct any sexually harassing or other protected group-harassing behavior.

134. Plaintiff Surgeson and Plaintiff Gunter unreasonably failed to take advantage of the preventive and corrective opportunities provided by Wal-Mart to avoid harm.

135. Any alleged harassment that Plaintiff Surgeson or Plaintiff Gunter may have experienced was not sufficiently pervasive to affect the terms or conditions of her employment, and thus is not actionable.

136. Plaintiffs' Complaint fails to state a claim upon which relief can be granted under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., and/or the California Fair Employment and Housing Act, Government Code § 12940 et seq., and/or other applicable law.

137. Some or all of the forms of relief sought in the Complaint are barred because Wal-Mart at all times acted in good faith and with the honest belief that its conduct was in compliance with Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., and the California Fair Employment and Housing Act, Government Code § 12940 et seq.

138. Plaintiffs' claims are barred in whole or in part by the doctrine of laches.

139. Plaintiffs' claims are barred in whole or in part by the doctrine of unclean hands and/or estoppel by reason of the conduct and actions of Plaintiffs and/or each of them.

140. Plaintiffs' claims and/or damages and other relief are barred in whole or in part by the after-acquired evidence doctrine.

141. Plaintiffs' claims are barred in whole or in part by Plaintiffs' failure to perform in accordance with California Labor Code §§ 2854, 2856-59, and 2863, as applicable.

WHEREFORE, Defendant Wal-Mart Stores, Inc. respectfully requests that the Court dismiss this action with prejudice and award Wal-Mart its costs of action, reasonable attorneys' fees, and such other and further relief as may be just and proper.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES,)
PATRICIA SURGESON,)
on behalf of themselves)
and all others similarly)
situated,)
Plaintiffs,) Cause No.
) C-01-2252 MJJ
vs.)
WAL-MART STORES,)
INC.,)
Defendant.)

VIDEO DEPOSITION OF KEVIN HARPER

Taken on behalf of the Plaintiffs

March 12, 2002

* * *

[Page 19]

Q. Sure. And what are the Neighborhood Markets?

A. They are a food and drug more a what you might call a regular grocery format. Something that would be similar to a lot of what you see out there with a Kroger perhaps something of that nature today.

Q. Okay. And are those stores located at any particular geographical region at this point?

A. They are in multiple areas primarily in Texas, Arkansas, and Oklahoma.

Q. The – in Division One the non-Supercenter stores non-Supercenter non-Neighborhood Market, do they have a particular name or code? Do they call them like regular Wal-Marts or something like that?

A. Generally referred to as just Wal-Mart. Supercenters is referred to as Supercenters and Neighborhood Markets is Neighborhood Markets.

Q. And the – for purpose of this deposition when we talk about Wal-Mart Stores then if it's all right with you, we'll be referring to those non-Supercenter non-Neighborhood Market stores. Is that – do you understand that distinction, we're making?

A. We can make that distinction.

Q. We'll call them – I'll call them regular Wal-Marts if you don't mind –

A. Understood.

* * *

[Page 32]

parent store.

Q. Well, let's take it step by step. We're – let's say we are in a regular Wal-Mart, and I want to sort of just trace quickly the reporting structure up for management purposes.

A. Okay.

Q. And maybe there's more than one range to go. So let's take them one at a time.

A. Okay.

MR. LAMPE: You haven't answered his question. I think you guys aren't communicating on this point.

Why don't you ask again what the clarification you need, Mr. Harper.

A. Within a Wal-Mart store regular Wal-Mart store, there could be as many as five different management reporting structures.

Q. (BY MR. SELIGMAN) Okay.

A. And so what I want to make sure I understand is do you want me to explain all five of those, and if so, then I can clarify and start with the first and go forward.

Q. Let's do that because I – let's go one at a time so maybe we can sort of draw the chart so I understand what we're talking about. So why don't we start. Ultimately I want to hit all five. So let's take the first.

A. Okay. Let me start with our TLE division.

[Page 33]

Q. Okay.

A. You have a TLE Manager. That TLE Manager would report to a TLE district manger which would report to a TLE regional.

In our optical, you'd have an Optical Manager, reporting to an optical DM, reporting to an optical regional.

In one hour photo, you'd have the Photo Manager, then the photo DM, and then the photo regional.

In – did I say pharmacy? Pharmacy and again it would be Pharmacy Manager. I should clarify that.

Q. Uh-huh.

A. Pharmacy DM pharmacy regional.

Then within the shoes and jewelry group there is not a salaried position, but the two Department Managers would report to the Shoes and Jewelry District Manager.

Q. So the Shoe Department Manager and the Jewelry Department Manager would report to the District Manager?

A. That's correct.

Q. Okay. And the Shoe Department Manager and the Jewelry Department Manager are not salaried positions?

A. That's correct.

Q. Is what you're saying. Unlike the other Store Managers you've just referred to, those are all salaried TLE, Optical Manager, one hour, and pharmacy?

[Page 34]

A. With the exception of the State of California, that's correct.

Q. And how does California work? It's different?

A. In the state of California, our one hour photos, our pharmacy, and our tire and lube express based under the California Fair Labor Standards Act have been designated as hourly. So all of those management positions in the State of California are hourly not salaried.

Q. Okay. Does that reflect a difference in job duties between California and other states, or is that a – let me just leave it at that. Does that reflect a difference in job duties between California TLE, One

Hour, and Pharmacy Managers in California than other states?

A. It does not reflect a job difference.

Q. Okay. Going back to, I'm sorry.

A. Shoes and jewelry report to the – the Department Managers report to DM Shoes and Jewelry DM which then report –

Q. Which is one job?

A. That's correct. Which then reports to the shoes and jewelry regional. Now, all of those that I mentioned across there would also report to their respected divisionals. So there would be a TLE divisional that the regional would report to. Same thing for optical, etc, and then each one of those divisions have an operating head. **[Page 35]** It's not structured the same in every division.

Pharmacy division has a Vice President of Operations. Our tire and lube express has a Vice President of TLE, and he actually has responsibility for operations as well as the other operating components within the TLE not just the stores.

Our optical has a Vice President or Senior Vice President, pardon me, of optical, but he also has responsibility for merchandising, third party collection, the operations of the stores, I mean, all of the components that make up optical.

The shoes and jewelry has a Vice President of Operations, and then he reports to the Senior Vice President of shoes and jewelry. And then the Senior Vice President again has merchandising as well as operational responsibilities.

Now, on the store's side to kick back over, inside the store you have the Store Manager.

Q. Now, the store side we're now talking about everything except for those five departments we've just talked about?

A. Yes.

Q. Okay.

A. In the store, you have several Assistant Manager positions. If you want to start with the first salaried **[Page 36]** level, that would be where it would begin. Depending on the size of a Wal-Mart store, you could have no assistant mangers because we have some of our very small stores that have none. You could have seven, eight, nine, ten assistants depending on the size or the location. The Assistant Managers would report either to a Co-manager if the store was had one, or they would report to the Store Manager. It'd depend on if that store structure had a Co-manager in it or if we had made the distinction to put a Co-manager in. Then the Store Manager reports to the DM, DM to the regional, then the regional to our divisional.

Q. Now, we've so far been talking regular Wal-Marts. Let's talk about Supercenter.

A. Okay.

Q. And first let me ask you in terms of the five specialty divisions is the reporting structure any different for Supercenters?

A. Reporting structure would be the same.

Q. So that a – to be clear if you're in the same regional area, a Tire and Lube District Manager would have reports from both Supercenters and regular Wal-Marts?

A. That is very possible, yes.

Q. Okay. And same with the other specialty divisions?

A. That is correct. And also it would not be uncommon for an optical or, pardon me, a pharmacy to also have **[Page 37]** responsibility for a Sam's pharmacy, and it would not be impossible for a one hour photo DM to also have a Sam's within their operating units as well.

Q. Okay. Let me back up a little bit. So the specialty divisions the specialty structure which we're referring to this manager, District Manager, regional.

A. Yes, sir.

Q. The specialty structure would include Sam's as well as regular Wal-Marts and Supercenters?

A. In most cases, yes, but not in all. For example, if you go to a Sam's organization today, they have a what's called a tire area. They have the tire – what we would call tire and lube express on the Wal-Mart side they have a tire area. Our Tire and Lube Express Division does not have responsibility for that Sam's piece. On the optical side, they have both Sam's and Wal-Mart. On the one hour photo, they have Sam's and Wal-Mart, and on the pharmacy they have Sam's and Wal-Mart.

Q. What about shoes and jewelry?

A. Shoes and jewelry do not.

Q. Okay. So –

A. There is a jewelry within Sam's, but it reports through Sam's not through the shoes and jewelry division.

Q. Okay. So in terms of specialty optical, photo, and pharmacy there's a common reporting structure for Sam's and **[Page 38]** the regular Wal-Marts and Supercenters?

A. Yes.

Q. But for tire and lube and shoes and jewelry there is not a common?

A. That's correct.

Q. Okay. Let me talk about Supercenters for a moment. Supercenter Store Managers refer to the same – report to the same District Managers as regular Wal-Marts in the same geographic areas?

A. Correct.

Q. Okay. Is there any other separate reporting structure for Supercenters different from regular Wal-Marts?

A. In a direct line of reporting, no. We do have additional members of management in a Supercenter because of the food business and oftentimes have additional Co-manager in the stores because of the food business. We do have an additional person that works in the field called a field merchandiser or food merchandisers, I'm sorry, and the food merchandiser's responsibility is just that it's the food within the Supercenters and making sure that anything from quality assurance standards all the way through to in stock are maintained. They do not have a direct supervisory responsibility, but they do have an indirect working with the District Managers and those markets.

Q. The food merchandisers do they operate at a **[Page 39]** district level or are they at for each store as a food merchandiser?

A. No. It's at a district level different than our District Managers because a Wal-Mart District Manager may have six to eight stores. A food merchandiser may have as many as twenty.

Q. Okay. In the Supercenters the additional salaried management positions that might be that are separate from the regular Wal-Marts, what would they be?

A. We have generally a dry grocery assistant.

Q. Assistant Manager?

A. Yes, sir. We generally have a manager that would handle our deli and meat area.

Q. And that would be an Assistant Manager?

A. That's correct. And then we generally have an Assistant Manager who would handle our bakery area as well.

Q. So in terms of salaried positions that are different from the regular Wal-Marts those are the three additional positions?

A. Those are the three additional. I have some Supercenters that only operate with two of those three. I have some that operate with an additional one because of volume. So it's not a set structure. We certainly try to manage our, you know, the appropriate number of people based on the volume, and/or in some cases, it's not even based off **[Page 40]** the volume. It may be just based off it's a new store so we want to have the additional staff in there until the store gets up and running, and then as it transitions into an existing store maybe move the management out. But it varies based on the need of the individual store.

Q. Okay. Do all Supercenters have Co-managers?

A. All Supercenters have Co-managers with the exception of some of our smaller 108,000 square foots or even 120s where the volume and the need just does not exist.

Q. Okay. And a Co-manager reports to the Store Manager. It's not on equal level as the Store Manager?

A. That's correct.

Q. We'll get to the actual job duties for those positions a little bit further down the line. Do you know why there's a separate management structure for Sam's Club?

A. Separate business.

Q. At what point in the organizational hierarchy do Sam's and Wal-Mart Stores report to the same people?

A. Once it reaches Lee Scott who is our President and CEO, the President of Sam's and the President of Wal-Mart both report to him, and that is where they meet in the general sense. Obviously on the divisions I described earlier with the specialty groups, it happens at the Senior Vice President level in pharmacy, the Senior Vice President level in optical, and the Vice President level in one hour***

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A. Based on what it looks to me is a list of our some of our job descriptions most likely pulled off of our internal web site Pipeline.

Q. The job positions listed on here you said it's some of the positions. It's not a complete list of all of the positions that are in stores?

MR. LAMPE: The document actually says job descriptions not positions.

A. I would say that the list is not complete.

Q. (BY MR. SELIGMAN) Are you aware of a document that would be a complete list of all the job positions in the Wal-Mart Stores?

A. I'm not aware of any single document that would all of them. No.

Q. Okay. Let me ask you to the best of your knowledge and the starting with the regular Wal-Mart Stores to tell me what are the hourly positions in those stores.

A. Okay. The hourly positions and I'm just going to try to go through the store kind of a chunk at a time.

Q. Sure.

A. If that's okay.

Q. However you want to organization it.

A. We'll kind of start with our overall Wal-Mart structure. Obviously cashier positions sales associate positions which would be varied by department. We would **[Page 43]** have a sales associate for in a regular Wal-Mart store for food department, for health and beauty aids, for stationary, paper goods and chemicals, house wears, toys, pets, sporting goods, hardware, paint, domestics, and a lot of these departments are clustered together. So they're not individual. Our fabrics area all of our apparel departments men's, women's, lingerie and a lot of the determining factors of how many of those associates sales associates would be in each would be based on the volume of the store as well as in some cases as the size.

Q. Let me ask you to stop there for a second. The sales associate jobs when you say varied by departments are they considered to be separate job titles by department or just sales associates appear in every department?

A. In some cases, they will separate because of the specific training required to do the function. If you are a sales associate in optical, you will be referred to as an optical sales associate because there is a difference in some of the aspects or responsibilities of the position as relates to customer service. Same thing could be said of pharmacy. So there are some differences based on what is required in the function.

Q. Okay. Other than the specialty division departments, are there separate – are there associates that whose job positions are specific to those departments?

[Page 44]

A. If you say position, the position titles will be the same. If you are asking if there are other responsibilities or requirements that would be different department to department, the answer would be, yes.

Q. When you say other responsibilities, you mean the job duties are different in the departments?

A. Correct.

Q. Are the job qualifications leaving aside the specialty different between the departments?

A. In some cases, yes.

Q. Okay. If I wanted to find out what those differences are, what kind of documents if any would show me that?

A. The documents that would show that if they are present would be our job descriptions that would actually on the system that would actually on Pipeline that would actually show what the requirements of the position were or qualifications if they – if they existed.

Q. Okay. Other than the job descriptions, are there other documents that would tell me what the qualifications for the different positions are?

A. On an hourly basis, the only thing that might exist would be our job posting, but again that refers right back to our Pipeline. So it is simply a tool that's used that refers you back to where the information is contained on **[Page 45]** Pipeline.

Q. Okay. And so the job postings would get you back to the job descriptions?

A. Yes, sir.

Q. And job postings generally have a shorter description of the position than what's on the actual job description?

A. I believe – I can't answer this with a hundred percent certainty that it refers back to the actual job description on Pipeline. So I don't think there is a difference.

Q. Okay. But those job descriptions are where if I wanted to find out what are the difference in job duties or qualifications that's where they'd be explained?

A. Yes.

Q. Okay. Has that been true all the time that you've been at Wal-Mart that there are job descriptions that explain those things?

A. No, it has not been.

Q. Okay. How recently has that been true?

A. With certainty I can't say because as we started developing job descriptions and/or requirements they did not all appear at one time. We have been working on those for probably the last ten years.

Q. Okay. At what point were there job descriptions **[Page 46]** available for the -- for most of the job positions in the stores?

MR. LAMPE: I'll object because I don't believe he's stated that that's the case.

A. Yeah. Job descriptions don't necessarily exist for everything even today. So to state at what point did most it would be within probably the last two to three years.

Q. (BY MR. SELIGMAN) Are there positions in the stores today you're aware of that there are no job descriptions available?

A. Yes.

Q. What positions?

A. A perfect example would be our Mary Kate and Ashley store just opened, and I'm quite sure that there's no job description for that position. I'm quite sure there's probably not any for our candy store that we just opened. We are constantly doing tests and/or structure changes within the organization, and I'm very sure when we do those that we do not write job descriptions for those changes immediately upon the change. Once we get prepared to roll out a structural change, we generally try to make those changes present then, and I'm not so sure that I could even specifically identify the specific jobs because we try to allow our Store Managers and District Managers some flexibility in making decisions on what associates in the***

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areas, and Pipeline?

A. Uh-huh.

Q. What role does do the people at Pipeline play in approving descriptions?

A. The Pipeline team is part of the overall training and development team. So they generally drive the approval process. Once any updates have been made, they distribute that update with an approval sheet to all of the people on that particular job description approval list.

Q. So they make sure the paper goes around?

A. Yes.

Q. Do they have any responsibility in terms of the substance of content of a job description?

A. They have responsibility for posting the corrections not the content with the exception of making sure that what's on the paper's the content that gets posted obviously from an accuracy standpoint.

Q. Okay. These job descriptions are used throughout the country at Wal-Mart? There's not separate job descriptions for different regional areas?

A. There's not sperate job descriptions. There may be overlapping job descriptions because in one market we may decide to only put one person where there may be two which may require them to have an understanding of the cashier job description and an understanding of a sales associate in a **[Page 59]** certain department. Even within our overall assignments of positions we have secondary and primary and secondary functions. So very likely one person could have more than one job description that they might call thier own based on their role in the store.

Q. But the actual job description the written job description there's only one cashier job description in use at Wal-Mart, for example?

A. To the best of my knowledge, that's correct. Yes.

Q. Okay. And that job description you say goes onto the Pipeline system?

A. That's correct.

Q. And who has access to that to these job descriptions?

A. As far as I know, anyone in the Wal-Mart Stores group.

Q. Anyone including hourly associates?

A. Yes, sir.

Q. And the access is electronically through the computer system?

A. That's correct.

Q. Is there some other way other than going through the computer that folks have access to these job descriptions?

A. Not that I'm aware of.

* * *

[Page 90]

Q. So Thirty was a division number?

A. That's correct.

Q. And 31 –

A. 31 was a division number for one hour.

Q. Okay.

A. And I apologize. I just can't remember the department numbers.

Q. Now, there's a – we've got a Division 11, a Division 30, a Division 31 where are all the other divisions?

A. They don't exist.

Q. So how many divisions are there –

A. Or they're broken up into home office divisions as well. The divisions numbers as they're laid out in corporation Division One was stores. That's the way that it started. I'm sure there was a Division Two, a Division Three, a Division Four, a Division Five. I have no honest idea what those are. We basically as the company grew and it structured and it ended up with these different operational units they just attached the division number that was not used, and then that became the new P&L reporting structure.

Q. With regard to the field to the store operations, what divisions are there other than you mentioned Division One for the stores; Division 11 which is jewelry; Division **[Page 91]** 30 which is optical; 31 which is photo; 10 which is pharmacy. Which other divisions are there used out there?

A. Six for tire and lube express.

Q. Okay.

A. Do you have five specialty groups there?

Q. No. Oh, wait. We got shoes –

A. Did you get 25 or 15 is shoes, sorry. Division 15 is shoes.

Q. Okay. And what's 25?

A. No. That's the department number for shoes.

Q. Okay. So I've got stores, jewelry, optical, photo, pharmacy, TLE, and shoes?

A. That should be all the divisions.

Q. Okay. Now, in addition to department codes, are there job codes for each position?

A. There are job codes for position types, yes.

Q. Okay. And the job codes what are the purposes of those?

A. Primary purpose for job codes is to assist in scheduling.

Q. How so?

A. By having – we obviously have the department numbers. We have a sales associate job code. We have a cashier job code, etc. We know what the associate's availability is based on an availability form that they***

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[Page 108]

Q. For those positions. Right. And likewise pay class two, three, four, and five are used for the positions that are listed?

A. Correct.

Q. And is it – are the pay classes higher pay as you go to higher numbers that is two is higher more higher paid than one?

A. That's correct.

Q. Okay. Looking down on the first column on the left side what refers to general merchandise, I assume that's what general MDSE stands for?

A. Yes. That's correct.

Q. All right. And that would refer to the regular Wal-Marts and the general merchandise parts of Supercenters?

A. That's correct.

Q. Okay. There's a position listed towards the bottom called Support Manager.

A. Correct.

Q. See that? What is that?

A. That is a position that is most often additional responsibility that an associate takes in which they can act as a member of management in some circumstances. Earlier I gave the description of being able to be at the back door while the back door is open while we are receiving freight or perhaps collecting money out of the registers or money of **[Page 109]** the machines in the front, and in even some cases in our smaller stores, our Support Managers actually act as an assistant when the Store Manager is out of the store for 30 minutes for a quick lunch or something of that nature.

Q. Is a Support Manager a salaried position?

A. It is not.

Q. Is it generally a route into management an entry level management position?

A. It can be. It is certainly by no stretch of the imagination the only route into that position.

Q. Okay. You're familiar with the – there's a job posting system at Wal-Mart for hourly positions?

A. Yes.

Q. And there's also a separate system for management positions?

A. That's correct.

Q. Which system would if either would a Support Manager be posted in?

A. It would be posted on the job announcements at store level.

Q. So the hourly positions?

A. Correct.

Q. Okay. And there's a job description for that position?

A. Yes, I believe there is.

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[Page 133]

broadcast series?

A. No.

Q. Under Personnel Manager's Planner, it refers to the Store Manager Recap Report. What is that?

A. There is a Store Manager Recap Report that prints off each morning for the Store Managers that recaps all of the key operational, personnel, and merchandise topics for the day, the week, the month, and it allows them to be able to get kind of a quick snapshot of how their store's performing on those topics.

Q. Okay. What kind of personnel issues would be in the recap report?

A. Evaluations due, where we're at an our CBL module's completion, and if we have any child labor violations with the minors that our associates in our stores.

Q. Does that have anything about jobs that are vacant or promotion decisions or anything like that?

A. No.

Q. No. Okay. Let me ask you to turn to Page 157958 under Coordinate the selection of new Associates by refers to the administration of the TAPS program. How does the TAPS program have to do with the selection of new associates?

A. What it's referring to is simply pulling the information off of the system once it has been sent to them***

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Q. What about for Co-manager?

A. Same as store.

Q. Co-manager has the same form as Store Manager?

A. Yes.

Q. You referred earlier to I think what you called a management trainee position.

A. Yes.

Q. Okay. And that's a position that is in the store system?

A. Correct.

Q. Okay. And do they have – is there a Manager Trainee in every store normally?

A. No.

Q. What stores get management trainees?

A. Most often not always stores that we have selected as training stores.

Q. And typically how many training stores would there be in a district?

A. Two to three.

Q. Out of how many stores on average in a district?

A. Six to eight.

Q. And are these -- are these larger stores, or how do you decide what something?

A. We try very hard to pick stores where we feel that the level of training that they will get will be of the

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[Page 150]

policy number in place with all other policies.

Q. Is it significant if something's called a policy as opposed to not being called a policy? Does that mean anything to somebody in a store?

A. It can in the sense that it is an operational policy which this one is. It is often going to still be up to the individual stores to make adjustments, and even within this documents it says in smaller stores will have to double up on responsibilities. So every store is going to have something that resembles an assignment of these responsibilities to the Assistant Managers, but it may look much different than what's on this document based on the overall head count of assistants in a store.

Q. Okay. If I wanted to get this document referred to before which splits up the store and makes recommendations for Assistant Manager assignments, what would I ask for?

A. Again I don't know the title. I would ask for the Assistant Manager merchandise responsibilities.

Q. So that document the Assistant Manager merchandise responsibilities document?

A. Uh-huh. I'm sure that's not the correct terminology, but I'm sure –

Q. Somebody should understand.

A. - somebody will understand what that is.

Q. Okay. Fair enough. The next position above **[Page 151]** Assistant Manager is often a Co-manager?

A. Correct.

Q. And there's a job description for a Co-manager?

A. I believe so.

Q. What's a Co-manager's duties?

A. Co-manager's duties are very similar to that of a Store Manager, and if you were to look at the responsibilities, there's certainly a financial responsibility, protection of company's assets through shrinkage or theft, as well as driving sales and profit, certainly responsibility from a supervisory impact to the associate base. They would supervise Assistant Managers in the store. They would have an in-stock responsibility, a price responsibility, competitive image, responsibility community involvement, pretty much the majority of the functions that you would see listed at a Co-manager or, pardon me, on a Store Manager's job responsibilities. And we are using that position to train them to run a Wal-Mart store or Supercenter.

Q. Now, some stores don't have a Co-manager?

A. That's correct.

Q. Do some stores have more than one Co-manager?

A. Yes, they do.

Q. And under what circumstances would you have the range zero, one, two, or whatever?

[Page 152]

A. Zero is generally a Wal-Mart store no food. They typically do not have cos. However, in some cases where they are just very high volume or in very difficult markets, we make a decision to put cos in there. In our Supercenters most generally unless they are very low volume, they have at least one co, and that co usually takes care of the food side of the business and typically has some food experience but not always because we are using that position to train people. So from time to time they move into that without food experience. The case where we have two is usually either a very high volume Supercenter and/or a brand new Supercenter where we are supporting that organization with an additional member of management until they – it gets up off the ground and runs. I've even seen us occasionally put three in a brand new stor where we just felt the volume was extremely high. Generally that's for a period of six months or less.

Q. And the next position over a Co-manager is the Store Manager. Correct?

A. That's correct.

Q. The Store Managers have they ever been referred to as Store Directors?

A. At one time, yes.

Q. At what point were they called Store Directors?

A. At one point, the Supercenter Managers were***

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[Page 155]

viewed. It is not a position that we view that needs to be permanent because of the type of role it plays in the store.

Q. Okay. What is the Co-manager in Training position?

A. Often especially with the expansion of Supercenters we need to hire people with food experience. A lot of those individuals are running food establishments, food organizations, or food retail establishments today. So we bring them in as a Co-manager in training which does have a duration of 12 months, and that way they can get accustomed to Wal-Mart business, Wal-Mart culture, and make the transition to a Store Manager as quickly as possible.

Q. So these are like lateral hires from the outside?

A. That's correct.

Q. Is there a job description for that position?

A. Not that I'm aware of there's not.

Q. Is it used for internal placements at Wal-Mart?

A. It has been, but it has been changed to not include that.

Q. Since when?

A. Since about eight months ago. We still have some people in there that are on the program from before, but as we transition those, we are making that outside hires only.

Q. And why was that decision made to your knowledge?

A. If you're already working for Wal-Mart and you're going to go into training, then go into a Co-manager***

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[Page 162]

Q. Let me mark as Exhibit Sixteen a District Manager job description.

(Plaintiff's Exhibit Number Sixteen marked for identification.)

Q. (BY MR. SELIGMAN) Is this the job description for the District Manager?

A. Appears to be.

Q. It's pretty short.

A. Yes, it is.

Q. Does that mean they don't have anything to do?

A. I certainly hope not.

Q. Where are the – strike that. Let me ask a couple of questions here. First of all, where are the Store Managers based? Excuse me, District Managers where are the District Manager based?

A. In the field.

Q. Are their offices typically in a store?

A. Yes.

Q. And how many stores do they normally supervise?

A. Six to eight. We do have a couple of districts that have more stores than that, but that would be the majority.

Q. And who selects the District Manager?

A. District Manager selection is done at the regional level with a Regional Manager RPM and divisional.

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Q. Are there any specialized education or training requirements to be a District Manager?

A. There are not.

Q. Okay. I'm looking under Major Responsibilities, and there's a lot of things listed. A few of them I just want to understand what they are. It says comply with company direction. First is grass roots. Can you tell me what that is?

A. Sure. We do an associate opinion survey annually, and that's what that refers to.

Q. And store structure?

A. Store structure is the number of anything from the member of management, number of management associates in a store, number of hourly associates in the store, the way the store is structured, number of departments, Assistant Manager assignments, anything having to do with that overall responsibility designation away from the store.

Q. Is that – I'm sorry. Is that referring to any particular document or printout, or is that just an overall description of responsibility?

A. It is – it's an overall description of responsibility and certainly is one in which we allow them to have a tremendous amount of autonomy in because every store is simply different.

Q. Okay. What is MOPR?

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A. MOPR was an operational procedural review Merchandise Operational Procedural Review.

Q. What is that?

A. It's a procedural review that we requested the District Managers perform quarterly that goes in and ask the District Managers to report out how the store is performing on a very specific questions having to do with merchandising and operations of the store.

Q. Do any of those questions have to do with personnel function?

A. Yes, they do.

Q. What kind of areas are in personnel function?

A. They are personnel files, how we're doing on store stacking, just basic, you know, are pay raises being put in on time. Those sort of things.

Q. And is this something that's included in a particular document?

A. This particular document does not exist anymore. It is now referred to differently.

Q. Okay. What is it now referred to?

A. It's referred to as a STAR, S-T-A-R.

Q. Okay. How long has the STAR been used as the name of this document?

A. About the last two years.

Q. So prior to that it was referred to as the MOPR?

* * *

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Q. Okay. So if someone's listed as a Regional Manager it means they're new to the job?

A. Generally speaking or they came from outside the company.

Q. How many regions are there in the Wal-Mart system?

A. There are 35 regions on the Division One side, and there are multitudes in each of the specialty groups.

Q. And as with the districts, the specialty regions aren't the same geographical areas as the districts?

A. That's correct.

Q. So there are 35 Regional Managers?

A. That's correct.

Q. Is there a job description for Regional Manager?

A. Not that I'm aware of.

Q. Is there any document that describes the duties and responsibilities of a Regional Manager?

A. Not that I know of, no.

Q. Is there a training plan for them?

A. No.

Q. How does one learn how to be a Regional Manager?

A. By primarily being a successful DM and understanding that that role is now multiplied times ten and working very closely with the Divisional Manager.

Q. Okay. So there's 35 regions. Each region has, what, roughly 100 stores?

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A. Slightly less than that. Usually somewhere between 80 and 85.

Q. What are the job responsibilities of a Regional Manager?

A. Certainly they have a very high level of financial responsibility to the sales and profit of the organization. They have a very high level of responsibility as it relates to the inventory management of the merchandise, the merchandise presentation, etc. They have a strong responsibility to the development of the people who report to them specifically the District Managers and certainly supporting our company as it relates to the relationship that we have with both our customers and our associates. If you got into the core, you know, individual job responsibilities, they follow up on everything from late evaluations to child labor violations to out of stocks to customer complaints to associate complaints to anything and everything in between that is elevated to their level. Certainly they try to get as much of that handled at the positions that are prior to them, but when it's elevated to their level, then they engage, and they try to resolve.

Q. Does anybody other than District Manager report directly to a Regional Manager?

A. The Regional Assistant.

Q. And what are the duties of a Regional Assistant?

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A. Very similar to what I described as the district assistant prior except they do it from a regional level. So they work a great deal with the district assistants to collect that information at the District Manager may be compiling whether that be sales, profit, finance, shrink numbers, any number of operational and merchandise issues.

Q. Are Regional Assistants hourly?

A. Yes, they are.

Q. Do they have a job description?

A. I do not think so.

Q. When we looked at the District Managers job description, we looked at several things. One of them was the MOPR now called STAR. Does the Regional Manager have a similar responsibility in terms of looking at the same kinds of information?

A. They do not not on a quarterly basis as the District Managers do.

Q. Do they have it on some other basis?

A. What they do is manage primarily by exception. The information that is on the STAR review is fed to them systemically both by the reports of the District Managers as well as systems reports that are generated by the support divisions of the home office whether that be our ISD or safety or risk management or quality assurance specialty groups, etc., who generate reports and information that **[Page 179]** would tell the Regional Manager what is happening in his or her region. A great example would be when we rolled out a video release of Pocahontas. The merchandising division will send a report to the regional that says here are the stores who haven't sold any. Then that way the Regional Manager can react communicate to the DM and say see if we can find out why this store has not moved any of that particular movie. So they have managed through a lot of exception reporting that do not have a specific go visit a store and audit these items on a quarterly or semiannual or biannual basis.

Q. Do they get district wide or region wide reports dealing with the personnel function?

A. They get a roll up of the People P&L that's received at store level.

Q. What do you mean by roll up?

A. The stores have a People P&L for their location. That all six or eight of those stores information rolls together and makes a district report. All of the district reports roll together and make the region report and so on.

Q. Is the same thing true of the STAR reports?

A. STAR reports the overall measurable sections are rolled up to the Regional Managers.

Q. So they get a summery basically for the regional?

A. That's correct.

* * *

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Q. Are Regional Managers considered home office personnel?

A. They are in the standpoint of their charge location and how they get their expenses are booked to the home office department accounts instead of the store locations but from the focus and who they supported is purely field.

Q. Do you know approximately how much time in a year a Regional Manager spends in the field as opposed to home office?

A. Average is four days a week three weeks a month.

Q. Is field?

A. Is field. That's correct. If they happened to live in the field, it would be slightly higher than that.

Q. How do you know that's the average?

A. Because I traveled with them for two and a half years.

Q. Is there any document that summarizes the amount of time they spend out in the field?

A. There is not.

Q. Are there any guidelines that says how much time they should be in the field?

A. There is not.

Q. So this is based on your personal knowledge?

A. That's correct.

Q. You haven't done a survey of the 35 Personnel***

* * *

[Page 190]

Q. So they report to the People Directors?

A. That's correct.

Q. Where are they located the Regional Personnel Managers?

A. Most are here. I do have two that live in the field and getting ready to add a third.

Q. Okay. And forgive me if you said this already. What is the position they report to in the people department?

A. People director.

Q. And you said there are three of them?

A. Yes.

Q. And how are – do they divide up the country regionally, or how do they divide it up?

A. They each have one or, pardon me, two operating divisions across the U.S.

Q. So each of those three – you have to run that by me again. I lost you.

A. The Regional Managers have 80, 85 stores and report to a divisional. Each of the divisionals have about six Regional Managers that report to them. The People Directors have two divisional areas that they have the people responsibility for or twelve regions in most cases.

Q. Okay. So let me see if I got the chain correct. The Regional Personnel Manager reports to divisional?

* * *

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has – that's in the center of the region that allows for easy transportation to and from. Some are held in hotels that are big enough to facilitate a room that will hold 30, 35 people. It just depends on the area and whether or not those facilities exist.

Q. So does each region have its own leadership foundation, or is it a company wide thing?

A. It's a company wide foundation. It is often attended by the Regional Managers or the Regional RPMs that stop by and add in their own spin as it relates to their experiences and their region and the focuses for their people, but it is a training program that's put together by the corporate headquarters.

Q. Okay. The foundation part of the title does that refer to a foundation, or does that mean foundation as a support?

A. Support.

Q. I got it. Is there a document which describes this project?

A. Yes.

Q. Or this program. And what's that called?

A. It would just be the Leadership Foundation Training Guide.

Q. And that would include – the folks who would go to that training would include Assistant Managers?

* * *

[Page 215]

Q. Manager?

A. Manager.

Q. Okay. And how many divisions are there?

A. Six.

Q. Are they denominated in some way?

A. A, B, D, E, T, and U.

Q. Do you know why?

A. Unfortunately, yes, I do.

Q. Okay.

A. Division C belonged to a gentleman who retired, and we retired the number with him or the letter with him. T and U were the two divisions that were used when we first started the Supercenter division which was not part of Division One. D and E were obviously the other two in Division One when we retired C, and then we incorporated Supercenters back. We just added T and U and didn't change them.

Q. Okay. And are the divisions other than having different letters are they different anything other than geographically?

A. No. There would be a little bit difference in the number of stores per division. We have one division that has five regions not six, but aside from that, geographical would be the only difference.

Q. So all of these have six regions except for one?

[Page 216]

A. Correct.

Q. And which has one – has five, I'm sorry?

A. I believe it's T.

Q. T. And the Division Managers are they the Vice President level?

A. Senior Vice President.

Q. They're located here in the home office?

A. Yes, they are.

Q. What ther division personnel are there that are involved in this?

A. I have my Divisional People Directors that support two divisions each.

Q. Okay. Let me just.

A. We do have Divisional Loss Prevention Supervisors, and that would be one per division as well. So there's six of those. If we leave out specialty group, that would pretty much be it I believe.

Q. Now, do the specialty group regionals report to the same Divisional Managers as the regular Regional Managers?

A. No, they do not.

Q. So they have their own separate divisional structure?

A. That's correct.

Q. Okay.

A. I do have – I do have one that that is not true,***

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, on behalf of themselves and all others similarly situated, Plaintiffs, vs. WAL-MART STORES, INC., Defendant.	Cause No. C-01-2252 MJJ

VIDEO DEPOSITION OF JOHN BUTLER

Taken on behalf of the Plaintiffs

March 21, 2002

* * *

[Page 39]

Q. Yeah.

A. The Supercenters that I got were ones that I opened in the Boise market in Pondiray, Idaho and Hermiston, Oregon.

Q. Okay.

A. Then when I lost that district we have been adding Supercenters in the Washington area, some more in Idaho, and another one in Oregon.

Q. Approximately how many stores were in your region when you started?

A. It'd be a guess.

Q. Just a ballpark.

A. Around 80.

Q. I think you indicated there were like 11 districts?

A. Yes.

Q. And how many do you have now?

A. 93 in 13 districts.

Q. And how many of your 93 stores approximately are Supercenters today?

A. Approximately 10.

Q. Your – has your job title or responsibilities changed since you became a Regional Vice President?

A. My job title has not changed. My responsibilities have only changed with regard to the number of stores and the geography that they cover.

* * *

[Page 106]

that I've asked for recently that would give you an example. Yesterday I sent them an e-mail that was attached to a recommendation from one of the District Managers that we wait to take seasonal markdowns on pools and things like that because the weather has been so late in coming in my area. Summer is just now getting here, and typically we mark down inflatable pools and swim suits and other things that are specific to summer in July. Well, one District Manager said, man, I've got a lot of this, and I think we can sell a good deal of it at regular retail. And he had sent that to a buyer who has control of whether, you know, to take the markdowns or not, and he copied me. And I thought, geez, that's a good idea. So I sent it out to all of my District Managers and asked them to respond back. Sorry for the long way of getting you there.

Q. Do you ask them to give you reports about store tours things like that?

A. They send in weekly tour notes. Yes. In our division, I don't know what they do in the other divisions, but in Division A that's – that was a requirement that their tour notes be sent in every week.

Q. Okay. Let me show you an example of what might be one of them. Let me mark this as Exhibit Number Eighteen which is District Manager Store Tour Notes bate stamp on the first page is 200536.

[Page 107]

(Plaintiff's Exhibit Number Eighteen marked for identification.)

Q. (BY MR. SELIGMAN) Let me first ask. Is this form District Manager store Tour Notes a form that's used in your division?

A. I think they have a like a two or three part pressure sensitive form that they use, and this may be it. Yeah. It looks like it is. There's three parts yellow, white, and pink that some use this. Some use, you know, their palm pilot to take notes. Some use paper to take notes, you know. It's a variety of different ways that they recap their visits to the store.

Q. And –

MR. GRAY: Can you just, I'm sorry, I don't – can we just make sure the record's clear? It seems to be sort of like an assemblage of several documents in a different order as well as another e-mail is attached, and I just want to make sure that Mr. Butler –

MR. SELIGMAN: Sure.

MR. GRAY: – has an opportunity, one, that the record's clear what he's looking at and, two, that he's seeing that this is a collective Exhibit.

A. Thank you. I had only looked at the front page.

Q. (BY MR. SELIGMAN) Actually I see the pages do seem to be out of order. These were collectively Exhibit Eight **[Page 108]** to the deposition of Danny Carter. So I don't know how these things got connected.

MR. GRAY: Unfortunately neither do I.

Q. (BY MR. SELIGMAN) All right. Why don't we focus our attention here on the first four pages of the document which – first five pages. That does seem to be something starting at 200539 which looks like something unrelated to me. I'm looking at these first five pages.

A. The first – okay. So prior to 2039 the first one appears to be tour – it's on a tour note form.

Q. Right.

A. And it's a – it looks like it's a recap of Danny's visit to 1704 Vacaville, California. This is what I was saying before. Different District Managers use different medium for, you know, their notes.

Q. Right.

A. Danny – Danny is obviously using several different medium here for keeping notes of things.

Q. Right. Some are on a form and some are not?

A. Right.

Q. And typically whether they used a form or not, the District Manager would send a copy of their tour notes in?

A. They are requested to send them in after – after each week is complete of their tours.

Q. So you expect to get a weekly tour note from each **[Page 109]** of your District managers?

A. Frankly, they send them in. We make – it's – it's our way of making sure that they're doing them, and the way that I use these is if I were going to visit Danny Carter's district and I had some concerns about a particular store I might pull his tour notes and review them. But I don't look at these every week.

Q. Okay. But you keep them?

A. They're – yes. They're maintained in the regional office.

Q. Is there a set list of things they're supposed to look at on these tours?

A. Well –

Q. That they're supposed to report on?

A. You can see on the third page he has scores here for this – I don't know whether this is an e-mail or what it is, but he has scores here for people merchandise, operations, and an overall score for each – each store. And that's – I'm remembering back to my early orientation something like that when Joyce Clark was visiting stores.

Q. Is there a written document somewhere that says what the District Manager's supposed to look at on these store tours or what they're supposed to report on?

A. Not on what they're supposed to report on. You know, I don't know. I don't know the answer to your

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[Page 128]

Q. Right. And with regard to those other people, does a Support Manager have a greater deal of supervisory responsibility?

A. If they are the person who is designated as the in charge at that particular time.

Q. Okay. The overnight Support Managers do they have their own departments, or are they full-time Support Managers?

A. Typically they're full-time Support Managers.

Q. Do you have any responsibilities with regard to job assignments of hourly employees?

A. No, not typically. I mean, if I were – if I were in a store, indirectly I might, I mean, I might ask the manager or the Assistant Manager for associates that do something in particular but, no.

Q. Okay. Do you have – do you have any responsibilities for performance evaluation of any hourly employees?

A. Well, I have – I think the responsibility goes up to me that they're done in a timely fashion.

Q. Do you have any responsibilities with regard to wage adjustments for hourly employees?

A. The instance that I can – if there were let's say there are two things that I can think of. One, if there were a complaint by an associate that they were being

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Q. You have to answer yes or no.

A. If you're asking if I've seen them, I'm not sure that I have, but it seems like I may have in my orientation.

Q. You're aware there's a training department at headquarters of Wal-Mart which is responsible for designing management training programs?

A. I'm aware that we have a training department. Yes.

Q. Okay. What's the difference between the First in Line and management trainee programs at Wal-Mart?

A. I described that the First in Line is someone who is working for Wal-Mart and going to college. When they finish college if they choose to go into the management training program, we have the First in Line program that allows them to do that.

Q. Okay. And the management trainee are non-college attending employees of Wal-Mart?

A. Not necessarily. I mean, someone could be in college but not in the First in Line program.

Q. Is the First in Line program has that been constant during the time you've been at Wal-Mart, or has it been phased in or phased out for that matter in terms of the number of people going in it?

A. I've been aware that it is a program since I've been here, but you're really outside my area of expertise.

Q. Okay. Is there any normal career path among hourly **[Page 135]** positions that folks who want to go into management normally pursue?

MR. GRAY: Objection. Foundation.

A. Each District Manager kind of has their own way of identifying talent within their district for development. Typically an individual is a Department Manager, has managed a couple of department – departments, maybe somebody that comes from the Support Manager ranks. Their experience varies. Their experience and background varies, and each District Manager is responsible for identifying those individuals and put putting them into the training program.

Q. (BY MR. SELIGMAN) To your knowledge, there's no requirement at Wal-Mart that you come from a particular job before you go into the training program?

A. Not to my knowledge. I think it's preferred that someone has been a Department Manager, but I, you know, I can't speak specifically black and white to that.

Q. Let me separate the First in Line from management trainee for a moment. The First in Line program do you play any roll in that program?

A. Not really.

Q. Who's responsible for selecting First in Line folks?

A. I don't know.

Q. Do you have any idea how many First in Line

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[Page 171]

A. No, they do not.

Q. Okay. Is there an application process that you're aware of a formal application process like job posting or like the MCS process for Assistant Managers to bid to become Co-Managers?

A. I don't know. I really don't. I think that's – that's something that's the individual is interested. They talk to their District Manager when they're in their store. The Store Manager supports the person, and if the District Manager feels, you know, good about that individual to be put into the mix for promotion to Co-Manager, then when a Co-Manager position comes open within my region the District Manager says I'm going to, you know, put Mark in for that particular promotion because he's interested. Then he becomes one of a pool.

Q. Do you know why the Co-Manager jobs are not on the MCS system?

A. Sometimes they are but usually not because that's typically been handled at the local level.

Q. Okay. When you say sometimes, they are – have they been in the MCS system in your region ever?

A. It seems to me that I remember using it that way on one or two occasions, but I can't remember which store it was.

Q. Do you recall why?

* * *

[Page 203]

Q. Strike that. Go ahead.

A. My guess is that this is after all of the District Manager evaluations were done. We looked at their individual People P & Ls and set goals together for improvements in these areas.

Q. Okay. How do you determine the goals for your districts?

A. We look at where we are, and we select what we think – what we consider is a reasonable improvement from one year to the next.

Q. And how do you determine what's a reasonable improvement?

A. Well, it wouldn't be reasonable to go from 39 percent to 51 percent in one year. So we'll – we'll target something in, you know, in between that we agree on, and based on the number of people that work in the store, we have an idea of about how many people we're talking about, you know, for each.

Q. And do you have any guidelines you follow in setting those goals, or is that something that you just –

A. No, not that I'm aware of.

Q. Okay. Why do you have goals? Is that a company requirement?

A. Not – not of me personally but it may be of Jim Winkler in his Regional Personnel Manager's responsibility.***

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated,
Plaintiffs,
vs.
WAL-MART STORES, INC.,
Defendant.

Case No. C-01-2252 MJJ

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

The videotaped deposition of TRENT BURNER, taken before MARIA MAZZA, CSR, Notary Public, at the offices of Spherion Deposition Services, 11 South LaSalle Street, Chicago, Illinois, commencing at 9:08 o'clock a.m., on the 31st day of July, A.D., 2002.

* * *

[Page 144]

general manager positions at Sam's club and store manager positions at Wal-Mart Stores that were – had the same or similar duties and required the same or similar knowledge of skills and abilities?

A It's my understanding that I have not seen one for Sam's.

Q You are talking about a job analysis?

A Job analysis but because you're comparing job performance to a survey instrument that leap would be quite easy to make based on content valid job descriptions for one or the other, but I have not seen anything from Sam's.

Q Okay. I want to make sure I get an answer to my question.

A Okay.

Q Which is it fair to assume that the people conducting this validation study that was issued in the year 2000 understood that the job duties of the store manager in Wal-Mart and Division One were the same or similar to the job duties of the general managers in Sam's Club and likewise had the same or similar knowledge of skills and abilities required?

A. The essential job duties that would be fair to assume that.

Q And the other half of my question that they **[Page 145]** had the same or similar knowledge of skills and abilities required?

A Yes, in as far as much that the current validation studies only looked at performance –

Q Slow down again. You've got to slow down.

A Sorry. Insofar as much as the current validation study only looked at current performance in the position, it is fair to assume that those essential KSAs and tasks would be similar.

Q And similar for store manager and general manager?

A That's correct.

Q And when you use the term the current job analysis, you are referring to the job analysis in 1994?

A Yes, sir.

Q Okay. Can we make the same observation and draw the same conclusion about similarities of the job duties that would have been understood for district manager and director of operations for Sam's Club and Wal-Mart Stores, that is they have the same or similar job duties and required the same or similar knowledge of skills and abilities?

A Yes, that would be fair to assume.

Q And likewise can we make the same***

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[Page 148]

MR. SELLERS: Okay. Let's give the witness a chance to answer the question.

THE WITNESS: Well, it's kind of what I said before, I'm not – I've never seen anything with regards to the area managers and I'm not even sure with my six-month's tenure at Wal-Mart that an area at Sam's has the same level of assistant manager. We have so much less interaction with Sam's, I really don't know.

BY MR. SELLERS:

Q I understand. Well, my question – Let me ask you this: Were the area managers included in this study?

A Without reviewing the actual study I have no idea. I reviewed quite a few this past weekend and I'm not sure. I could take a few minutes to review if you wish me to; but off the top of my head, I don't know.

Q Let me help you out. Let's see. Actually on page Bates No. 377770, under the section Criteria, middle paragraph it refers to Sam's Clubs, do you see that paragraph?

A Yes.

Q They use the term assistant manager but they nonetheless seem to reflect that they analyzed **[Page 149]** assistant managers at the Sam's Club, would you agree with that interpretation of that paragraph?

A Yes.

Q So whether we called them area managers or assistant managers here is the point I'm trying to make: Would you agree that the people who conducted this study understood that they were – that the job duties of the assistant manager at the Wal-Mart Division One Stores were the same or similar to the job duties of the assistant managers in the Sam's Clubs and likewise that they required same or similar knowledge of skills and abilities?

A Yes.

Q I'm glad we did not get hung up on terminology. Now, in this study and I think unlike the last one they did some different things with the results, am I correct? It may have been a similar procedure but once the results came in they did some other permutations?

A They presented a lot more statics on this one than the previous one. They actually broke it down by the big five in their relationship for the performance which they did not do for the 1977 study.

Q And where were you referring to?

A 377765, second paragraph it even talks***

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, on behalf of themselves and all others similarly situated, Plaintiffs, vs. WAL-MART STORES, INC., Defendant.	)	Cause No. C-01-2252 MJJ

VIDEO DEPOSITION OF ROXANNE WIGGER

Taken on behalf of the Plaintiffs

April 18, 2002

* * *

[Page 68]

we've now covered the only two areas where outside the – where audits outside the store level are conducted?

A. By –

Q. Is that correct?

A. No.

Q. By corporate.

A. By our internal group.

Q. Right.

A. We do have our Regional Personnel Managers in both Wal-Mart and Sam's who do visit, and that was the store visit form that I eluded to at the beginning as well.

Q. Okay. So are you saying that the Regional Personnel Manager also conducts audits of the store?

A. They have a form that they utilize for their visits. It is not always completed in its entirety, but it is a form that was initially used in Sam's and then began being used in Wal-Mart about 18 months ago.

Q. And is the same form used now both at Wal-Mart and Sam's?

A. No, it is not.

Q. Do you know what the deferences are on the form?

A. It's more customized to the business.

Q. Is the format the same?

A. No, they do not look exactly the same.

Q. But as I understand it, you're saying the Wal-Mart **[Page 69]** practice of using a store visit form actually grew from Sam's practice Sam's Club practice –

A. That is correct.

Q. – of doing that. Is that correct?

A. That is correct.

Q. And that store visit form do you know if that is a form that is retained in Wal-Mart records in a regular course of business?

A. That is a form that our Regional Personnel Managers are asked to complete not in total. It's a very extensive form, but any time they make a visit to the store they are asked to complete at least the top section of the form. Anything that they did verify while they were in the store should be acknowledged. They make a copy of that when they return from their week's travel. A copy is given to their people director, and they keep a copy for their files.

Q. So the people division keeps a copy of all store visit forms?

A. The Regional Personnel Managers keep one for their records. The people directors I eluded to Bob Momfiles at the beginning he's who I gained my information from on retention. So it is kept at those two levels.

Q. Okay. And do you know if there's any time frame for destruction of those store visit forms, or are they kept indefinitely?

* * *

[Page 110]

Manager's workbench, and it actually could be accessed from Pipeline. The path at the bottom tells me exactly how I would get to this document. So it's on Pipeline that, and it can be accessed from there.

Q. Okay. And –

A. Pipeline let me clarify that Pipeline is accessible from workbench but Pipeline or workbench is not accessible.

Q. From Pipeline?

A. Exactly. Okay.

Q. Okay.

A. So many times you'll find the same document.

Q. And so this particular document is accessible – not accessible by associates?

A. This document would be accessible by associates.

Q. It is. Okay.

A. Yes.

Q. Okay. On the second page of this document which is Bates 161464, it says the objective of STAR is to ensure stores for following proper policies and procedures. Is that correct? I mean, is that your understanding of what STAR is –

A. Yes.

Q. – supposed to accomplish?

A. Yes.

Q. And so when you and the other people involved in***

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

	)	
BETTY DUKES and PATRICIA	)	
SURGESON on behalf of	)	
themselves and all others	)	
similarly situated,	)	Case No.
Plaintiffs,	)	C-01-2252
v.	)	MJJ
	)	
WAL-MART STORES, INC.,	)	
Defendant.	)	
	)	

VIDEO DEPOSITION OF MR. KEVIN HARPER

Taken on behalf of the Plaintiffs

October 9, 2002

* * *

[Page 15]

A. No.

Q. Do you have a responsibility of monitoring how stores implement those policies?

A. No.

Q. Do you have a responsibility for approving any changes in the policies regarding pay and compensation?

A. Yes.

Q. What responsibility is that?

A. As part of changes in compensation, the key people representative of all divisions come together, have discussions about those changes and how they would affect all divisions, and then trying to certainly come to some agreeance or decide if it's going to be implemented in one division and not the other.

Q. Okay. Does part of that responsibility have to do with the setting of initial starting wages for employees?

A. No.

Q. Or guidelines for what type of job class somebody – a particular job position would be in?

A. Yes.

Q. Explain what your responsibility is with regard to that.

[Page 16]

A. What we do is review both internal equity of positions, as well as external comparisons.

Q. And what do you do with that information?

A. We use that information to either make decisions to leave classes the same or make recommendations for changes.

Q. As I understand it, at Wal-Mart the hourly jobs are organized into one of I think five different classes for pay purposes?

MS. MARSHALL: Are we talking when you're using the term Wal-Mart, Division 1 or –

MR. SELIGMAN: Yes.

MS. MARSHALL: – if we can get some definition on that.

MR. SELIGMAN: Yeah.

Q. In Division 1 stores, the job positions are organized as one of five different pay classes, is that correct?

A. Correct.

Q. And those pay classes determine what the range for a starting wage would be for a particular job?

A. They – those classes don't determine the starting. They simply determine the difference between those five classes.

[Page 17]

Q. In fact, the pay classes describe Class 2 has to be X amount higher than Class 1 and Class 3 X amount higher than Class 2 and so forth? That's how it's organized?

A. That is how it's organized, yes.

Q. Okay. And in determining what job class to put a particular job, that's what you were referring to when you talked about internal equity and external comparisons?

A. That's correct.

Q. Okay. What do you mean by internal equity in that context?

A. As we evaluate positions, we simply look at items that would allow us to understand the responsibility of each position, impact to the store, the decision-making that would be allowed in the position, all of the factors that we would have interest in, and then make recommendations off of that. Often it's also based off of the external considerations as to where they get placed.

Q. And what do you mean the external considerations?

A. To give a specific example, in Tire & Lube Express, the reason that the technicians are placed where they are in the class range is because of **[Page 18]** the external competitive nature in pay.

Q. When you group these jobs, is it your intent to put in each job class job positions that have similar requirements in terms of knowledges, skills, and abilities?

A. Not always.

Q. Okay. What other factors would affect whether you put something in a job class or not?

A. The example I just gave with external competitive pay challenges. The positions are often reviewed from a standpoint of – again like I described earlier, the impact. We look at items having to do with turnover of the position, so there are several factors that go into the decision.

Q. Do you know if there's any analysis that's been at Wal-Mart that would group jobs by similarities and the requirements in terms of the skills and ability and knowledge of the position?

A. None that I'm aware of, no.

Q. When you say we look at these various things, who's the we that's making this decision?

A. The various people heads from all divisions as well as the compensation group.

Q. Is your role limited to, in regard to this pay class delineation, limited to Division 1 **[Page 19]** stores or do you have any involvement in setting the pay classes for Sam's Club?

A. I do not have involvement with Sam's.

Q. Do you have involvement with setting the pay for the specialty groups?

A. Yes.

Q. You play a similar role for that as you do for the regular Division I?

A. Correct.

Q. Have you reviewed any documents to prepare for this deposition?

A. Yes.

Q. What have you reviewed?

A. I reviewed documents provided by counsel yesterday.

Q. Okay. And what kinds of documents did you look at?

A. There were multiple documents, pay guidelines, information on promotional guidelines, items of that nature.

Q. What kind of pay guidelines did you look at?

A. Just the most recent field pay guidelines.

Q. And you were familiar with those***

* * *

[Page 36]

Q. Was aware of the suit?

A. Yes.

Q. Have you discussed with anyone whether any allegations were true or not?

A. Have not.

Q. Have you investigated any of the allegations of the complaint?

A. Have not.

Q. Have the allegations of the complaint caused you or anyone at Wal-Mart to your knowledge to change any policies or practices at Wal-Mart?

A. No.

Q. Has it caused you to investigate any statistical patterns at Wal-Mart?

A. None that I can speak of.

Q. Have you or anyone working with you investigated the claims of any of the individual plaintiffs, present or former, in this case?

A. Have not.

Q. Have you ever talked about Betty Dukes with anybody?

A. No.

Q. Was there ever any discussion that you were involved in about whether the company should change any policies or practices as a result of the **[Page 37]** allegations in this suit?

MS. MARSHALL: Again I instruct not to disclose any attorney-client communications.

A. No.

MR. SELIGMAN:

Q. Has the company focused more on promoting women since the filing of the suit?

A. No.

MS. MARSHALL: Objection as to form.

MR. SELIGMAN:

Q. Has the company examined the pay levels of men and women since the filing of the suit?

A. Can't speak for the company. My area, no.

Q. Do the regional personnel managers have a responsibility of investigating EEOC charges?

A. Are you describing all EEOC charges or specific charges?

Q. Well, first, in general do they have a responsibility for investigating EEOC charges?

A. No.

Q. Do you know if any of the regional personnel managers investigated any of the EEOC charges filed by plaintiffs, current or former, in this case?

A. No.

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Q. And you never saw a report about any investigation?

A. No.

Q. Do you know if Wal-Mart talked to any other companies about their experiences with litigation after the filing of this lawsuit?

MS. MARSHALL: Objection as to form.

A. When you say talk to other companies, specifically discussing this lawsuit?

MR. SELIGMAN:

Q. Discussing their experience with similar lawsuits.

A. Not that I'm aware of outside of privilege, no.

Q. Do you get salary exception reports?

A. Could you be a little more specific?

Q. You know what an exception report means at Wal-Mart?

A. Generally, yes.

Q. What does it mean?

A. It could be anything from sales exceptions to markdown exceptions to modular exceptions. Things that typically are not complete.

Q. What about in terms of people practices or policies?

[Page 39]

A. Are you asking if there are exception reports for –

Q. Yes.

A. – people practices? There are some, yes.

Q. What kinds are there?

A. We have notification of social security verification reports. We have exception reports that let us know how performances are versus goals for turnover or training.

Q. What other exception reports are you aware of in the people department?

A. We have measurements to review diversity versus goals. We also review child labor violations. Those are the ones I can think of right now.

Q. What about timely completion of performance evaluations?

A. Yes, we do review that.

Q. Completion of CBLs, computer based learning?

A. Yes. That's training.

Q. Compliance with Management Career Selection time periods?

A. Yes.

Q. Otherwise known as MCS, right?

[Page 40]

A. Correct.

Q. Do you get any exception reports regarding job posting?

MS. MARSHALL: Objection to form. Lack of foundation.

A. Not that I'm aware of.

MR. SELIGMAN:

Q. By you I'm asking in terms of your department, not you personally necessarily.

A. Not that I'm aware of.

Q. Do you get exception reports again referring to the – your department regarding whether a salary level is within guidelines?

MS. MARSHALL: Objection as to form.

A. Which positions?

MR. SELIGMAN:

Q. Well, first let's look at hourly.

A. No.

Q. Do you get any exception reports regarding hourly compensation?

A. No.

Q. What about for salaried employees?

A. Only those charged to the home office.

Q. And who would that be, what level of employee?

[Page 41]

A. District manager, regional manager.

Q. Do you know if the regional personnel managers get exception reports regarding salaried employees?

A. No.

Q. What about regarding hourly employees?

A No.

Q. Do you know if store personnel managers get exception reports regarding hourly employees?

A. Be more specific, please.

Q. Do you know if store personnel managers or store managers get reports indicating whether pay levels for employees in their stores comply with guidelines?

A. There's not a report that I'm aware of.

Q. Do you have a responsibility for approving exceptions with regard to salaries for district managers or regional managers?

A. Could you restate the question, please?

Q. Do you have any responsibility for approving salary levels for district or regional managers?

A. Yes.

Q. And what is that responsibility?

A. I review the level and communicate that **[Page 42]** to the divisionals and executive vice president of operations.

Q. Do you have that responsibility for any other positions?

A. No.

Q. Do your people directors ever advise you of salary level issues regarding employees below district manager?

A. Yes.

Q. What type of issues would come up when that happens?

A. The issues that generally come up are store managers and only discussing what their base pay is.

Q. Do your people directors have some responsibility in approving the base pay of store managers?

A. Limited.

Q. And what is that?

A. They can make exceptions based on market need.

Q. So they essentially approve exceptions to the base – the guidelines for base pay for store managers?

A. If needed.

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Q. And they run that by you?

A. Not always, no.

Q. But sometimes they do?

A. Occasionally.

Q. Okay. Any other positions that your people directors have consulted with you in terms of pay levels?

A. No.

Q. Has your department had any responsibilities for setting the pay levels for assistant manager positions?

A. We have responsibility for setting the start rates.

Q. Same true for co-managers?

A. Yes.

Q. And store manager?

A. Correct.

Q. Do you have the responsibility for setting any other store employee start rates other than the pay group discussion we had earlier?

A. We also are involved in the specialty groups as well.

Q. So the salary employees and the specialty groups, your department has responsibility for determining the start rates?

* * *

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Q. Do you know what department it came from?

A. No.

Q. Another way somebody can get a salary adjustment at Wal-Mart who's an hourly employee is through a merit increase, is that correct?

A. Yes.

Q. And what is a merit increase at Wal-Mart in that context?

A. Usually identified as someone who goes above and beyond the call of their role.

Q. And who's responsible for making that judgment about whether to give such an employee a merit increase?

A. The recommendations can come from an hourly supervisor, could come from a peer, up through the assistant manager and/or co-manager, ultimately to the store manager.

Q. And who makes the actual decision?

A. Store manager.

Q. Are there any guidelines that you're aware of about under what circumstances such an increase should be given?

A. We do have guidelines for merit increases. Generally the description is, again, performing above and beyond their position, the role***

* * *

[Page 73]

the system had the ability of allowing them to key it into a document in which we were simply able to pull it and have automatic – have system automatically do the totals.

Q. The totals being the actual adjustment?

A. Actual adjustment for each associate, yes.

Q. And is the purpose of this to ensure that guidelines are followed for the amount of adjustment?

A. The purpose of this automation process was to ensure that it was done timely.

Q. Under this automated process, when the performance evaluation is keyed in, a recommended salary adjustment comes out based on guidelines?

A. No.

Q. No. There's no information suggesting what a recommended annual increase is?

A. I don't know if there is in this document or not.

Q. Well, I'm looking at the title of the document, which is Automated Annual Appraisal Rating & Increase Recommendation Process. What part of this is increase recommendation?

A. There are two categories, two lines on the document for the district manager to complete. The **[Page 74]** first is the evaluation rating and the second is the recommendation for increase.

Q. Okay. And does the system provide any information about what that increase should be based on the rating?

A. The system I do not believe provided that information.

Q. So how does a district manager know what to put in?

A. It's in the field pay guidelines.

Q. Okay. Has there been any discussion that you're aware of about the percentage increases being given to assistant managers based on performance appraisals being inconsistent?

MS. MARSHALL: Objection as to form.

A. Inconsistent with?

MR. SELIGMAN:

Q. With the guidelines.

A. I'm not sure if there have been specific discussions, but there certainly are increases given that are inconsistent with guidelines.

MR. SELIGMAN: Let me mark as Exhibit 6 a memo dated January 21st, Bates stamped 650667.

(Exhibit 6 was marked for identification by the reporter).

* * *

[Page 160]

all?

A. None that I know of.

Q. Okay. Do you know what proportion of co-manager positions are filled through MCS?

A. Most co-manager positions are not filled through MCS.

Q. Why is that?

A. We don't make a routine posting of co-manager positions.

Q. And why is that?

A. The only time we post them is if it's an area where we're having a difficult time staffing the position.

Q. Why don't you post it for the same reasons that you post the store manager positions?

A. Number one reason right now is I have more co-managers than I will have stores to place them in in the future.

Q. That's a relatively recent phenomenon, isn't it?

A. Not for me.

Q. Okay. It's been true as long as you've been there?

A. Correct.

Q. And is that the reason you don't post?

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A. Most often we do not need a co-manager, so we would utilize the ones that we have.

Q. The MCS system is not normally used to fill assistant manager positions, is that correct?

A. Not normally.

Q. When would it be used for an assistant manager?

A. It's been used on a few occasions in hard-to-staff areas.

Q. Why isn't it used for the rest of the assistant manager positions?

A. The majority of the assistant manager positions are filled with individuals coming out of the training program, so those positions are pretty much filled or available positions are taken up by people transitioning.

Q. Transitioning from management trainee to assistant manager, is that what you said?

A. Correct.

Q. Who makes the decision about what store a management trainee will go to as an assistant manager?

A. That can be a decision at multiple levels.

Q. Including what?

A. It can be a decision certainly at the **[Page 162]** district level. It can be a decision at the RPM level or the regional level.

Q. When a person goes into the management trainee position, they're not slotted for a particular assistant managing opening when they go into it, is that correct?

A. Not usually. On occasion they are.

Q. Okay. But for most management trainees, they go into the program not knowing what store they're going to end up going to?

A. I'm not sure what your definition of most is compared to mine.

Q. Majority?

A. That doesn't help me either. Is it 70 percent, 75 percent, or –

Q. You tell me what's your understanding. What percentage of management trainees know what store they're going to go to when they go into the program?

A. I would say 20 percent probably know what their next position is.

Q. Okay. Why don't those management trainees, why aren't they given the opportunity to bid for particular assistant manager openings through your MCS system?

A. At this point the majority of our **[Page 163]** assistant manager openings for a given district are filled by that district. Most of our districts are small enough in area that – and the need for filling the position quickly so we have right leadership in the store to manage the building, we just have made a decision not to post that, that we feel that we can at this point manage it without a tremendous amount of difficulty.

Q. Have you ever considered, and you being Wal-Mart, to your knowledge considered posting assistant manager positions?

A. Not outside of privileged conversations, no.

Q. The MCS system identifies certain criteria that are supposed to be met for positions. You have that on the exhibit in front of you, starting at the bottom of the page?

A. Yes.

Q. Are these minimum criteria?

A. These are criteria that are used. There are people who could perhaps not meet these criteria but still be selected.

Q. And who would have to approve that?

A. For a store manager position, it would be the regional.

* * *

[Page 180]

A. No, I did not.

Q. Why does Wal-Mart not post management trainee openings?

A. At this point we believe that our associates have numerous avenues to become aware of or voice interest in positions within Wal-Mart, whether that be management trainee positions within the Wal-Mart Division 1, the Supercenters, any of the specialty groups.

It is a discussion that's commonly had with them during their evaluations. And certainly we take those interests very seriously and that's how the majority of the people get into the program.

Q. Well, couldn't you say the same about hourly positions, hourly employees have numerous avenues to voice an interest in other positions and promotion?

MS. MARSHALL: Objection as to form.

A. I think all associates have an opportunity and availability to show interest in anything.

MR. SELIGMAN:

Q. Well, why do you post for hourly jobs and for store management jobs but not for management trainee?

[Page 181]

A. I don't know that I know a reason.

Q. Do you know if there's ever been any consideration about posting management trainee?

A. Not that I'm aware of outside of privilege, no.

Q. Has there been some concern expressed in senior management about the lack of information hourly associates might have about how to get into the management training process?

A. I don't know of any that's been voiced.

Q. Have you ever had any conversations with Charlyn Jarrells Porter about the issue of posting management trainee positions?

A. I don't recall.

MR. SELIGMAN: Let me mark as Exhibit 29 a memorandum from Charlyn Jarrells Porter, Bates stamped 649821.

(Exhibit 29 was marked for identification by the reporter).

MR. SELIGMAN:

Q. Are you familiar with this document?

A. Yes, I am.

Q. And you got it sometime around June 27, 2002?

A. Yes.

* * *

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it can be any number of things that may impact that store completely different than it impacts a store in Florida.

So a lot of the information that they learn will not be uniform because it will be specific to that location that they're actually training in.

Q. There's a company-designed training plan for the management training position, isn't there?

A. Yes, there is.

Q. And that's a training plan that is a training plan that is not different for each store or each region or each district; it's a company-wide training plan?

A. It is a company-wide training plan that associates are placed through.

Q. Now have there been recent decisions about adding other positions into the Management Training Program?

A. There have been decisions about allowing participation of other divisions within the Wal-Mart Stores.

Q. So the specialty divisions?

A. That's correct.

Q. And has a decision been made to have specialty folks go through the Management Training***

* * *

[Page 204]

Pipeline looks different. The majority of this information is there. It's not in this form. I was not in the position when this particular document came out. I don't know if I can state whether it still exists in this form anywhere.

Q. But the information on Pipeline is at a level of detail similar to this?

A. It describes the position. It certainly talks about the training expectations while you're in the position and walks through what the criteria are. Again, I can't speak if all of these items are on there. I'm not sure.

Q. There's not a similar document about the Management Training Program, is there, that's available on Pipeline or on the Workbench?

A. There is an outline of what the manager trainee job is and the actual training by week that shows what the person would go through.

Q. There's no document that's out there that says, "Here are the criteria for going into the program and here's the selection process"?

A. Not that I can recall.

Q. Do you know why not?

A. I think that the First In Line program was new; the management trainee program is not. The***

* * *

[Page 206]

have gone back and asked what caused that or what caused that to occur to try to see if we can make corrections and improvements going forward.

Q. How were they monitoring what the store manager and district managers are doing in the way you describe? Do they get reports? How do they do it?

A. No. No, when I say that their – their monitoring is what is coming to their attention. It is not something that they go out on or have a report of that says the trainees are performing at X level or X success factor of these selections.

Q. Who has the authority to put someone in the Management Training Program?

A. The store manager makes the recommendations generally. District manager and RPM are the ones that approve it.

Q. Is there any – strike that. Anyone above the district manager or RPM have to sign off?

A. No.

Q. Is there a document that the district manager and RPM have to literally sign off on?

A. There is a PCN that we use to put them in the payroll system for the home office that would require someone in the RPM role to administer it. So from that standpoint there is a sign-off, if you would,***

* * *

[Page 216]

told that these are the criteria?

A. I'm not sure.

Q. Do you know if there's any instruction to store or district managers about any criteria other than these that should be considered for promotion into management – assistant manager trainee?

A. Other criteria that's written?

Q. Other than what's written here.

A. But you're talking about additional criteria in writing? Or are you just talking about criteria that we may discuss at training sessions, district manager orientation?

Q. Well, let me break it up. You've already told me there's no other written criteria that you're aware of, right?

A. Correct.

Q. Okay. Other than that, is there any instruction or training given to store or district level management about what criteria they should consider other than these written criteria in promotion of associates to assistant manager trainees?

A. There is different opportunities for them to be educated on that fact through new store orientation, first time manager school, DM orientation, year beginning meetings, midyear meetings. There's a **[Page 217]** lot of different ways that this kind of communication could be communicated to them.

Q. And what other factors have they been told they should consider?

A. Certainly people with outside experience, people who are perhaps going to come into the organization that you do not have a place for today but maybe in three months you would. Certainly people who seem to be moving through the organization at a much more fast pace. Those kinds of things would be taken into consideration.

Q. Any other factors that they've been told they should consider?

A. None that I'm aware of.

Q. Anything about leadership qualities?

A. Leadership qualities certainly are discussions through pretty much any decision to move anyone into management and into additional positions.

Q. What about communication skills?

A. I consider that part of leadership.

Q. Okay. Are these selection criteria meant to state a minimum level of criteria somebody must meet in order to be promoted to the specified position?

A. I think it's meant to be things that are to be looked at and considered.

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Q. Do divisions have the authority to set lower levels of criteria than these?

A. Don't know that I would describe it as lower levels. I think they had the autonomy to certainly consider if someone does not meet one of their criteria as a justifiable reason.

Q. But I mean in terms of a guideline. Does a – does a division or a region or even a district have the authority to set a general guideline that would have lower requirements than this?

A. Again, I think that the districts would go off of this criteria and then value any exception.

Q. Are you aware of any divisions setting criteria lower than the criteria that are set in this management selection process?

A. None that I'm aware of.

Q. You're aware some set a higher level for some factors?

A. Yes.

Q. Which ones do you know of who set a higher level?

A. The only one that I'm aware of is Division A.

Q. Division A has its own list of selection factors?

[Page 219]

A. It did at one time.

Q. Do they anymore?

A. No.

Q. When did that stop?

A. When we had a discussion in December of 2001 with the operations divisions talking through some of the guidelines. The decision was made after that meeting that that would be removed.

Q. And why is that?

A. In order to make sure that the opportunity for advancement was the same throughout the organization and it gave a fair opportunity for all across all divisions and was not different but allowed for that same growth opportunity for the folks in Division A that would allow for the other five divisions.

Q. So you were trying to look for some consistency throughout the company?

A. What we were trying to look for is opportunity to allow people to advance, and we did not want anything to hinder that.

Q. You didn't want one division to have special rules that would limit their employees?

A. We didn't want any people in one division to have a different set.

* * *

[Page 246]

So I think as we became more densely populated in certain markets, the need to request that particular status is just simply not as great.

Q. How do you know how many requests are made?

A. I don't.

Q. So how do you know there's fewer requests?

A. I base that purely off the numbers of the people who are in the program.

Q. So there's fewer people in the program, but you don't have any information about how many people asked to be put in the program?

A. There are fewer people in the program of when I was a regional personnel manager in the mid '90s. If it is – I couldn't articulate or don't know if it's fewer than what have requested.

Q. Okay. And your explanation for that that you just gave me, that's your supposition or have you done any analysis about why there's fewer people?

A. I have no written analysis.

Q. Do you have any information other than our own opinion you've just stated that supports your belief about why there's less?

A. No.

* * *

[Page 292]

management level.

Q. How long has that program been part of Wal-Mart as far as you know?

A. It was started prior to me moving into the position. I couldn't tell you exactly when it went in – became – it came into existence.

Q. Okay. Now you track a lot of information as part of your job. What are the programs that you have at Wal-Mart specifically to achieve diversity?

A. We have several programs. We work with Speaking of Women's Health. We have a Women in Leadership program. We have specific expectations as it relates to our college recruiting and our initiatives there. We have diversity, both minority and gender career fairs that we go to across the nation. We participate in events like SIFE.

We have goals that are established for our individual regions so that we can make sure that we are moving in the right direction where we need to. We continue to utilize great examples of diversity to come into our merchandising division and help us with the way that we merchandise our stores based on perhaps an ethnic product or an ethnic line of products. There are numerous programs that we have across the company.

Q. Let me talk about the goal setting in **[Page 293]** terms of diversity. We've seen some of the goals of some of the documents that are there. There are goals for management for women and minorities that are set?

A. Yes.

Q. And are there goals for specific positions in management as opposed to generic management?

A. We do not set goals by position.

Q. Has that always been true so far as you know?

A. It's always been true. This year we tried our first breakdown, but it was a very high-level breakdown. It was not done by region.

Q. And when you say a high level, you mean is it company wide?

A. I can't speak to company. I can only speak to Division 1 Supercenters.

Q. And what was that breakdown showing?

A. We went through and took a look at trainees, assistant managers, co-managers, store managers.

Q. And did you set goals for them?

A. We did for my area.

Q. Meaning Division 1 and specialty?

A. Meaning me. I did not break it down by **[Page 294]** people director or by region.

Q. So it's just – it's a company wide – I mean division wide as opposed to a smaller geographical?

A. That's correct. And that did include specialty.

Q. And how did you go about setting goals for those positions?

A. We asked for each of our RPMs to gather the goals by district and roll that into region number and then roll it up to the people directors and ultimately up to myself.

Q. For each of these positions?

A. No. Just in total.

Q. Okay. That's for setting the general goal?

A. That's correct.

(Mr. Putman returns to the deposition room).

MR. SELIGMAN:

Q. Okay. But in terms of setting the specific goals for trainee, assistant manager, co-manager, and store manager, how are those goals determined?

A. I determined those myself.

* * *

[Page 297]

A. Yes.

Q. So you don't set a goal at the top and it goes down?

A. We certainly review those goals and if we believe that they are less than or too aggressive, we do sit down and have conversations with the people who establish those regionally.

Q. Okay. Let me take the – the first level of goals is district?

A. Yes.

Q. And how long have you been keeping goals by district?

A. We've had them for about two years now.

Q. And who devises those goals?

A. The district manager.

Q. And is the district manager the one who is – is the district manager supposed to consult with anyone else in doing that?

A. He or she certainly can. We don't ask that they consult. We just ask for them to report the information back to the RPM.

Q. And what instructions are given to the district managers about what that goal should be?

A. We don't give out specific instructions except that our goal is to continue to drive minority **[Page 298]** and gender representation.

Q. They're not given any overall percentage guidelines about what range they should be in or what kind of improvement?

A. No.

Q. So it is left to each district manager to decide what their goal for the following year is going to be?

A. It is left to the district manager and then the RPM and regional to discuss whether or not that's an acceptable number.

Q. So that the district manager then brings that to the regional and the RPM and says, "This is what I propose" and they review and approve or change?

A. Yes.

Q. And what instructions do the regional or the regional personnel manager have in terms of how to review these goals?

A. We've had several discussions in our RPM weekly meetings about our desire to continue to grow our representation. And as a result of that, certainly as they reviewed the numbers those numbers should reflect efforts that are being made in the district's regions, et cetera. And certainly our expectation is to continue to see improvement.

* * *

[Page 302]

would have been the final. I can't say that for sure. I don't know.

Q. Do you know if the criteria for setting goals have changed since you became the – in your position?

A. I don't know the answer to that.

Q. Is there an ultimate goal to have management reach a level equal to the community representation?

A. That presents a certain challenge. The minority representation is a goal that, compared to the community in most markets and most areas, is one that we believe that we can get to.

If you look at the female community numbers, depending on the reports you look at could be anywhere from 50 to 52 percent. If you look at our overall management numbers, we're short of that number.

We are continuing to make improvements. And I believe that we will successfully reach our goals and perhaps even beyond that. Getting to the community will be a chance.

Q. Why?

A. We are full of industries within Wal-Mart that it is historically been are fairly male dominated. And quite honestly, in a lot of those situations we are***

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[Page 304]

Q. Have you ever studied that?

A. No.

Q. 78 percent or so of your department managers are women and about 35 or 6 percent are assistant managers. Is that about right?

A. That's pretty close.

Q. Do you have any explanation about why there's that big disparity in female representation?

A. The only thing that I can draw on is my personal experience of being in a position to be able to affect that.

Q. And when was that?

A. All the way from the late '80s through the mid '90s.

Q. And that's when you were in store management?

A. Store manager, district manager, and regional personnel.

Q. Since that time you haven't seen any analysis about why that disparity exists or any explanation?

A. I can't recall any.

Q. Does it concern you or any other senior management at Wal-Mart that that disparity exists?

MS. MARSHALL: Objection as to form.

* * *

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around that had some thoughts on it.

MR. SELIGMAN: I'll mark as Exhibit 64 a document called Diversity Ideas, Bates stamped 365621.

(Exhibit 64 was marked for identification by the reporter).

MR. SELIGMAN:

Q. Do you recognize this document?

A. Yes.

Q. And what is this document?

A. This was information I believe that was just shared amongst the RPMs.

Q. Are these ideas from the RPMs?

A. That I couldn't tell you.

Q. And you got given a copy of this by somebody?

A. Yes.

Q. And when approximately was this?

A. It would have been sometime late last year.

Q. Did you follow up on any of the items raised?

A. No.

Q. Why not?

A. Because the majority of the items that are on here we are already doing, have been for some***

* * *

[Page 320]

guidelines of relocation?

A. There hasn't been any discussion.

Q. Has there been any discussion about diversity in the co-manager ranks?

A. There's been diversity about – or discussions about diversity in all ranks.

Q. Has there been a particular focus this last year about co-managers?

A. Not that I'm aware of differently than the entire management organization.

Q. There's a diversity CBL module, right?

A. Yes.

Q. And who watches that?

A. I believe diversity CBL is all hourly supervisors and above.

MR. SELIGMAN: Mark as Exhibit Number 65 a document called Diversity Awareness.

(Exhibit 65 was marked for identification by the reporter) .

MR. SELIGMAN:

Q. This is the diversity awareness module?

A. Yes, I believe it is.

Q. Was there ever a recommendation that this should be shown to all employees as opposed to just the supervisor?

[Page 321]

A. Not that I know of.

MR. SELIGMAN: Let me show you a document we're going to mark as Exhibit Number 66, I believe. It's a two-page document. First page is 559170.

(Exhibit 66 was marked for identification by the reporter).

MR. SELIGMAN:

Q. This is from Katie Morris at Computer Based Learning to Dennis Anderson. Who was Dennis Anderson in 1998?

A. 1998 Dennis was our – I do not know if he had been promoted to vice president at the time or not, but he was in charge of training and development.

Q. Okay. This memo says that Andy, Maxie, and Kevin Harper do not want to change the current requirement that only management and hourly supervisors view the module. Does that refresh your recollection about whether you had ever opposed?

MS. MARSHALL: Objection to form and to characterization of prior testimony questioning.

A. My response to this would be is my recommendation would have been based off of the time where I was supporting a group that did not do CBL because it was not available to home office. And that was the division I supported at the time. So I'm quite***

* * *

[Page 335]

terms of doing a survey?

A. I don't know of one if it's been done.

Q. Do you know if there have been any sessions with district managers about their attitudes towards diversity?

MS. MARSHALL: Objection to form.

A. I'm not sure how – could you restate the question?

MR. SELIGMAN:

Q. Have there been any sessions with district or store managers and outside consultants where they were asked about their attitudes concerning diversity?

A. Not that I know.

MR. SELIGMAN: Okay. Let's go off the record. How much time we got left?

MR. HARRISON: Going off the record. Time on the monitor is 5:27.

(Recess taken).

MR. HARRISON: Back on the record. The time is the monitor is 5:34.

MR. SELIGMAN:

Q. You've reported to Charlyn Jarrells Porter your views about the progress of diversity at Wal-Mart at various times, is that correct?

[Page 336]

A. Correct.

Q. Have you told her what you think the biggest impediments were for achieving greater diversity in the management levels?

A. I don't recall outlining specific areas where I thought there were barriers, but simply identifying things I thought we could do to continue to improve.

Q. Have you recently expressed to her the concern that there are not enough people in the Pipeline to get promoted to meet female diversity requirements?

A. We have had that conversation.

Q. That was pretty recently, right?

A. I believe it was probably within the last five months.

Q. Okay. Tell me when you had that conversation.

A. I can't remember the exact date.

Q. Approximately?

A. Approximately five months ago.

Q. And tell me who else was there.

A. I believe it was just her and I.

Q. And what did you say?

A. We just simply talked about the diversity **[Page 337]** goals, where we were to that point, and what we were going to have to do to reach the goal by the end of the year.

Q. And what was that?

A. We were simply going to have to do exactly what the discussion was, which is put more female management in the Pipeline.

Q. And you think this was about five months ago?

A. I don't recall the exact timeline.

Q. Okay. When you say female management, you mean more people into management training or something else?

A. All positions.

Q. Okay. And did you discuss how you were going to do that?

A. We talked about the opportunity of – several opportunities. We talked about opportunities of recruiting through diversity career fairs and women's career fairs. We talked about college recruiting. We talked about promoting more hourly associates into the training program. We talked about hiring from outside the company. I'm not so sure that we didn't talk about most any way that we could improve the representation of the company.

[Page 338]

Q. Have you revisited this issue with her since this conversation five months ago?

A. I don't recall having that specific of a conversation, no.

Q. Have you sent her any memos on the subject?

A. She gets a monthly update of where we are on diversity. We do a quarterly review. So she's certainly received different documents since that would have allowed her to review that information, sure.

MR. SELIGMAN: Let me mark as Exhibit 71 a First Quarter Report dated September 9th, 2002, from you to Charlyn Jarrells Porter, Bates stamped 646265.

(Exhibit 71 was marked for identification by the reporter).

MR. SELIGMAN:

Q. This is a document that you sent to Ms. Porter?

A. It would have been.

Q. And it refers to a first quarter report. You do a quarterly report to her?

A. I do.

Q. And it's CC'd to Jim Haworth, who's the head of operations for the stores?

A. That's correct.

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Q. And he usually gets the – or whoever the head of operations is gets your quarterly reports also?

A. All the quarterly reports I send to Charlyn also goes to Jim.

Q. Okay. Let me ask you to take a look at the second page. Under diversity it says, "Female representation is improving. My largest concern is in the Pipeline. We do not have the needed representation at the trainee level at this time. We're trending down to last year. This is a major focus of the team." Had, you had any discussions about that other than what you referred to five months ago?

A. I think Charlyn and I have had an update discussion as we've went through our normal updates where we've talked about diversity representation by position. So certainly trainee position has been discussed.

Q. Has there been any follow-up after this letter on the subject of what to do about this?

A. I don't recall anything that I've sent her as follow-up.

Q. What did you mean by "we are trending down to last year"?

A. As I measure our diversity numbers, I certainly do it by position. And at that particular***

* * *

[Page 341]

A. It does.

Q. On the first page – second page it says, "Increase diversity representation." That was an objective for fiscal year 2002, or is?

A. Yes.

Q. It refers to diversity training for district managers?

A. Yes.

Q. Has that been done?

A. We have not done specific diversity training, no.

Q. Has there ever been diversity training for district managers that you know about?

A. I'm not aware of any.

Q. Is there a plan to do it in this fiscal year?

A. I haven't had discussions about that outside of privilege.

Q. Okay. What did you mean here by diversity training?

A. Just simply continuing the – to build on what diversity training we already have available.

Q. Would that involve some meetings with the district managers to talk about their attitudes about diversity or something else?

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES and PATRICIA SURGESON on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	Case No. C-01-2252 MJJ
v.	)	
WAL-MART STORES, INC.,	)	
Defendant.	)	

VIDEO DEPOSITION OF MS. CELIA SWANSON

Taken on behalf of the Plaintiffs

November 6, 2002

* * *

[Page 61]

Q. And who was in charge of people at that time?

A. It ultimately rolled up to her, but in 1996 I had the VP of people position.

Q. Okay. And people reported to the membership, marketing, and administration VP at that time?

A. Correct. Senior VP at that time.

Q. How long did you stay with the title of senior VP, membership, marketing, and administration?

A. Until 12/2/2000.

Q. And that's when you were made executive vice president?

A. Correct.

Q. What is the difference between an executive vice president and a senior vice president?

A. Scope and breadth of responsibilities as it relates to Wal-Mart Stores, Inc.

Q. In terms of your responsibilities, what differences were there?

A. Serving on the Wal-Mart executive committee, attending Wal-Mart board meetings, attending analyst presentations, actually being a presenter at analyst meetings, playing a more senior executive role within the total Wal-Mart Stores, Inc.

[Page 62]

Q. Had there ever been a female executive vice president at Sam's before you were given the title?

A. I'm sorry, the question again?

Q. Prior to the time that you were made executive vice president, had there ever been a female executive vice president at Sam's?

A. That role had not existed previously to when I was promoted to executive vice president.

Q. There were no executive vice presidents?

A. For Sam's. That was a newly created position at that point.

Q. Was it only one position that was made at that time or –

A. No, there were three.

Q. And why were three executive vice president positions made in December 2000?

A. It was out of recognition of the growth and contribution that the total Sam's Club organization had made to Wal-Mart Stores, Inc.

Q. Had there been executive vice presidents prior to December 2000 for Wal-Mart?

A. Yes.

Q. Had there ever been a female executive vice president?

[Page 63]

A. Not to my knowledge.

Q. Since you were made an executive vice president, have any other women been made executive vice presidents?

A. I don't know what Jean Jackson's title was. Other than that, no.

Q. Was Kevin Turner an executive vice president at any time?

A. Yes.

Q. When was he made executive vice president?

A. Within the last year and a half to two years.

Q. After you were an executive VP?

A. Shortly after I was.

Q. Who were the two other executive vice presidents for Sam's that were given that title at the time that you were?

A. Phil Sutterfield. Jim Haworth.

Q. And then when Kevin Turner was made executive VP, was he replacing Sutterfield or Haworth?

A. No.

Q. Was he – was Mr. Turner an executive VP for Sam's?

A. No.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiffs, vs. WAL-MART STORES, INC., Defendant.	Case No. C-01-2252 MJJ

Friday, January 17, 2003
Washington, D.C.

VIDEO DEPOSITION OF:

THOMAS M. COUGHLIN, III

was called for examination by counsel for Plaintiffs, beginning at approximately 10:18 o'clock a.m., at the law offices of Cohen, Milstein, Hausfeld, & Toll, 1100 New York Avenue, West Tower, Suite 500, Washington, D.C. 20005-3965, before Ronnie C. Palmer, a Notary Public in and for the District of Columbia:

* * *

[Page 12]

Hyde, who's the executive vice president of the corporation for legal. I don't think I missed anyone. I think that's it.

Q. And your area of responsibility is to oversee the operations for Wal-Mart Stores, Division 1, Supercenters, Specialty, and Sam's? Is that right?

MS. ABELL: Objection, ambiguous. You can answer.

THE WITNESS: That would be a large part of it, and the Neighborhood Markets are in there, as well.

BY MR. SELLERS:

Q. Okay.

A. Inclusive with the list of responsibilities. But it's not just the operations. It's a variety of, you know, all that goes into making the areas work together.

Q. You're familiar with a gentleman named Coleman Peterson?

A. Yes, sir.

Q. Does he report to you?

A. No, sir. He does not.

Q. To whom does he report?

A. To Lee Scott

* * *

[Page 42]

A. Again, we've got six or eight Sam's opening this week, and I believe that would put them in the 560 range.

Q. Okay. Now, as I understand your description of your career – or let me ask you this.

When you started as director of loss prevention, was that with respect to the entire company as it then existed or was that focused on Sam's or Wal-Mart Stores?

A. There was only the discount stores, 196 discount stores. There were no other, except support divisions of the company for logistics or any other office support that would be there, warehouses. That type thing were the only other part of the company at that time.

Q. All right. Did you find – at one point or another it looks like you had responsibility particularly for the Sam's operation as opposed to Wal-Mart Stores. Is that correct?

A. Totally separate from. Yes.

Q. Did you find that the personnel policies that were in operation in the Sam's facilities were similar to those that were in place in the Wal-Mart Stores?

MS. ABELL: Objection. Ambiguous and **[Page 43]** compound. You can try to answer.

THE WITNESS: I would have found – I would have to think about what would have been different because it generally would have been the same.

BY MR. SELLERS:

Q. Okay. In your view, does Wal-Mart wherever possible try to fill positions through promotions rather than hiring from outside?

A. I would say that that is a very, very true statement. We always look inside the company to find people that – who understand again somewhat different approach to retail. It's a bigger issue .than somebody outside looking in would think about it.

People in retailing are very promotionally driven. High, low, you know, sales. And coming to understand the value that we gained out of an everyday low price program, when it's well understood by your people is a huge advantage in getting on and being successful in your business, not compromising in doing what many people would consider an easier way to run it.

Q. Thank you. In the job you currently hold, I think you said that Mr. Scott is your***

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[Page 95]

the executive committee?

A. You know, I would say no, in the current state of affairs. I can remember times in the past where they had been at different periods, but it was – again, facilities regulate a lot of what we do. We are not big on offices and a lot of places to meet. And when the room would grow to a certain size, something would have to be eliminated. And I can remember times when they had secretaries in taking notes. But it would be less – far less often than there would have been.

Q. Do you know what happens to the – did you get copies of the notes after the meetings, at which they did take notes?

A. I got copies when I was absent for a period of time. But that's been a long time ago.

Q. More than five years ago?

A. Five years would be a comfortable guess for me. It's been a substantial amount of time. I'd be guessing at five years. It would seem like that would be about what it would be.

Q. Has the topic of posting of jobs at Wal-Mart come up at any board meetings at which you've been present?

A. I recall discussions on our posting **[Page 96]** process as we began it, and as we accelerated what we were doing. I can recall that it has been discussed at some point in time, and I'm not certain it was in the formal board meeting. We have dinners with them. To explain myself, I'm not trying to be vague, we'll sit around dinner and talk about a lot of subjects.

And I suspect it was at a dinner meeting where we discussed it, but I am not certain. But it was with board members.

Q. Were there discussions with the board members, at whatever setting it may have occurred, with respect to job posting, about whether posting of jobs was something that was desirable, or something that was a goal, or would that kind of topic have come up?

A. I think it would have been, the best of my recollection, it would be – or we would bring it up as something we were doing, and then taking it to another level to attempt to do – to make sure that we were identifying all available talent, and hopefully dealing with diversity issues as well.

Q. And just so I understand, you're saying that in these board discussions, posting came up in the context of it being a tool used to help develop all available talent at the company? Is that what***

* * *

[Page 122]

general manager and whoever supervises them immediately who would be addressing these things, not the People Division or human resources?

A. The store manager and I guess on occasion DMs. Yes.

Q. Are you aware of any studies that have been done at Wal-Mart looking at whether as a group women, either store managers, or assistant managers, or district managers, or some discrete group, are paid differently at different levels than men holding the same jobs?

MS. ABELL: Objection. To the extent that your answer would call upon you to disclose information learned from counsel, I instruct you not to answer. Otherwise you may answer the question if you have information from any other source.

THE WITNESS: I would have no further information beyond anything that we would have discussed.

BY MR. SELLERS:

Q. Let me just be clear. I'm not trying to intrude on what you and cancel discussed, but you have not come across in the regular course of business in your work, any results of any studies of pay – of comparing compensation for men and women? **[Page 123]** Is that correct?

A. Other than what I would have –

Q. I am not asking you what you learned from counsel.

A. I'm not familiar with any.

Q. Okay. Would you expect that those kinds of analyses, if they were done, conducting those kinds of analyses routinely, not related to anything counsel has told you or any particular litigation, but just as part of the regular business function would be a good idea?

MS. ABELL: Objection, ambiguous, lack of foundation.

THE WITNESS: You'd have to – I'd have to understand more about what you're asking to understand the value of it. Beyond general information that I could look at when I want to, I don't have enough understanding to say that yes, it would be of value.

BY MR. SELLERS:

Q. Let me help you put it – provide some context. Do you think it's generally a good business practice for Wal-Mart to monitor, to look at the aggregate effect of various decisions that its managers make whether it be compensation, or gross***

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[Page 150]

process at the store.

Q. Now, are you familiar with the term resident assistant manager?

A. Yes.

Q. What is that? What's the nature of that job?

A. Well, I can remember it from again my earliest days with the company, that as we started to spread from a development standpoint into other states, other geographies, that there were many people – I should correct the statement many.

There were people that could not make the moves to new areas or would not because of personal circumstances, who returned a lot of value to the store they worked in and yet weren't able to go and do many of the things that were necessary to run the business and grow the business. And it continues today that there are people in that classification.

Q. And what is it that the resident assistant manager position offers?

A. It offers far less than the other assistant managers provide for us, as far as versatility to run and develop new stores or operations. There have been things that we found about it that had been good. It offers a certain **[Page 151]** amount of stability. But coupled with that, there have been corresponding problems where people didn't perform well and it dragged down the performance of the stores.

So it came back to just how good was the person. And we learned through the years it had to be a very productive person to be able to leave them in the environment and produce for you. And fair numbers of the people in that position for a given period, you know, good period of time.

Q. Are there things that the resident assistant manager can or can't do that other assistant managers do?

A. Well, yes. There's store setups is part of the development process with assistants. To my knowledge, resident assistant managers don't go out and complete that part of the development process for assistants. So miss the opportunity to understand how you literally create the store from the turnover of the building's keys.

They will typically not go out on remodels or some other projects you would put assistants through to help them develop, again, their base to be able to take on additional challenges. And there is a difference in the – some of the **[Page 152]** structure of – requirements for them, too. And I am not articulate on them.

Q. Resident assistant managers do not have to relocate? Is that the distinction between them and regular assistant managers?

A. They don't have to relocate their residence. They very well may have to relocate, but not their residence.

Q. So they may have to work at a different store, but within a commuting distance of there existing residence?

A. Correct.

Q. If you seek to enter the regular assistant manager program, not the resident assistant manager program, do you have to be willing to relocate? That is move your residence?

A. No. No. You just have to be willing to relocate the store that you are operating in.

Q. Then I'm not sure I understand the difference between a resident assistant manager and an assistant manager.

A. Well. Again, I'll go back to some of the differences. There is differences in what's required of them. There is less requirement, and I'm not real keen on these, these details, but they have different***

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[Page 157]

on a variety of different training exercises like you're put through many training exercises in your day-to-day operation. But going out and resetting stores, going out and resetting stores, going out and initially setting stores, going out and being responsible for hiring for new stores.

There's a whole variety of training exercises that assistant managers who hopefully are going to be promotable to new or open operations gain through this process of going out and working on these projects.

Q. And it's not the practice of sending the people who hold the resident assistant manager positions out to perform these training exercises?

A. That would be correct.

Q. So what is it that the resident assistant managers do?

A. They work in a store or stores right in the market that they have limited their lifestyle, living arrangements to, and they work in those stores.

Q. And in your view, do people who hold resident assistant manager positions, are they less likely to get promoted than those people who hold assistant manager positions?

[Page 158]

A. Absolutely. I don't know if I know of any promotions from that position.

Q. From the resident assistant manager position?

A. Right, unless they opened up their availability.

Q. Are they paid the same amounts? That is the people who hold the resident assistant manager and assistant manager positions paid the same amounts?

MS. ABELL: Objection. Lack of foundation.

THE WITNESS: I couldn't answer it anyway. I am not close enough to looking at – you know, there's not a lot of them. I wouldn't know without looking it up.

BY MR. SELLERS:

Q. Okay.

MS. ABELL: Counsel, is this a good time for a break?

MR. SELLERS: Sure.

THE VIDEOGRAPHER: Going off the record. The time on the monitor is 3:16.

(Off the record.)

THE VIDEOGRAPHER: Going back on record.

[Page 159]

The time on the monitor is 3:40. Please continue.

BY MR. SELLERS:

Q. Has the position on whether people entering the assistant manager positions where they have to relocate always been the same?

A. I cannot think of a point in time where it would have been any different.

Q. It's your understanding there has never been a requirement that candidates for selection to assistant manager positions have to agree to relocate their residence?

A. Well, let me clarify. Assistant managers need to be able to go to where the opportunity for the advancement and/or where their expertise may be required. What I'm saying is it isn't always – it wasn't every time that they had to move their residence.

They may have had to go to a different store or for that store to utilize their skills. It's very irregular that they do relocate their residence. I answered the question, I thought the way you asked me if they had to always relocate.

Q. I may not have made it clear. What I meant was, did they have to be willing to relocate as a condition of being considered for the assistant **[Page 160]** manager position?

A. Yes.

Q. Is that still the case?

A. Yes, it is.

Q. So in your view, consistently over the, let's say, the last ten years as just a sample, consistently it's been the policy that if you want to be considered an eligible for selection as an assistant manager you have to be willing to relocate your residence?

A. Yes.

Q. And in your view, the candidate's willingness to relocate his or her residence is a precondition to being considered for assistant manager position hasn't changed over that period?

A. No. We've always – with this huge growth that we've had, we've always had the need for the expertise that was being developed in other new stores, discount stores, Supercenters, or Neighborhood Markets that were being developed. And the people that were in those positions that were moved were in need of advancing to different responsibilities as part of their development, and most often would relocate to different areas where those needs were.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES , et al Plaintiffs, v. WAL-MART STORES, INC., Defendant.	))))))))	Case No. C-01-2252 MJJ

VIDEO DEPOSITION OF COLEMAN PETERSON

Taken on behalf of the Plaintiffs

December 18, 2002

* * *

[Page 8]

Q And what is the title of your current position?

A My formal title is executive vice-president, people division, which is our, Wal-Mart's nomenclature for human resources.

Q Does your area of responsibility extend throughout the entire Wal-Mart Stores, Inc, that is includes responsibilities in the Sam's division as well as Wal-Mart Stores, Wal-Mart Division 1?

A Yes, sir, it does.

Q It also covers the specialty area?

A Yes, sir, it does.

Q Okay. Would you describe for us the nature of the job duties you have in your present job?

A I really simply define them as having responsibility, overall responsibility for getting, keeping and developing Wal-Mart talent worldwide.

Q All right.

MS. ABELL: Mr. Muzingo's entered the deposition.

MR. SELLERS:

Q How long have you held this position?

A Since the spring of 1994.

Q So you have held this job for more than eight years, is that right?

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to dig into it to really understand so –.

Q Okay, I understand. Is it fair to say that in the past a majority of the pool from which you have drawn your management have been internal employees rather than external?

A Yes, sir, that is fair to say.

Q Okay.

Q Let me direct your attention to the last page of Exhibit 3. This page is entitled Board Strategy Discussion People. Would that title signify to you that these topics were likely raised with the board compensation and nominating committee?

A It is likely. I don't want to limit this to the compensation and nominating committee because again as I said it's not titled compensation and nominating so it's possible that it might have been literally a broader board discussion.

Q I see. Let me ask you that. Do you have occasion to make presentations to a broader group of board members than just those who comprise the compensation and nominating committee?

A Yes, sir, I do.

Q Under what circumstances?

A On an annual basis we address the entire board as to our individual strategies by specialty of the **[Page 73]** business.

Q I see, okay. And this may be a list of discussion points for that broader meeting?

A Yes, sir.

Q All right. You make reference in the box on the upper left-hand corner to the use of the term – use of equity formulas. Do you see that under pay programs?

A Yes.

Q What is it that you meant to convey there?

A I don't know what my intent was at that time.

Q Okay. Under the category worklife issues?

A Yes.

Q The first bullet item is introduce alternative work arrangements. What did you mean there?

A This was we were focusing on home office and again retention was our challenge and so we were looking at all aspects of our business in terms of what kinds of things might be done to continue to make Wal-Mart an associate worker friendly place and so some of the initial discussions we had had was maybe we should begin looking at home office and experimenting with alternative work arrangements.

Q And what – give me an example of an alternative work arrangement you were looking at.

* * *

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A I have exposure to the reports. The really detailed attention in terms of the content and so on took place really more with the compensation players on my team and the divisions themselves.

Q Okay. I'm not asking for detailed numerical reports. I'm asking you were – in general terms did you find – were differences found?

A Yes, sir, I believe so.

Q And were the differences found in a respect that men were paid – were in the higher end as opposed to the lower end of the difference in their compensation compared to women?

A I believe there are a number of differences that were found. I don't believe they were just around gender. I think gender was among them but I think that there are also others in terms of, you know, people who had been in jobs same periods of time, you know, equal maybe merit and, you know, and different pay outcomes. So gender was among them but it wasn't exclusively a gender issue.

Q Well I gather – let me make sure I understand. If you simply compare gender did the studies find that women were paid less than men?

A I am not confident to respond to that because I was not as close to the studies as those that did***

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other sources than the management trainee program, is that right?

A No, sir.

Q No?

A Everyone that would – the posting process would be for the management trainee position.

Q Oh I see. So they would know which vacancies to bid on when they graduate from their program?

A Yes, sir.

Q I see, okay.

A No, sir. Let me back up. I don't – I still don't think I'm being clear. The posting process for the assistant store manager position was the opportunity to become trainees, was the opportunity to become and move into the training program.

Q Oh I see. So I think we have not communicated clearly.

A Yes.

Q When I asked you about posting for assistant manager vacancies you were really speaking about posting for management trainee vacancies?

A That's correct. In other words how one moves into the assistant store manager ranks. What are the opportunities to move into the assistant store management ranks.

[Page 161]

Q Okay. So you have as yet not had a posting process for the management trainee class vacancies?

A Not one that is as formal as to department manager and to store manager and district manager, no. There are clearly processes in place but they're not as formal as the ones that we have.

Q Well what processes are clearly in place?

A Oh gosh, the – I mean starting at the store manager level you have – and I'm sure you are aware that we have daily and weekly store manager meetings where the store manager just talks about in general what's going on within the store, what the opportunities are within the store and so on. And then on an annual basis you have a performance appraisal for every hourly associate within the store and as a part of the performance discussion you, of course, talk about what is it you want to do, okay. What opportunities are you interested in, how does that work and so managers have an opportunity to respond to questions that associates might have about how they get there. Third can be the personnel managers themselves. Everyone knows that if they have got questions about jobs, pay, promotions, transfers, they go see the personnel manager. Personnel manager explains to them how it works. On an ongoing basis you have the **[Page 162]** district managers that are in and about the store. We have the Wal-Mart today that really kind of talks about, you know, how stuff works. How we do things around here, things like that.

MR. SELLERS: Okay. I'm told that we need to change the tape.

MS. BLACKWELL: Here marks the end of tape number two in the deposition of Coleman Peterson. The time on the monitor is 12:10 pm.

(Lunch recess).

MS. BLACKWELL: Here begins tape number three in the deposition of Coleman Peterson. The time on the monitor is 1:03 pm. Please begin.

MR. SELLERS:

Q Mr. Peterson, what is the value of job posting? What human resource or personnel objective does it serve?

A Job posting ensures the company that it is able to attract and identify as many talented people as possible for jobs that are needed and for the individuals it provides an opportunity to apply for positions in the company that can allow them to move forward in their careers.

Q And in the absence of job posting what – either from a human resource perspective or your***

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and rationale for each of these, meaning job posting and direct manager selection. Or I'm sorry. District manager selection. They both are heavily tied to turnover costs, litigation avoidance expense, union organizing and commitments made out of the grass roots process.

Do you have any reason to doubt that those were rationales, legitimate rationales or rationales that you have cited to support job posting?

A No, sir, I do not.

Q And as of 1996 were there – was there job posting in the retail stores?

A See I don't think we really had begun it. I think we – this is certainly the good news for both Tom Coughlin and Maxine Carpenter, but I think by the time we got into 1997 and '98 we were actually into – we were actually into the posting process in both of these cases.

Q In what respect were you of the view that job posting may be associated with litigation avoidance expense?

A I think just the fairness of how people get picked for jobs.

Q And what about job posting contributes to the fairness of how people are picked for jobs?

[Page 167]

A People understand where the jobs are and they understand what it is you need to do to qualify for the jobs.

Q And in the absence of job posting is it possible that people wouldn't know where the vacancies are or what it takes to get selected for those jobs?

MS. ABELL: Objection, compound and incomplete hypothetical.

MR. SELLERS:

Q I'm merely asking you further about the answer you just gave me.

A I would say that no, that did not necessarily follow but as we've talked about a number of human resource systems, there's always an opportunity to do things better.

Q So in your view back in 1996 the means by which notice was given or employees were informed about vacancies for jobs in the stores was fine, is that right? Was fully satisfactory to you?

A Those are your words, not mine.

Q No. I'm asking you because you said there was no problem; it's just a chance to do things better?

A I didn't say there was no problem.

Q Okay.

A I said there's always an opportunity to do***

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do have it.

Q Right. No, I understand. And you have no view on the subject. Is that what you're telling me?

A I don't think I understand enough to have a specific point of view about how it should work.

Q Now in this memo you set forth the present situation on the first page. You say while each of Wal-Mart's individual decisions have made some progress toward their diversity initiatives, there is no direct accountability for results within the areas. Responsibility now falls to the executive vice-president of people. I assume that's you?

A Yes.

Q In the third person?

A Yes.

Q Okay. What did you mean to convey by saying there's no direct accountability for results within the areas?

A It's not unlike maybe one of the two of the memos that's we've seen before. Clearly part of my responsibility is to get everybody's attention.

Q I understand.

A So I do that in the process of making some pretty strong statements.

Q Well was it a lie? Were you – was it – were **[Page 244]** you writing something that wasn't true?

A Yes, I was.

Q I see. You were writing a statement here that wasn't true to get their attention?

A Absolutely.

Q I see, okay.

A And of course you have, you know, phrased that in a very inappropriate way but I think we both understand that when you are in these leadership jobs your objective is to get the attention of your business partners. They full understand that – where the accountability lies within their divisions and that people take accountability for these kinds of things. And I understand it as well.

Q Now what you then list are a series of findings and I assume these are findings from the results of benchmark inquires of other companies about their diversity programs and initiatives, is that right, and resources?

A Yes, sir.

Q This is Exhibit 24. Mr. Peterson, you have Exhibit 24. It's entitled Executive Summary Diversity Corporate Affairs Benchmark, June 2002. Was this a memo prepared summarized the results of the benchmarks conducted to compare diversity initiatives at the***

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a few minutes rather than debating broad principals which, you know, isn't very useful.

A Well you asked me the question about attending a Hooters to have a meeting –

Q Attending business meetings at a Hooters restaurant.

A And I would have to answer that within the context of – you've heard me say a number of times today that it depends on the situation or it's a store by store issue. Let me give you an example of your example. It is conceivable in some small town that Hooters is kind of like the restaurant du jour, okay, and that it is viewed as one of the most elegant and really one of the best places to meet and eat in contrast to a Chicago or different town where it has a different view. So in order to interpret intent and appropriateness one has to take it within its context, Counselor, and that's why it's difficult to – I realize you are trying to get to the discussion of culture but I think with that kind of an example it's very difficult to articulate better than that.

Q All right. Let me give you another example. See if you have – just give you a few of these and see if you have similar response. Another woman reported -- and these are by the way the subject of testimony in***

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attitudinal survey and tabulating the results or conducting focus groups that are professionally conducted. All of those would be in my view evidence of a study. They may be conducted by outside consultants or done internally so that's what I mean by study. And if you want to change your answer to any of these things then tell me.

A I would say to you that every spring and fall we have a study, okay, and that study is is we bring together every store manager and fifty percent of the assistant store managers and we talk about the things that are important to driving this business forward. There is always a significant piece on human resources where we talk about upward mobility and promotion and those are the ideal times for the key people directors to really talk about what goes on, what are the things that we need to be doing more effectively. So if in their view location is one of those, then that is an ideal time and has been an ideal time in my understanding where those kinds of things get talked about and brainstorming and problem-solving goes on around those issues.

Q Okay. Other than that, are you aware of any other kinds of studies as I've used the term that have looked at the impact of relocation on women? That's my **[Page 274]** first question.

A I think probably more actions than studies, okay, because it's out of these understandings of what our challenges may be that we've gone down to Louisiana for example and experimented with new schedules for assistant store managers to see if that can make it friendly. We've resurrected the resident assistant program which does not require a person to relocate in order to move to the assistant store manager level. So I think it's kind of loosening the requirements on relocation for those who are looking at the assistant store manager or store manager type roles. So I think we've been more – I think our energy has been really more around trying to do something about it rather than studying ourselves to death.

Q Have you studied with the term as I've defined it for you whether women employees – the extent to which women employees are interested in moving into management?

A Have I – have we studied?

Q The level – whether the interest levels of women in moving into salary management positions?

MS. ABELL: Just a second. Objection, ambiguous. Which levels?

MR. SELLERS:***

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, on behalf of themselves and all others similarly situated, Plaintiffs,	Cause No. C-01-2252 MJJ
vs.	
WAL-MART STORES, INC., Defendant.	

DEPOSITION OF WITNESS, MELINDA HASS, produced, sworn, and examined on the part of the Plaintiffs used in an action pending in the United States District Court, within and for the Northern District of California, in re: BETTY DUKES, PATRICIA SURGESON, on behalf of themselves and all others similarly situated vs. WAL-MART STORES, INC, on April 24, 2002 at the Holiday Inn Express, Bentonville, Arkansas, before JOANNA HARALAMBIDIS, Notary Public within and for the County of St. Louis, State of Missouri.

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[Page 15]

A. I wouldn't say that I've ever had responsibility directly for Sam's Club in a corporate type position. I worked with Sam's Club, but I don't know that I'd ever say I was responsible for them.

Q. Okay. And in your position in the legal department, did you work on both Sam's Club issues or lawsuits as well as Wal-Mart lawsuits?

MS. MARSHALL: I just caution the witness not to get into any privileged material, but within that limitation, go ahead and answer the question.

A. Yes. It was mostly EEOC charges and.

Q. (BY MS. LARKIN) Okay. And can you describe for me your responsibilities in your current position?

A. I'm responsible for updating as well as creating all new and current people policies. I'm also responsible for the updates of all other organizational corporate policies but not the creation of other department's policies. That also would include any corporate form that we use from a people perspective. I also supervise the drug screening department and supervise our ride share program.

Q. Let me make sure that I understand what you said because you just told me a lot. You're responsible for updating and creating new and current people policies. Is that correct?

A. Yes.

[Page 16]

Q. Okay. And those are policies that apply across the company?

A. Yes.

Q. Okay. And you have similar responsibilities with respect to other corporate policies but not other department policies?

A. The other department policies are also corporate policies, but I don't have responsibility for creating them just updating them as a department. If a department calls me and says as an example a marketing policy on coupon use if they call and say the coupon policy is wrong it needs to be updated, then I ask them to edit the policies send me the updates, and then I'll review it and post it.

Q. I got it. Okay.

A. I'm more or less a gait keeper I guess you would say on the other department's policies not solely responsible for them.

Q. Drug screening that's the O'Ryan drug screen?

A. No.

Q. Oh, okay. What's the drug screening?

A. In Wal-Mart we do pre-employment post accident.

Q. Oh.

A. Reasonable suspicion and promotion drug screening.

Q. Okay.

A. And we have a department in-house that manages***

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Q. Okay. Now, will he have been involved at any point up until the time that it's sent to him after the executives have approved it?

A. No.

Q. Okay. And how do you communicate with him about this?

A. I prepare a memo that covers what changes have been made and then attach final versions to the memo for him to review and approve.

Q. And what comes back to you if anything from Mr. Peterson? How is it Mr. Peterson indicates to you that he's approved it?

A. He generally gives me his copy back with either any changes that he thinks are necessary, or he writes, okay, beside it and then signs it or initials it.

Q. Okay. And generally speaking, does Mr. Peterson approve them?

A. For the most part.

Q. Okay. And I take it that you wouldn't necessarily know if Mr. Peterson went and talked to other people about a draft policy or anything else in terms of his own process of deciding whether to approve something?

A. Not necessarily, no.

Q. Okay. And I think you said that after Mr. Peterson approves it that the next step that it is posted on **[Page 34]** Pipeline?

A. Yes.

Q. Okay. We're going to get to talking about Pipeline probably more this afternoon. So we'll get back to that. Is anything else done with it besides having it posted on Pipeline?

A. I send a memo with the changes as well as attachments of all of the finalized versions of the policies to a revised policy notification distribution list that I have.

Q. Hang on.

A. Okay.

Q. Policy notification. Okay.

A. I send that on e-mail.

Q. Okay.

A. And then I also send it to Division One, Sam's, and logistics for them to send to the field either on workbench or e-mail. Division Seven uses e-mail, and Sam's in Division One use the workbench to notify the facility managers of the changes.

Q. I'm sorry, you said Division Seven uses e-mail. Is that logistics?

A. Yes.

Q. Logistics is the distribution network for Wal-Mart?

A. Right.

* * *

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directives that a Regional Vice President or a Regional Manager could send out, is there any particular process by which those need to be reviewed or approved?

A. That is not something that I would be knowledgeable of.

Q. Okay. Let me ask you the same question about District Managers. Is it also the case that they are not permitted to formulate their own people policies for their districts?

MS. MARSHALL: Objection as to form and again use of the term policy.

A. That is correct.

Q. (BY MS. LARKIN) And is that for the same reason that you've described with respect to the Regional Vice Presidents?

A. Yes.

Q. Okay. And let me ask you the same question about Store Mangers. Are Store Managers free to formulate and implement their own people policies?

MS. MARSHALL: Again objection in terms of definition of policy.

A. Again I would say, yes. Not in the context that we have corporate people policies, no, they could not.

Q. (BY MS. LARKIN) Okay. Tell me I want to switch now to how you disseminate information about personnel **[Page 52]** policies. How are personnel policies or people policies communicated to new employees of Wal-Mart?

A. The first way would be through the associate handbook which is covered in new associate orientation. There have also been some orientation videos which cover some of our policies, and then all associates have access to Pipeline. So the information would be there. There are some policies that are covered in CBL modules that they would be required to complete and pass, and we also have various posters posted throughout the back of the facility break room. In the Wal-Mart Today I believe it's quarterly that there's a policy Q and A section in the Wal-Mart

Today, and then also through their store management.

Q. Okay. Why don't we start with the associate handbook. Did we – is that all the ways in which you can think of at the moment that new employees are given information about people policies?

A. At the moment, yes.

Q. Okay. Tell me first what is the associate handbook?

A. It is our handbook that covers our three basic beliefs and our basically company philosophies that go along with those three basic beliefs. It covers briefly what benefits are available to associates if they're part time or full time. There's information in it regarding the history **[Page 53]** of the company. There's some brief information about each division within the company, and also there's a brief overview of several of our people policies. There's also FMLA notification in the handbook.

Q. What's that?

A. I'm sorry.

Q. What's that?

A. The FMLA notification?

Q. Yes.

A. Just notifying the associate of what their rights are under the FMLA and how they go about requesting FMLA.

Q. Okay.

(Plaintiff's Exhibit Number Sixty Three marked for identification.)

MS. MARSHALL: Sixty Three?

Q. (BY MS. LARKIN) We've marked as Exhibit Sixty Three a document which is entitled Wal-Mart Associate Handbook which is Bate Stamped 1 WMHO 1 through 50. Is this the associate handbook that you were just testifying about?

A. Yes.

Q. And is this the most current version of the associate handbook?

MS. MARSHALL: Take your time to look through it if you need to.

A. It appears to be, yes.

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MS. MARSHALL: Just note for the record on the last page, it says 2001.

Q. (BY MS. LARKIN) Okay. And have there been prior iterations or versions of the associate handbook since you've been at Wal-Mart?

A. Yes.

Q. Do you recall has there always been one since the time you've been at Wal-Mart?

A. Yes.

Q. Do you know approximately how many different versions there've been since 1995?

MS. MARSHALL: I'm going to object just to the extent that this is not necessarily a topic on which she's been designated but if you have personal knowledge.

A. There was a 1993 version, a 1998 version, and this version.

Q. (BY MS. LARKIN) Okay. Do you have any responsibility for the preparation of the associate handbook?

A. I'm involved in it. Yes.

Q. Okay. And in – is it only in your current position that, or in your prior positions, have you also had responsibility for development of the handbook?

A. Both.

Q. Okay. I think you covered this, but is the **[Page 55]** associate handbook given to every new employee of Wal-Mart?

A. Yes.

Q. And is the same handbook given to the employee irrespective of what division they join?

A. Yes.

Q. And I take it then there are no different handbooks for different regions?

MS. MARSHALL: Same objection. Beyond the scope of her designation.

A. Not an associate handbook there should not be. No.

Q. (BY MS. LARKIN) Okay. And are new employees required to read it?

A. Yes.

Q. And does Wal-Mart have any system of ensuring that new associates read the handbook?

MS. MARSHALL: Same objection.

A. Once the associate's given the handbook, they're asked to read it, and once they complete reading it, then we ask them to sign the acknowledgment page that's at the back. And that goes in their personnel page.

Q. (BY MS. LARKIN) Okay. And you're referring to Page WMHO 49?

A. Yes.

Q. Okay. And you said that that acknowledgment gets put into their personnel file?

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A. Yes.

Q. And is it put anywhere else?

A. No.

Q. Okay. Why are they required to read it?

A. It contains information about the company from a culture perspective from a history perspective kind of to let the associate know where Wal-Mart started, where we've been, where we're going. It contains our three basic beliefs which we believe are very important for associates to understand. They're the founding principles of our company, and it also like I said gives an overview of several people policies and benefits. So it's basically an introduction to their new company and to kind of help orient them to our organization.

Q. Okay. And are there – is the associate handbook ever distributed to existing employees for any reason?

A. Yes.

Q. And tell me when that occurs.

A. Any time there's an update, it's given to all associates within the company.

Q. And when you say an update, is that different than the versions that you referred to?

A. No. Same thing.

Q. Okay. So in 2001 I'm assuming that this is the 2000 – what we call the 2001 version?

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A. Yes.

Q. Okay. Does it have any other name?

A. No.

Q. Okay. The 2001 version when it was published it was distributed to each existing employee?

A. Yes.

Q. And they signed the acknowledgment form of having received it?

A. That's correct.

Q. Received it and read it?

A. Yes.

Q. Okay. And for existing employees, that acknowledgment was put into their personnel files?

MS. MARSHALL: I'm going to have a continuing objection line of questioning just beyond the scope of the 30(b)(6)e.

MS. LARKIN: You know, I think – I think this is – I'm not trying to argue with you at all. Let me just explain my thinking about this. I asked her how personnel policy disseminated. One of them is the associate handbook. Also as part of the deposition notice is how does Wal-Mart monitor the implementation of the personnel policies. So I think that the acknowledgment fairly falls within the area of monitoring –

MS. MARSHALL: I'm not trying to cut off her **[Page 58]** answers. I'm just saying –

MS. LARKIN: Right. And I wasn't –

MS. MARSHALL: – that if she has personal knowledge.

MS. LARKIN: And I wasn't trying to argue with you.

MS. MARSHALL: Yeah.

MS. LARKIN: I just was trying to explain to you why in the world I was bothering with it.

Q. (BY MS. LARKIN) Okay. You also mentioned that there is – there are orientation videos to help disseminate information about personnel policies. Is that correct?

A. Yes.

Q. Can you tell me what those videos are?

A. No, I cannot because they're out of the training department.

Q. Okay. Are you familiar with the orientation that new employees get at Wal-Mart?

A. No. In the field, I'm not.

Q. Okay. Do you know whether all employees within Division One get the same orientation?

A. Yes.

Q. Okay. And what's your familiarity with that?

A. The orientation process for Division One is designed within the training department, and it's a standard***

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videos that do cover those topics?

A. Yes.

Q. Okay. Let me ask you to look at Exhibit Sixty Six. This document is Bate Stamped WMHO 1192. It's entitled Department Orientation Checklist. Are you familiar with this document?

A. Yes.

Q. Can you tell me what it is?

A. It is a document that they go through with new associates from a risk control perspective about safety of doing their job, dealing with chemicals, evacuation process, that type of thing dealing with risk control.

Q And is Exhibit Sixty Six the current form of this form if you know?

A. I believe there's a more current version.

Q. Okay. And the fact that it's called Department Orientation Checklist what does that mean if you know?

A. I do not know.

Q. Okay. Do you know whether this orientation procedure is done for all new employees?

A. I believe it is, yes.

Q. Okay. And is that limited to the stores or all new employees?

MS. MARSHALL: Continuing line of objection based on not being within the scope of 30(b)(6).

* * *

[Page 67]

corporate people policies?

MS. MARSHALL: Again same objection.

A. There are – I know there are other areas that have things that are that may be characterized as a policy that is not a corporate people policy.

Q. (BY MS. LARKIN) Okay. Can you give me an example? Is there an example of the stores of something that would be a people policy but not a corporate people policy?

A. I would not – I would not say that the example is a people policy. I would say it's something that may have the word policy after it, but it's not a people policy.

Q. Okay.

A. And that would be in the management career selection information on-line.

Q. So that's information about people issues, but it's not necessarily a policy?

A. That's correct.

Q. Okay. Are there – is there any kind of information about people issues that you wouldn't consider to be a policy that are on Pipeline?

MS. MARSHALL: I'm going to object to the extent that it goes beyond the 30(b)(6). If you have personal knowledge, you can go ahead and answer.

A. I'm not thinking of any right now. No.

Q. (BY MS. LARKIN) Okay. You mentioned that there **[Page 68]** are CBL modules that provide information to new employees about people policies. Do you know what those CBL modules are?

A. There is a CBL module on harassment and inappropriate conduct, and there's also a CBL module on our union philosophy.

Q. I'm sorry, our?

A. Union philosophy.

Q. Okay.

A. And there are other CBL modules that do not necessarily relate to policies but like relate to our three basic beliefs and more cultural type things.

Q. What's the name of the harassment video, I'm sorry, the harassment CBL if you know?

A. There are a couple. I think one is entitled Inappropriate Conduct, and the other is Sexual Harassment. And there's a module for hourly associates and a module for management associates.

Q. On sexual harassment?

A. Yes.

Q. Yeah. And what's the CBL module on your union philosophy called?

A. I think it's called Labor Relations.

Q. Okay. And you indicated that new associates are required to take the CBLs?

[Page 69]

A. Yes.

Q. And does Wal-Mart have a system of ensuring that a new associate has taken a particular CBL?

A. Yes.

Q. And what is that system?

A. The – and this is sort of getting outside of the scope because training they're responsible for CBLs, but I do know that in a store they have – they have a way of systematically checking if an associate has taken a CBL and was it taken timely. Did the associate pass the module. So that all is monitored at store level and also at regional level.

Q. And if – do you know what happens if they discover that someone has not taken a particular CBL?

A. No.

MS. MARSHALL: Again object to the extent it goes beyond the 30(b)(6).

A. Yeah. I don't know.

Q. (BY MS. LARKIN) Okay. And the CBL modules that you identified sexual harassment and inappropriate conduct and the labor relations module are those the same for all Division One employees? It's the same module?

A. Yes.

Q. And do you know whether it's also the same module for the other divisions?

* * *

[Page 80]

group?

A. Yes.

Q. Okay. Now; are there any other management trainings that you know that disseminate information about people polices other than Management Skills 101 which used to be called leadership foundation?

A. The Walton Institute –

Q. Okay.

A. – would, and that is generally for Store Managers and District Managers.

Q. Okay.

A. Where as the other class is available to all field management.

Q. Okay.

A. At our year beginning meetings and our mid year meetings which are again for store management or Store Managers and District Managers, there is generally a people rotation in each of those sessions wherein they discuss people policies or other important people topics.

Q. Okay. You referred to the year beginning and?

A. Holiday.

Q. Holiday.

A. Or I may have said mid year.

Q. Mid year. Okay. Can you explain what the year beginning meeting is?

* * *

[Page 88]

Q. Okay. Is there like a TV set?

A. Uh-huh.

Q. And is it in the training room?

A. That's what I was saying it could differ. It might be in the break room. It might be in the training room.

Q. Okay. And that TV only gets Wal-Mart TV and not other stations?

A. I don't know the answer to that.

Q. Okay. I guess it doesn't really matter. Okay. Do you know whether there are broadcasts on Wal-Mart TV that deal with people policy issues?

A. There are broadcasts that we do for Personnel Managers that could include people policies. Beyond that, I'm not involved. So I would not know.

Q. Okay. And that's what's called people matters series?

A. That's what it used to be called. Yes.

Q. Oh, I think it has a new name. What's the new name?

A. Last year it was PMTS Personnel Manager Training Series. It has a new name this year that I don't remember.

Q. People matters seemed fine.

A. Yeah.

Q. Okay. So there's now a new name. Where are those Personnel Manager programs created?

[Page 89]

A. In the training department.

Q. In the Bentonville corporate office?

A. Yes.

Q. Okay. And do you play any role in developing the content for those broadcasts?

A. On some I do, yes.

Q. Okay. Which ones particularly?

A. Last year there was a broadcast that included information on employment of minors and our attendance policy, and I facilitated those two broadcasts since they were policies. So if there's anything that relates to a policy where they're actually wanting the policy to be covered than they will generally ask me to do that. Beyond that, I might review the content but not necessarily be a facilitator.

Q. Okay. Is the broadcast actually live?

A. Some are. Some are taped.

Q. Okay. And do you have any idea whether – what determines whether something's going to be live or taped?

A. I don't know.

Q. Okay. Are the broadcasts interactive?

A. Some are. Some have the ability for the stores for the Personnel Managers to e-mail questions in.

Q. Okay. And who's the person that has responsibility overall responsibility of being most knowledgeable about the***

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Q. Do you know why Wal-Mart has the store Personnel Managers all watch a particular broadcast simultaneously?

MS. MARSHALL: Objection as to form and lack of foundation.

A. I don't know that I really understand –

Q. (BY MS. LARKIN) okay.

A. – what you're asking.

Q. The people matters is a broadcast that's intended for the Personnel Mangers in the stores. Correct?

A. Right.

Q. And when it is broadcast, it is I guess required for Personnel Managers to watch it?

A. Yes.

MS. MARSHALL: Objection as to form again to the extent it exceeds the 30(b)(6) notice.

Q. (BY MS. LARKINO Do you know why Wal-Mart wants to have all Personnel Managers watch the same broadcast at the same time?

A. I don't know the answer. No.

Q. Okay. Do you know who might know the answer to that?

A. I would think Kevin Harper.

Q. Okay. I've heard the term live video conferencing. Is that something different than the satellite broadcasts?

A. I don't know.

[Page 93]

Q. Okay. Do you know who might know about that?

A. I would probably say Tim Crane.

Q. I've also seen mention of something called Wal-Mart Radio.

A. Uh-huh.

Q. Does Wal-Mart Radio exist?

A. Yes.

Q. Okay. What is Wal-Mart Radio?

A. It is our radio network.

Q. And what is – what's the purpose of Wal-Mart Radio?

A. Well –

MS. MARSHALL: Again same objection to the extent it's outside the scope of 30(b)(6). She's not a designee if she has personal knowledge that she can share.

A. Yeah. I don't know that I could tell you exactly what the purpose is, but, you know, there's information communicated to store associates. But lots of times they'll, excuse me, cover anniversary dates or something along those lines, but it's generally just a – hang on a second.

Q. (BY MS. LARKIN) Sure.

A. It's generally just a – didn't get any better. You know, it has music on it, and sometimes there are messages. Like at holiday time there are messages sent out **[Page 94]** to associates in the store from the home office from people who may know certain associates in facilities just to say thanks for what you're doing kind of thing.

Q. Okay.

MS. MARSHALL: Excuse me, do you want to take a break?

A. Fix my voice. Yeah. Okay.

Q. (BY MS. LARKIN) Where is Wal-Mart Radio broadcast from?

A. From here in Bentonville.

Q. In Bentonville. And who has responsibility for programming if you know?

A. I think it falls under the marketing department, but I don't know anybody's name.

Q. And does it include any information about personnel policies?

A. I don't know.

Q. Okay. Your understanding is though that it is broadcast to the stores?

A. Yes.

Q. And that the broadcast that goes out from Bentonville is the same broadcast that goes to every store?

A. Yes.

Q. Okay.

A. And it's not just for associates. It's what***

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[Page 102]

last topic of the 30(b)(6) which is the monitoring of the implementation of personnel policies. What systems or methods are used at Wal-Mart to monitor that personnel policies are being properly implemented?

A. I think it would be the responsibility of all of our field management as well as the District Managers or the Regionals or Regional Personnel Managers when they go into a facility and visit with associates and do audits of the personnel area that that's how they would monitored if our policies are being implemented properly.

Q. Do you know what particular audits are done of the personnel area?

A. There is an audit called the week-52 audit, and that is done annually. And there are also STARS that are done, and I don't know if those are monthly or quarterly. It's one or the other.

Q. Why don't you describe what the week-52, I'm sorry, is that the list of audits that you can recall?

A. Uh-huh.

Q. Okay. Can you describe what the week-52 audit is?

A. Week-52 is an audit of personnel files for all associates to ensure that all personnel files are current and up to date and all of the documents that – all of the documents that should be in it are in it, for example, the most recent evaluation.

* * *

[Page 105]

review?

A. It is.

Q. Okay. You mentioned the STAR reports. That's a you said either quarterly or monthly review. That includes monitoring of people policies?

A. It would include monitoring of and I don't know all of the specifics with the STAR review, but one example of a people function that it would audit not necessarily people policy but a people function would be like CBL completion.

Q. Okay. And do you know how they mechanically monitor whether a CBL's been completed?

MS. MARSHALL: I'm going to have the same objection. To the extent you have personal knowledge, you may go ahead and answer.

A. It's systematic but that's all I know.

Q. (BY MS. LARKIN) Okay. Does the company use the grass roots surveys as a means of monitoring whether the personnel policies are being implemented?

A. I would say it could be. Yes.

Q. Okay. Can you describe what the grass roots surveys are?

A. Our grass roots surveys are administered on an annual basis, and they contain a variety of questions regarding work environment, supervision, leadership, how the associate feels about the training that they've received.***

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated Plaintiffs, -vs- WAL-MART STORES, INC., Defendant.	Case No. C-01-2252 MJJ

Wednesday, July 17, 2002

9:08 a.m.

30(b) (6) videotaped deposition of ULONDA CRAWFORD, held at the Law Offices of Cohen, Milstein, Hausfeld & Toll, 1100 New York Avenue, N.W., Washington, D.C., before Judith L. Leitz, a Registered Professional Court Reporter and Notary Public of the District of Columbia.

* * *

[Page 26]

A. Okay. I started as associate auditor –

Q. Okay.

A. – in February of '97.

Q. Uh-huh.

A. And then I was promoted to Staff Auditor I and then Staff Auditor II.

Q. What was your job description as a Staff Auditor I?

A. Same as associate auditor. Just meaning I had completed my training.

Q. Okay. And then Staff Auditor II, when did you get that – was that a promotion?

A. Yes.

Q. And when did that happen?

A. I'm not sure of the actual date.

Q. Okay. What were your job responsibilities at that point?

A. Responsible for inventories and also store compliance audits.

Q. What's entailed in store compliance audits?

A. Well we actually go into the stores and the clubs to verify their compliance to **[Page 27]** policies and procedures.

Q. What kind of policies and procedures?

A. All policies and procedures that are in effect from personnel to receiving to inventory.

Q. And that was for Wal-Mart stores and for Sam's Club?

A. Yes.

Q. Do you know what kind of personnel policies you were auditing?

A. Evaluations to ensure their timeliness, to ensure documents were – in the associate files that should be, their accuracy.

Q. How were the – which – how is it determined which file to which employees evaluations will be audited?

A. We take – we look at the associate listing and we take a sample of that listing.

Q. And then what did you do when you had your sample? You had, let's say, Joe Smith, what would you do from there?

A. We had guidelines that we had to go***

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A. They are two different departments. We don't handle benefits.

Q. Who does handle it?

A. The benefit department.

Q. Okay. Can you tell me how base pay would be determined for associates starting at a Sam's Club, and let's just use a cashier as an example so that we can have something to focus on?

A. They have – each club has a start rate, but the general manager, the director of operation has the autonomy to hire at a rate that they feel is competitive for their market.

Q. Let me ask you this: Are the jobs slotted into different categories for hourly positions?

A. Yes, they are.

Q. How does that system work?

A. We have four pay classifications.

Q. Is that through – is that true throughout all Sam's Clubs?

A. Except for three markets where we have a different test pilot going in. They have three.

* * *

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A. What do you mean "overlap"?

Q. For example, somebody in pay Classification 1 has been employed at Sam's Club for 15 years and somebody who is in pay Classification 2 has just started, could the person in pay Classification 2 be paid less than the person in pay Classification 1?

MR. GRAY: Objection, form.

A. I can't speak to that just because I don't administer pay in the field. Speaking from being in compensation that is a possibility, yes.

BY MS. GOLDSMITH:

Q. Okay. Generally, are the pay classifications or pay categories set up so that there will be a progression in start rates? If you're a pay Class 1, you'll make X amount and then in pay Class 2 you'll make more than X amount?

A. Their start rates differ, yes. They're higher as you go.

Q. And how are they set?

A. Based on the wage survey.

Q. Okay. After you take a wage survey for pay Classification 1, do you then also **[Page 73]** look at the wage survey for pay Classification 2 or do you simply step up the salary based on what pay Classification 1 reveals?

A. It could be both. We look at the start rate and see where that is and then we look at it in comparison to the positions that we pulled – that we surveyed in pay Classification 2 what the start rate is coming back and saying and look at it to see if we need to make some adjustments. Based on information we got from two, we may need to adjust one, or based on one, we may need to – we'll adjust two.

Q. And is that so that you can maintain the distinction between the two pay ranges? Yes.

Q. Okay. Who ultimately approves the pay ranges?

A. The executive committee for Sam's along with Fred Disch has input in the beginning of the process.

Q. How frequently are the pay ranges reviewed?

A. Annually.

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Q. Okay.

A. By compensation – let me clarify on that. Compensation, I review them annually, but the clubs that's an ongoing process.

Q. Is this done on a national basis so that every Sam's Club store is within a given pay range?

A. Rephrase that.

Q. When you said that the executive committee approves these pay ranges –

A. Uh-huh.

Q. – do those pay ranges then get submitted to the field for implementation?

A. Yes.

Q. And is the same pay range given to every Sam's Club to implement?

A. No.

Q. What differences can there be?

A. The start rate could be different based on their local area.

Q. So does that mean that pay ranges are identified store by store?

A. Yes.

Q. And when you send the approved pay recommendations out, the store manager then***

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increases – how does the merit increase or merit pay work under the, current system, the nonpilot system?

A. The merit increases, the general manager has the discretion to award those to associates who have shown an outstanding performance or exceptional performance and that increase can be up to 50 cents.

Q. Can the general manager do an increase of 75 cents?

A. No.

Q. Even with approval?

A. Even with approval.

Q. Okay. Does the general manager need to get approval of a 50 cent merit increase?

A. No.

Q. So the general manager has the discretion to determine that somebody's performing in an outstanding manner and give them a 50 percent increase?

A. A 50 cent increase, yes.

Q. And is there any frequency with which the merit increases can be awarded?

A. They can be given once per year and they can't be given 90 days before – I***

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increases?

A. What about them?

Q. How are performance increases administered for assistant managers?

A. They're given a pool of dollars, an increased budget and the director of – the directors of operations, the general managers distribute that pool of dollars based on evaluations.

Q. How does the evaluation process work?

A. I'm not involved in that process.

Q. After the evaluation happens, can there be a salary increase as a result of the performance evaluation?

A. Yes.

Q. What do you know about that process? A. Based on their eval score they get a percentage, performance increase percent.

Q. Are there guidelines with respect to what percentages are appropriate?

A. Yes.

Q. Are those guidelines the same for all Sam's Clubs?

A. Yes.

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Q. Who determines the percentage?

A. The VP of People, director of field personnel sets the matrix.

Q. Is there any approval – approval required?

A. For the matrix to be set?

Q. Uh-huh. Yes.

A. The executive committee for Sam's.

Q. Does that go up to the Wal-Mart executive committee?

A. No.

Q. You just talked about a matrix. Can you tell me what that matrix is?

A. I don't know the specifics of the matrix. I can't remember it. But it's what – your eval rating determines the percentage that you will get, increased percent that you will get.

Q. And what if a manager wanted to give an associate more than – an assistant manager more than the percentage set forth in the matrix?

A. Then it has to be approved as an exception.

Q. And who approves that?

[Page 123]

A. The EVP of operations, the VP of People.

Q. So a general manager cannot give an evaluation or a performance increase raise unless there's prior approval from the executive vice president of UPS and also of People?

A. Yes.

Q. Okay. Now, under the pay progression guidelines, is – what is different in the evaluations for assistant manager – or, I'm sorry, what is different in the compensation for assistant managers?

A. That's only for hourlies.

Q. Okay. You referenced GAP. Can you tell me if that's an acronym for something?

A. Geographic Assistance Program.

Q. And assistant managers are eligible to receive it?

A. Yes.

Q. Area managers do not –

A. No.

Q. – receive it?

Can you describe the program to me?

A. We have a third-party firm that***

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for performance increases.

Q. So let me make sure I understand this. A general manager is eligible for base pay, incentive pay, and GAP?

A. Yes.

Q. And a general manager has an annual performance review but because there's no performance increase attached to that performance review it does not affect their salary?

A. Yes.

Q. What's the purpose of doing a performance review for a general manager if it doesn't impact the salary?

MR. GRAY: Same objections.

A. I don't know.

BY MS. GOLDSMITH:

Q. Why are the performance reviews attached to increases for hourly employees?

A. Because they're eligible for performance increases.

Q. Okay. How about stock options, is a general manager eligible for stock options?

A. No.

Q. Have you ever recommended that a***

* * *

[Page 140]

compensation set?

A. They have a pay that they come in, flat pay.

Q. And is the flat rate the same for every Sam's Club store?

A. They do have – they come in as a manager trainee at 30,000.

Q. And that's the same at every Sam's Club store?

A. Yes.

Q. Is there any performance review or performance increase?

A. No.

Q. Is there a merit increase?

A. No.

Q. Is there an incentive?

A. Yes.

Q. What's the incentive?

A. Same as assistant manager.

Q. I want to make sure I understand this. So the general manager's compensation is essentially base pay plus whatever incentives come from the profitability of the store; is that correct?

A. And GAP.

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Q. And GAP. And based on your understanding of the compensation at Wal-Mart through compensation committee meetings, is that the same as is true for Wal-Mart managers?

A. Yes.

Q. How about with respect to assistant managers, the assistant manager at Sam's Club can have base pay and performance increases, right, and GAP?

A. And merits.

Q. And merits.

And is that the same at Wal-Mart stores?

MR. GRAY: Objection. I mean, clearly that's beyond the scope of your 30(b)(6) deposition. We're only here on behalf of Sam's Club, so she's only –

MS. GOLDSMITH: But she's testified that she sits in committee meetings with Craig Arnold, for example, who does do Wal-Marts.

MR. GRAY: Okay. She can –

BY MS. GOLDSMITH:

Q. So based on your knowledge?

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated Plaintiffs, -vs- WAL-MART STORES, INC., Defendant.	Case No. C-01-2252 MJJ

(TRANSCRIPT CONFIDENTIAL PURSUANT TO ORDER)

Tuesday, June 4, 2002

8:55 a.m.

30(b) (6) videotaped deposition of CRAIG ARNOLD, held at the Law Offices of Cohen, Milstein, Hausfeld & Toll, 1100 New York Avenue, N.W., West Tower, Suite 500, Washington, D.C., before Judith L. Leitz, a Registered Professional Court Reporter and Notary Public of the District of Columbia.

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[Page 57]

increases associated with promotions in differing amounts?

A. Based on my history here, yes.

Q. I assume you can speak more authoritatively on that as it relates to the field?

A. Yes, sir.

Q. Okay. Now, are there – is there a grid or a matrix for the compensation that sets forth the compensation presumptively for employees in the field?

A. Yes.

Q. And how is it organized?

A. It's organized by position classification.

Q. And position, I assume, you mean job title?

A. Job title, yes.

Q. And what do you mean by classification?

A. Each job title has a classification.

Q. And what are the range of classifications they have?

A. One through five.

Q. With five being the highest or the **[Page 58]** lowest?

A. The highest.

Q. All right. And jobs in different classifications get paid different amounts?

A. Yes.

Q. Do all jobs in the same classification get paid the same amount?

MS. MARSHALL: Objection as to form.

A. Please repeat the question.

BY MR. SELLERS:

Q. I asked you whether within the same classification do all the jobs in that same classification get paid the same amount in the field?

A. I don't have knowledge of that.

Q. You don't know what, in fact, the jobs are paid in the field?

A. No.

MR. SELLERS: This is Exhibit 123.

(Plaintiffs' Deposition Exhibit No. 123 was marked for identification.)

BY MR. SELLERS:

Q. Mr. Arnold, you have Exhibit 123 in front of you. Have you seen this document before today?

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[Page 66]

would get whatever the store's start rate is, correct?

A. That's correct.

Q. If I then after six months moved to be a cashier, what – how would my pay be adjusted?

A. I would need to refer to the compensation guidelines to give you the most accurate answer to that.

Q. All right. This start rate plus 25 cents would not – would not be an adequate predictor of how my pay might change if I move from assembler to cashier; is that correct?

MS. MARSHALL: Objection as to form.

A. Not always.

BY MR. SELLERS:

Q. Let me ask you a little bit about these factors that you say influence the assignment of a starting pay rate. What do you mean by experience?

A. Experience in that position that you're being hired for.

Q. I see. So if you – if I had been an assembler at some other place before, **[Page 67]** that might count as relevant experience in adjusting my initial pay rate?

A. That's correct.

Q. Would it have to have been in exactly the same area in which I was going to hold a job at Wal-Mart in order for it to be relevant experience?

A. That determination would be made by the operating unit manager.

Q. And do you mean by that the store manager or –

A. The store manager.

Q. – assistant manager or –

A. The store manager or another hiring manager within the store.

Q. That person would determine whether I had experience that was relevant to warrant an adjustment of my pay rate?

A. That's right, yes.

Q. And what about education might be relevant In adjusting my pay rate, my initial pay rate?

A. There are positions that education is relevant.

Q. So education may or may not be a **[Page 68]** factor warranting adjustment in my initial pay rate depending on whether it's relevant to the job?

A. Yes.

Q. Of the Class 1 jobs in the Division 01/Supercenter box, are there any jobs there for which education would have been a relevant factor in adjusting upward the starting rate of pay?

A. Based on personal knowledge, yes, I see some positions that education would play a role.

Q. Which positions?

A. Off duty security guard.

Q. Okay. Are there any others?

A. Floral associate. Again, these are my personal knowledge. Lower bay technician. I'm sorry, that goes down below to the next square.

Q. Let's start with – let's confine it for the moment to the Division 01/Supercenters.

A. Okay.

Q. Are there any others beside those two which you would expect ed – to which***

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VIDEO TECHNICIAN: Here begins Videotape 2 in the deposition of Craig Arnold. Going back on the record. The time on the monitor is 11:02. Please continue.

MR. SELLERS: Thank you.

BY MR. SELLERS:

Q. Mr. Arnold, you also mentioned that local market rates enter into the assignment of start rates for hourly associates, correct?

A. Yes.

Q. How does that play a role?

THE WITNESS: Do you need to repeat the question?

MR. SELLERS: No.

A. Each store performs a local wage survey.

BY MR. SELLERS:

Q. And what is – how does that establish local market rates?

A. Yeah, what they are doing is they are gathering local market rates on the survey. They're gathering the data, what the competitors pay.

Q. And how do they get that***

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[Page 109]

A. Please ask the questions again as a –

Q. Sure. Is any review conducted of the adjustments that may be made to the starting rates for hourly associates?

A. In reference to the – the wage survey or individual associates?

Q. I'm talking about individual associates.

A. We have a performance review process.

Q. I'm sorry, what I mean by review is, after store manager X, if I were to decide to hire a cashier at a level above the start rate plus 25.

A. Okay.

Q. Does anybody check to see whether that's a fair rate or is that pretty much the final – am I the final word on this?

A. Per our guidelines there are guidelines that – that talk about hiring an associate – when you hire an associate based on those three components, there are guidelines that stipulate how much they can do. Within those guidelines there's not a **[Page 110]** review.

Q. Okay. As long as they stay within the guidelines they get to decide, the store managers get to decide?

A. Yes, sir.

Q. And if the store manager wants to go outside those – that range that's permitted in the guidelines for starting rate, what does he or she have to do?

A. Gain approval from their district manager.

Q. And anybody else or is that the level at which it goes?

A. That's the level at where it goes.

Q. Okay.

(Plaintiffs' Deposition Exhibit No. 124 was marked for identification.)

BY MR. SELLERS:

Q. You have Exhibit 124 in front of you. Have you seen a document like this before?

A. No, I have not. No.

Q. Take a moment and look at the information. Is it possible that you've seen that kind of information depicted but***

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Q. Okay.

A. It is a report that generates based on exceptions to some of the guidelines, compensation guidelines, in here.

Q. And which – with respect to which guidelines, the exceptions to which guidelines, does it report on?

A. The starting rate, hiring an associate outside of guidelines on the starting – starting rate for an associate.

Q. Okay.

A. And to the best of my knowledge, performance increases out of guidelines.

Q. And this is information supplied by the store managers?

A. This is systemic – this generates systemically based on what's happening in the store to these people, district manager and regional vice president.

Q. All right. But what I'm trying to get at is, the origination of the information comes from the store –

A. Yes.

Q. – or district manager or higher?

A. The original information comes from **[Page 135]** the store –

Q. Okay.

A. – yeah.

Q. And, then, it's – it's ultimately, as they say, rolled up –

A. Uh-huh.

Q. – to a point where there's a report generated that encompasses a large body of people; is that correct?

MS. MARSHALL: Objection as to form.

A. This, again, to the best of my knowledge, this report is by – is by store, goes to the district manager responsible for that store, and then to the regional vice president that's responsible for that store.

BY MR. SELLERS:

Q. What's done with this information?

A. I can't answer that. That's the operating division that receives this information.

Q. What's the purpose of supplying them with this information?

A. To report associates hired and receiving increases out of guidelines.

Q. Does it – is it intended to lead to***

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[Page 149]

performance?

A. No, it's related to the performance appraisal –

Q. Okay.

A. – yes.

Q. And the performance appraisal is a formal written form that's completed by supervisors and employees, correct?

A. Yes.

Q. Okay.

All right. Let's go back now to Page 11 to the merit increases. They are separate and apart from the annual performance appraisal increases, correct?

A. Yes, sir.

Q. All right. How do they work?

A. If an associate – well, the way they work. When a supervisor thinks that it is justified or an associate is doing an exceptional job would recommend them to the store manager for a merit increase.

Q. And this term "exceptional performance", that's a – how is that measured? Is that the same thing as exceeds expectations on the annual performance **[Page 150]** appraisal?

MS. MARSHALL: Objection as to form.

A. I – no, it does not have anything to do with the performance appraisal. To the best of my knowledge, it's just exceptional performance.

BY MR. SELLERS:

Q. And it's left to the manager to determine what that means?

A. Yes.

Q. Now, there's something called an associate commendation form that's supposed to be completed in order to get this merit – to award this merit increase, correct?

A. Yes, sir.

Q. What's on that – what kind of information is provided on that?

A. To the best of my knowledge, it has associate information, personal info – you know, name, job position, et cetera, and then blanks to note – notate the exceptional performance.

Q. What kind of personal information is listed, name?

* * *

[Page 152]

Q. How is the determination made whether it's 4 or 5 percent increase?

A. I don't know. I don't know from a store manager standpoint. I know that the 4 or 5 written into the guidelines gives them the flexibility to use one or the other.

Q. Uh-huh. Is the adjustment to your pay to reflect a merit increase, noted as a merit increase on the – on the database that's created?

A. Yes.

Q. So it's not – it's distinguishable from a performance increase?

A. Yes, sir.

Q. Okay. And, likewise, is the – the adjustment upward after the first 90 days indicated in a way differently on the database then merit increases or performance increases?

A. Yes.

Q. Now, what's the – what's the policy on shift differential pay?

A. Okay, on Page 11.

Q. Yes.

A. The guideline is for associate to***

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[Page 174]

BY MR. SELLERS:

Q. Right. But you don't – for instance, do you look to see as a company whether there are any differences between by gender for who receives starting rate upward adjustments?

A. No.

Q. Okay. The same is true, I gather, with merit increases and performance increases, there's no similar kinds of studies done?

A. No.

Q. Okay. Okay. Are you in a position to talk about the holiday bonus?

A. No, I'm not.

Q. Okay. Are there any other forms of compensation for hourly employees that you are in a position to discuss?

A. If we could review your list.

Q. Yes. Base salaries we've already covered?

A. Yes.

Q. Merit increases?

A. Yes.

Q. Performance increases?

* * *

[Page 203]

A. Again, on an annual basis. Typically, it's effective the first part of April or late March depending on the budgetary year.

Q. Uh-huh.

A. A store – an assistant manager is evaluated by the store manager and the district manager and given a corresponding performance increase.

Q. One of three categories?

A. One of three categories. And the associated pay increase. And, then, that's implemented into the system to adjust their pay.

Q. All right. So if you don't get promoted this gives you a chance to get a pay increase corresponding to your performance – annual performance review?

A. Yes.

Q. Is there a grid here that indicates the percentages that are to apply based on different performance levels?

A. Not located in this document.

Q. All right. Well, do you know what those percentages are?

[Page 204]

A. I don't know out of the top of my – I don't know from memory because those are adjusted annually due to budget.

Q. What document would contain that information?

A. I'm trying to give you a good name that we can reference.

Something to the effect of assistant manager or field management performance increase structure.

Q. Okay. Now, these performance increases only apply to the – do not apply to co-managers or store managers, correct?

A. That's correct.

Q. Only to salaried positions below that level?

A. Yes.

Q. And how are store managers compensated or are store managers compensated based on performance?

A. Yes.

Q. How?

A. Their performance is indicated by the performance of the store.

Q. Okay. And how does that – and how **[Page 205]** does the performance the store permit them compensation?

A. The more profit, profitable the store is, the more or higher incentive they would receive.

Q. And that comes from the – this is the incentive plan that we discussed before?

A. Yes.

Q. Okay. Now, how does the stakeholder incentive plan work for assistant managers?

A. The plan works exactly the same. It works the same with the exception of –

Q. The same as what? The same as store managers?

A. No, the same as hourly associates.

Q. Oh.

A. Yes, the stakeholder plan is, in fact, just a stakeholder plan. It works the same. Although, assistant managers are eligible to receive a double share or twice the bonus if their performance is a 3.8 or higher.

Q. And if their performance is not a 3.8 or higher then they would receive the same kind of incentive compensation as an***

* * *

[Page 212]

A. No, it does not.

Q. Let me go through, as we did with the hourly employees and just make sure we know what categories of compensation salaried employees in the field are entitled to.

A. Okay.

Q. Or may be entitled to.

We've got base salary?

A. Yes.

Q. We've discussed that, right?

A. Yes.

Q. Merit increases, those would be the performance increases, I guess, just for the assistant managers?

A. Two different – two different types of increases.

Q. Okay.

A. You can have – an assistant manager can receive a merit increase.

Q. Is that what we refer to as performance increase?

A. No, it's not. Performance increase is associated with their annual –

Q. Okay.

[Page 213]

A. – evaluation.

Q. All right. Are merit increases addressed in this – discussed in Exhibit 129?

A. I don't believe so.

Q. Okay.

A. No, they're not.

Q. Okay.

A. No.

Q. How do they operate?

A. Similar to the hourly merit increase. Awarded to associates with exceptional performance. And they must have supervisor – I'm sorry, two levels of approval.

Q. And those two levels would be?

A. The store manager, obviously, has to initiate it and gain approval from the district manager –

Q. Okay.

A. – yes.

Q. And this is with respect to – these merit increases are available only to assistant managers?

A. Yes, sir.

[Page 214]

Q. Okay. And the determination of exceptional performance is done in the same fashion with the same judgment of the manager, the store manager, as we described was done for the hourly employees –

A. Yes.

Q. – correct?

A. Yes.

Q. Okay. And is there a set percentage, again, as there was for the hourly employees of what this merit increase would amount to?

A. I'm not certain to that. I do not know.

Q. Okay. All right. So we have base salaries, merit increases, performance increases. Obviously, we've got promotional increases?

A. Yes.

Q. We have the incentive plan?

A. Yes.

Q. Are there other forms of compensation to which salaried employees at the stores would be eligible?

A. The GAP.

* * *

[Page 229]

Q. I see. Okay.

A. Yes.

Q. Now, there's reference here to something called a wage disparity report?

A. Yes.

Q. Are you familiar with that?

A. Yes, I am.

Q. What is that?

A. That's synonymous with SMARR, S-M-A-R-R, and that's an acronym for store manager associate review report.

Q. Okay. And what is it?

A. What is it. It's a report that the store can generate that lists all associates and their wages and it's for the store to review any inequities in pay by position.

Q. How – how are inequities detected in -pay by position?

A. The report does notate people that are paid 5 percent below the average rate of pay. I'm sorry, 10 percent below the average rate of pay or 5 percent higher than the average rate of pay.

Q. For – the average for all people holding that particular job?

[Page 230]

A. That position, yes.

Q. And, again, I gather that that – these reports don't attempt to analyze or look for patterns based on gender in compensation; is that right?

A. No, they don't. It's by job.

Q. You said the stores may prepare these reports. Are they expected to or is it in their discretion?

A. It's recommended that they do prepare them.

Q. Do most stores do that?

A. Yes.

Q. Okay. And to whom are the reports submitted?

A. The report is submitted – or the report is generated by the system for the store manager and district manager to review.

Q. Does it end up, either the report or a summary of the report, get submitted to your office?

A. No, it does not.

Q. Does it go to anybody else outside above the store manager level?

* * *

U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES and PATRICIA SURGESON, et al., Plaintiff,	* * * * *	Case No. C-01-2252 MJJ
VS.	*	
WAL-MART STORES, INC., Defendant.	* * * *	

****

VIDEOTAPED ORAL DEPOSITION OF JEFFREY B. REEVES
January 14, 2003

****

VIDEOTAPED ORAL DEPOSITION OF JEFFREY B. REEVES, produced as a witness at the instance of the Plaintiffs, and duly sworn, was taken in the above-styled and numbered cause on the 14th day of January, 2003, from 9:15 a.m. to 6:06 p.m., before Mark S. Brandt, CSR in and for the State of Texas, reported by machine shorthand, at the offices of Brown McCarroll, L.L.P., 2001 Ross Avenue, Suite 2000, Dallas, Texas 75201, pursuant to the Federal Rules of Civil Procedure.

* * *

[Page 41]

through 597 inclusive, entitled Sam's Club performance evaluation fiscal year ending 2002.

A. Yes, ma'am.

Q. Have you seen this before?

A. Yes, ma'am.

Q. Did you have any role in creating this document?

A. Not creating. Reviewing and approving.

Q. And were there changes from the fiscal year 2001 performance evaluation for GM's and co-managers?

A. Yes, ma'am.

Q. Do you recall what those changes were?

A. Yeah, just the weighting changed. It used to be 50 percent on people and 50 percent numbers, and we broke up the demographics of how the 100 percent weighting took place.

Q. On the first page under Section A, three basic beliefs, it indicates this is to have a weighting of 15 percent.

A. Yes, ma'am.

Q. And then No.4 under there is diversity.

A. Yes, ma'am.

Q. How did diversity figure into the performance evaluation for GM's and co-managers at this form?

A. Well, based on the definition there, I was very **[Page 42]** subjective, and you would get a rating of one to five there.

Q. Who would perform the rating on GM's and co-managers on the basis of diversity as it's defined on this document?

A. The directors of operations, with probably input from the RPM and the regional vice president.

Q. And what was the source of information on which a diversity rating would be determined?

A. Pretty much basically looking at the definition there, and they would look and see what improvements they made, look at raw numbers and look at what improvements they made over the fiscal year. Most people had a 10 percent goal of aggregate improvement. I always stressed 20 percent. I was a lot more aggressive than most people, and I always met my goal.

Q. Did the GM's generally meet a goal of 20 percent?

A. Heavens no.

Q. Pardon me?

A. Heavens no.

Q. Where did this definition of diversity come from?

A. Corporate definition.

Q. Do you think that it was a helpful definition***

* * *

[Page 44]

this first page under three, basic beliefs, together had a weight of 15 percent on the entire evaluation?

A. Together, yes, ma'am. 5 percent each one of the three corporate beliefs for the company.

Q. So diversity was one of four elements that added up to a 5 percent weight?

A. Yes, for general managers and co-managers.

Q. Was there any change in the performance evaluation for general managers and co-managers for fiscal year ending 2003?

A. No. I think we just made a few – yeah, the only tweak that was made was the organization went away from the five point rating to a below, meets, and exceeds.

Q. If you would turn to page 2 of this Exhibit No.4, please.

A. Okay.

Q. This heading is leadership, and this again has a weighting of 15 percent, correct?

A. Yes, ma'am.

Q. And that's everything on this page would add up to the 15 percent weight?

A. Yes, ma'am.

Q. And then one of the subcategories is people results. Do you see that part?

* * *

[Page 100]

looking at various ways to – to measure folks and hold people accountable and was part of the initiatives.

Q. And then there is three subbullets with the last one saying identify top 25. What did that refer to?

A. This was part of the plan I was getting ready to put in place. This was identified that this was corporate – strictly corporate club support top 25 bench strength individuals that we were going to put through a training process for future development.

Q. The next heading is retention, and the last bullet point there is build field bench by hiring one female GM co-manager per region. Did you get any feedback from the executive committee on this bullet point in particular?

A. Uh-huh. It was mixed.

Q. And who gave you what feedback on that one?

A. I can't remember in particular who gave me the feedback on which piece. I just know that there was – we were back to the quota issue on the piece I talked about earlier around, you know, are you telling me I have to hire a female, open a spot up, that kind of stuff.

Q. And why were you proposing hiring one female GM co-manager per region?

A. I don't remember my thought process, but I think what I was trying to do was to – that would have **[Page 101]** given us 70 females versus the – at the time the 30 or 32 that you had. So 70 is better than 32.

Q. And in response to the feedback expressing concern that this was a quota issue, what was your response?

A. I think I've testified to it earlier. It was back to the education piece.

Q. The next page, 11 of 14, has a heading communication.

A. Uh-huh.

Q. And the first bullet point is broader definitions of clear sponsorship from officer level differences, it's more than women and minorities. What did you mean by that bullet point?

A. Let me think about this for a second.

Q. Uh-huh.

A. When I was talking about the commitment to diversity, diversity – so many people are hung up on diversity as being race and gender. It could be style. It could be approach, thought process. It could be a handicap. It's so broad, and I was trying to get people to understand as part of the education that it's not always about men and women or black and white. It's about – you know, you may not like the fact that I'm direct. I'm very direct. Okay. That's not always***

* * *

[Page 118]

board members concerning female diversity?

A. What do you mean by directives?

Q. Were you told to go out and do something in particular?

A. No, ma'am.

Q. Did you present to the committee members of the board of directors the goals for females in management?

A. No, ma'am.

Q. Were you aware of any shareholder initiatives addressing glass-ceiling issues at Wal-Mart Stores?

A. The nuns got up every year and tried to do that, but they were always – they would get their time, and then they sat down.

Q. Were you ever asked to help in preparing a response to those shareholder initiatives?

A. No, ma'am.

MR. LAWRENCE: Do you want to break for lunch? It's about 12:30.

MR. DINARDO: Whatever the group feels like.

THE WITNESS: I'm okay. That's fine. 30 minutes?

THE VIDEOGRAPHER: Going off the record. The time on the monitor is 12:29 p.m.

(Lunch break taken)

* * *

[Page 144]

A. Let me see. I missed one. I skipped that next one. So it would have been 2002, I think. 2003. 2003, I believe, of January.

Q. That's where we are now.

A. That's right now. '2. '2 .

Q. Okay. And did any women go on that trip?

A. Yeah, Rhonda. It would have been – it had to be 2001, because Rhonda was gone by then. I let her go in October of 2001, I believe. Rhonda, Lisa, Barbara, Celia, Ruth. I think Ruth went. She may have been on maternity during that time, but Ruth McCarthy was an officer. I think that's it. That's all I remember.

Q. What was the purpose of the hunting trip?

A. Bonding. The first one was bonding. Tom was always about business, though. Tom didn't – Tom didn't like play. So Tom – we hunt in the morning, then meet in the afternoon, and then go back hunting again. Nobody liked going with Tom because Tom liked work too much. It's just like – it's just like golfing. A golf outing with the group – hunting was the same thing. You hunt in the morning, come back in and eat, and go back out hunting all afternoon.

Q. Was there any suggestion that rather than having a hunting trip, that the trip be focused on golf or some other activity?

[Page 145]

A. Oh, yeah. That was brought up the first year I went.

Q. And what was the response to that kind of suggestion?

A. Bahumbug. Told Tom to get over it. He was told to –

Q. Tom was proposing that it be something other than hunting?

A. No. Several of us said something about golf because not everybody liked to hunt. I mean, I would go and have fun, but you know, I'm not a hunter, but I do it because the rest of everybody else was doing it. Tom said – and Tom said, I would rather do golf than hunt; and basically it was said that, Hey, this is tradition.

Q. That's something that Sam Walton had started; is that right?

A. I don't know. Mr. Walton was a hunter.

Q. Who was it that was saying it was tradition, bahumbug?

A. I'm not sure where the response came from.

Q. Did you know Dale Green?

A. Yes, ma'am.

Q. Was he terminated?

A. Yes, ma'am.

Q. And what position did he have at the time he***

* * *

[Page 147]

Q. Was he terminated more than once?

A. No.

Q. Okay. When Mr. Green was being terminated, he gave you a call for an open door?

A. He called somewhere during the process. He talked to several people, I think. I don't know.

Q. And what was your involvement in the open door with Mr. Green's termination?

A. Just listen.

Q. Did you take any action?

A. No. I supported the action, supported the decision.

Q. How was it determined that his performance was not adequate?

A. His regional vice president and his director of operations.

Q. And do you know what the specific details were as to what his performance issues were?

A. I don't remember. Yeah, I don't remember.

Q. But it was only on performance?

A. I didn't say that. I said that's all I remember.

Q. How did policies – corporate policies for Sam's get created?

A. Most of our policies were the same as **[Page 148]** Wal-Mart's. Wal-Mart has a policy committee, and the policies are set through that committee. Decisions are made to change, upgrade, or whatever, delete, based on that policy committee. And then once it's approved, which I was part of that committee, that information would come to Sam's and put into the system. 99 percent of the policies were the same.

Q. What policies were different?

A. The only one I know of was attendance.

Q. And what was the difference on the attendance policies?

A. Ours were more stringent, and ours were formalized. Wal-Mart's was not.

Q. What was the actual policy then at Sam's about hours and attendance?

A. Excuse me?

Q. What were the details on the attendance at Sam's?

A. The biggest issue was tracking. Wal-Mart didn't have a mechanism to track, and we put – ours was – we had a tracking system, because I didn't like paper. So we got away from the manual process and automated it. Days of – the second difference was I think you had three – three exceptions with a doctor's note, and Wal-Mart policy you did not.

* * *

[Page 281]

A. I assume there were. They weren't as aggressive, but I assume there were.

Q. Why weren't they being met?

A. Well, let me – let me take that back. Excuse me. They were not set for the field. They were hypothetically set from a reporting perspective, but they were not being measured based on that.

Q. And so did you make some changes?

A. Well, that's the goals we've gone through and we put in place –

Q. Okay.

A. – to be very clear around what was expected.

Q. Have you had any discussions with anyone at any time concerning Stephanie Ogle – Odle?

A. Stephanie Odle. I don't even know who that is.

Q. Have you had any discussions with anyone at any time concerning Nancy Hamm?

A. I don't know Nancy Hamm.

Q. What do you think Sam's could do to increase female management – female representation in field management?

A. You're asking my opinion?

Q. Yes.

A. One is the area we talked about earlier. I think what you do is to get people's attention you tie **[Page 282]** expectations and – and the number to people's incentive, whether it's their base or it's their bonus, but I think that's the first and foremost and most important piece. Until you do that, it will continue to be lip service.

MR. DINARDO: Betty, I think we've arrived at slightly over seven hours.

MS. LAWRENCE: Okay. Thank you very much.

THE WITNESS: Thank you.

THE VIDEOGRAPHER: Here marks the end of videotape number four in the deposition of Jeff Reeves. The original videotape will be retained by Videolink on behalf of Davis, Cowell & Bowe. Going off the record. The time on the monitor is 6:06 p.m.

(Deposition concluded 6:06 p.m.)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, et al., Plaintiffs, -vs- WAL-MART STORES, INC., Defendant.	Cause No. C-01-2252 MJJ

(CONFIDENTIAL ATTORNEYS' EYES ONLY PURSUANT TO STIPULATION)

RHONDA HARPER

TAKEN ON BEHALF OF THE PLAINTIFFS

MARCH 17th, 2003

* * *

[Page 103]

A. I probably went – actually in terms of stores – you know, occasions and stores are two different things. My guess would be that I went to more than 50 stores.

Q. Those weren't just more than 50 separate trips?

A. Correct, because we would go into a market and then go into five or six Sam's Club in a given day or Wal-Marts. And I went on any number of different trips and did the circuit in many different cities and towns. If all blurs after a while.

Q. Have you ever heard – we've obviously talked to a lot of people about this – about this case at Sam's Club.

Have you ever heard female associates in Sam's Club referred to by managers in Sam's Clubs as "girls"?

A. Yes.

Q. Was that a fairly common practice?

A. Yes.

Q. Have you ever heard female associates at Sam's Club referred to as "Jamie Qs" or "Little Jamie Qs"?

A. Janie Qs, yes.

Q. I'm sorry, how? Janie?

[Page 104]

A. Janie Q, yeah.

That was a pet name for consumers as well as associates.

Q. Who are women?

A. Yes.

Q. Do you recall any officers of the company using the term "Janie Q" to refer to female associates at Sam's Club?

A. I remember one officer using the term "Janie Q". I can't recall if he was referring to an associate or a consumer at that point in time.

Q. Who was that, that you remember that officer?

A. Kenny – I'm sorry, I haven't –

Q. Do you recall Kenny's position?

A. Regional vice president of operations.

Q. If you remember the last name feel free to –

A. I will. I'll scream it out probably in the break.

Q. No problem.

Now, let me ask you about another subject. There was some testimony –

A. Excuse me. Kenny Folk.

Q. Kenny Folk.

[Page 105]

A. I believe. I could be wrong there. I apologize.

Q. In addition to Mr. Folk, did you hear that term "Janie Q" used to refer to Sam's Club female associates by store manager at Sam's Club?

A. No.

Q. But by other management personnel you did?

A. Yes, but vaguely. I wouldn't be able – I mean –

Q. You wouldn't be able to pick any names?

A. No.

Q. Okay.

There was some testimony – okay, rather than waste time, I'm going to tell you there was some testimony by somebody, whose name I can't find, but I'll – wait – by Mr. Grimm, about an occasion where Mr. Hayworth sat in a chair with stiletto heels and womens' legs for the legs. Were you present for that incident?

A. Yes.

Q. Could you describe that incident for me?

A. My recollection is that it was a holiday party for Wal-Mart associates. It was – it took place in the Wal-Mart auditorium. There was a stage set, any number of different events occurred on that***

* * *

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES and PATRICIA SURGESON, on behalf of themselves and all others similarly situated, Plaintiffs, v. WAL-MART STORES, INC., Defendant.	Case No. C-01-2252 MJJ

Deposition of MR. KENDALL SCHWINDT, produced, sworn, and examined on Wednesday, September 11, 2002, at 9:00 a.m., pursuant to notice to take deposition at the Holiday Inn Express, 2205 S.E. Walton Boulevard, in the City of Bentonville, County of Benton, and State of Arkansas, before me, Karen S. Rogers, Registered Professional Reporter, Certified***

* * *

[Page 57]

lot of the softer skills, the people side of the business, how you treat people.

Spent a lot of time in those classes on the three basic beliefs of Wal-Mart, the respect for the individual. The things that Mr. Walton stood for. And then just the company's philosophy on management.

Q. Did you know Mr. Walton yourself?

A. I did.

Q. Did you ever go to his house?

A. I think I was there several times. When he would invite our hourly associates over for the stockholder's meeting, he also would invite us. But other than that, no.

Q. Did you ever go hunting with him?

A. Yes, I did.

Q. How frequently did you do that?

A. Whenever I was invited.

Q. How often was that?

A. Oh, every year just about. If we all did a good job, we got to go hunting out at the camp in Texas.

Q. And who's the we you're referring to?

A. It varied from time to time, but it was the regionals. It was the merchandisers. Females, males. Anybody that had an inclination to go. Nobody **[Page 58]** was forced to go. If you didn't want to go, you didn't like to hunt, you didn't have to go.

Q. Was it primarily senior management that was invited for hunting?

A. Yeah, primarily. That was his reward for those of us that traveled. In the beginning that was what it was intended for, the operations group that traveled every week and was away from their families. That was how he kind of thanked them for the job.

But he takes – we've taken department managers down there every year. We take our department managers every year down there to do a little hunting if they would like to go. And so it's been spread around. But initially it was for the senior officers.

Q. During the period when Mr. Walton was with the company still, approximately how many people would go down?

A. Gosh, I don't know. It would be from the teens up to maybe – I used to coordinate that, so it would be like from the mid teens in the beginning up to maybe 37 to 40 some people.

Q. Did you say you used to coordinate that?

A. Some of it, mm-hmm.

Q. It was one of your responsibilities coordinating who would go on the hunting trip?

[Page 59]

A. Well, I would just pull it all together.

Q. Did you decide who would go on the trip?

A. Absolutely not.

Q. Who made those decisions?

A. Don Sodaquist or whoever the division heads were asked if they had people that were eligible to go. And he – they would run them by him and then he would yea or nay it. We would go from there.

Q. Okay. What proportion of the people that went during the years that you were coordinating it were female?

A. Gosh, I don't know. It got larger as years went on because the number of female officers in the company has increased as years went on. So a lot of them don't like to hunt. There's several that were invited that did not want to go. My last hunt there was probably – I don't know how many was there. But it's increased dramatically over the years.

Q. When was your last hunt?

A. I was in and out this last February. I had back surgery and I had to be down in Dallas for the follow-up visit, so I missed part of the hunt.

Q. But you were at part of it?

A. Yes.

Q. In February of 2002?

[Page 60]

A. Mm-hmm.

Q. And how many people approximately were there then?

A. I'm guessing in the high 30s to 40s. I'm guessing. I'm not sure.

Q. And how many of them were female approximately, what proportion?

A. I don't know.

Q. Were more than five of them female?

A. I would say it was somewhere – three or four.

Q. Three or four?

A. Maybe five.

Q. Do you know who keeps records about who goes on these hunts?

A. (Shakes head). That's not something we retain records of, for Christ's sake. It's just a hunt.

Q. Okay. When was the last year you were responsible for coordinating them?

A. I passed it off last year.

Q. So you were doing it up to 2001?

A. Yes.

Q. The year 2001 you attended the whole hunt?

[Page 61]

A. This past year?

Q. No, the one before this year. You just referred to 2002.

A. I don't believe I made that one either.

Q. Okay. Were you at the year 2000?

A. I missed that – I missed that one. My mother died in 2000, and I think I was having back problems the last two years. I went to part of the last two hunts, but I was not able to stay but one day, I think.

MR. SELIGMAN: Let's go off the record for a second.

MR. HARRISON: Going off the record. The time on the monitor is 9:58.

MR. SELIGMAN: Why don't we take a short break. Why don't we take a five-minute break here. (Recess taken).

MR. HARRISON: Back on the record. The time on the monitor is 10:07.

MR. SELIGMAN:

Q. We were talking before the break about various things that you've done, and I asked you briefly about the Walton Institute. I'm looking at your HPRO, Exhibit 3. It also refers to something called Diversity Phase 1 with a date of 1993. Do you***

* * *

[Page 134]

college and hourly, I guess, you're meaning how many of the management training should be the college students and how many should be other? Is that what you meant?

A. How many should be hourly promotes and how many should be college, yes.

Q. All right. And who made that balance? Where did that come from? Is that a corporate policy?

A. We had corporate guidelines that we tried to attain.

Q. Did you ever discuss with your managers what kind of employees should be entered into the management training program? And I'm not talking about First In Line, just regular management training?

A. Not specifically, no.

Q. Did you monitor how people were selected or who was selected to go into management training?

A. The how and the specifics of who, no. The total numbers, yes.

Q. Do you know who made the decisions by – not by name, but by level of the company of who goes into management training?

A. Well, the RPMs are instrumental in that. They will go to the college campuses and interview.

They would get recommendations for – from the hourly promotion of store level, and sometimes they would***

* * *

[Page 138]

A. They were the Division 1 people, managers at the time.

Q. Okay. And this memo went to divisionals such as yourself?

A. Mm-hmm.

Q. And Don Harris at that point was EVP of ops?

A. I believe so.

Q. And Tom Coughlin was his superior?

A. That's correct.

Q. And it goes to RVP and RPM, which I assume means regional vice presidents and regional personnel managers?

A. I think you're correct.

Q. The second sentence of the promotional guidelines say, "The criteria has been set to help clearly state the expectations that must be fulfilled in order to be promoted." Was that your understanding of this memorandum?

A. These are the minimums, yes.

Q. So that's what – these were the minimum criteria?

A. Right.

Q. And were you bound by these minimum criteria in your division?

[Page 139]

A. No, I wasn't. I took them as a guide and I would try to raise the bar to raise the quality of people, and I added some things. I think you've probably got mine there somewhere, and you can see the differences for yourself.

Q. But in terms of the minimums, were you bound not to go below these?

A. I would never do that.

Q. You would never go below them?

A. Why would I?

Q. My question is, did you consider those minimums binding on you; you could not go below those?

A. Yes, I would have not went below it.

Q. Do you know how these particular guidelines were developed?

A. Gosh. I don't.

Q. Were you involved in the development of these particular guidelines?

A. Could have been at one particular point in time. I don't recall.

Q. Do you know if there were guidelines like this earlier than October of '99?

A. I'm sure there was. I can - when I first became a regional, we had similar guidelines. What they were, I don't know. But I know I had my own***

* * *

[Page 148]

am in an area where I am developing a lot of new stores and have a need for people to fuel the growth, I will have less of those people in my other stores because I can't develop my new stores. I've got no place to train the folks.

If I'm in an established area, like we are right up here in northwest Arkansas, there's probably several resident assistants in this area. So it varies. It's not going to be the same.

Q. As a company program though, was it more used in the past than presently or vice versa?

A. I think it varied.

Q. Do you recall Sam Walton ever talking about a resident assistant program?

A. Why, sure.

Q. It was his idea, wasn't it?

A. I'm not sure whose idea it was, but I know Sam felt very strongly that we had good hourly associates out there that we needed to utilize. And as long as we could grow our business, we needed to accommodate as many of those folks as we could, that our growth would allow us to accommodate.

Q. Do you recall why he wanted to accommodate such people?

A. I can't – I can't speak for his reasons. **[Page 149]** I wouldn't even attempt to do that.

Q. Was the resident assistant manager program cut back in the '90s at some point?

A. In the areas where we were having trouble growing the business, yes, and it may have been some of those areas where we were growing. I can only speak to my area.

It got to be a problem if I had too many resident assistants in a particular district that was responsible for growing a new area. And nobody wanted to go to that new area to operate the stores. What do we do? Carry extra?

Q. So was there a particular time that that got to be a problem in your division?

A. I couldn't tell you the dates, but we have different bursts of growth in different geographical areas. You look at that map you got when it started out that you showed me earlier, the line would have stopped in Nebraska. And so maybe in Colorado it was an issue for a while.

Once we got through that growth, we ended up with a lot of assistant managers coming back into those areas and being resident assistants.

I'm not sure what you're asking. It varied depending on the needs of the growth of that business.

* * *

[Page 195]

people, that's certainly a consideration.

Q. Let me ask you to look at the very last page of this document, trainee/intern placement.

A. Okay.

Q. Do you know what the management candidate recommendation is referred to in the first bullet?

A. Let me see. I can't recall, no.

Q. Okay. The second to last bullet says, "Trainee should not be promoted to an assistant in the same store in which they trained." That was a policy in your division?

A. Yes.

Q. Were there any other criteria for being placed in the trainee position in your division other than what's listed here that you recall?

A. Not that I can recall.

Q. There was never anything put out about like a minimum performance evaluation score or what factors you look at or anything like that to get into the training position?

A. I left that up to the judgment of the people that were working with those folks every day. The store managers that knew those folks very closely, the district managers that were working for them and reviewing their training process during the training **[Page 196]** program and during their program as their time as a department manager or whatever they did prior to getting on the program. And those people were making those decisions.

Q. Now were those people also bound by the minimum company promotion standards?

A. Yeah, I believe so, yes.

Q. Okay. Let me ask you to look back at Exhibit 22 for a second.

A. Okay.

Q. You'll see on Exhibit 22 they do have criteria for associate to assistant manager trainees. It's on the first page of the document. It says, "Associate to assistant manager trainee" with various criteria. Do you see that?

A. Mm-hmm.

Q. That would apply to your division?

A. That would have been the minimum, yes.

Q. Okay. So that was a requirement throughout the company as well as your division to have these factors?

A. It was a requirement in Division 1 –

Q. Right.

A. – of Wal-Mart Stores.

MR. SELIGMAN: Let me ask you to look at a***

* * *

[Page 211]

diversity in the stores in your region – excuse me, in your division, is that true?

A. I was aware of a more collective number that related to my division and possibly the regions.

Q. Okay. You were aware from your store visits that women held the majority of hourly positions in the stores and that men held the majority of management positions in the stores?

A. Not necessarily from the store visits. I was aware from looking at my mix that, yes, that most of the hourly associates in the store or a good number of them are female, yes.

Q. And that's been true as long as you've been a divisional vice president?

A. And when I was a store manager, yes.

Q. Okay. Particularly in the last ten years, have you ever inquired or explored why women are the majority of hourly but the minority of management?

A. We – yes, we've worked on that pretty hard to try to improve our diversity numbers in that regard.

Q. I'm actually asking a different question. And I'll ask you the second part that you're answering. But my question is, did you ever – were you aware of **[Page 212]** anyone trying to discover why there was this disparity?

A. We were – as we were trying to improve the process, the numbers, we always were seeking out reasons.

Q. Okay. In your seeking out those reasons, did you ever have any reason to believe women were less qualified for management jobs than men?

A. Absolutely not.

Q. Did you have any reason to believe that women were less interested in management jobs than men?

A. Sometimes that's – that's the case. And that's sometimes part of the issue. You get people make decisions about wanting to take that next step. I think that's part of it.

Q. And what –

A. People make that decision on their own. And some men feel they don't want to take that next step and some women feel that they don't want to take that next step, and both for different reasons that are quite logical and make sense in their own environment.

Q. Do you have any reason to believe that women are less interested in taking that next step than men in general?

A. I can't quote you any reasons. But I don't know that they are or aren't.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, KAREN WILLIAMSON, on behalf of themselves and all others similarly situated, Plaintiffs, vs. WAL-MART STORES, INC., Defendants.	Case No. C-01-2252 MJJ

VIDEOTAPED DEPOSITION OF ROSE M. REZA
January 3, 2003
9:51 a.m.
Bean & Associates, Inc.
500 Marquette, Northwest, Suite 280
Albuquerque, New Mexico 87102

PURSUANT TO THE FEDERAL RULES OF CIVIL PROCEDURE, this deposition was:

TAKEN BY: MS. JOCELYN D. LARKIN

Attorney for the Plaintiffs

REPORTED BY: Jan A. Williams, RPR, CCR 14

* * *

[Page 98]

A. I mean, if you had a corporate social event, I was always invited. I really didn't want to hang out with anyone from work because I was with them almost always, you know, so I wanted to be alone on the weekends. But no, I had friends.

Q. Were you aware that male regional vice presidents were engaged in social events that you were not included in?

A. The ones that they were – if they had events like bird hunting and stuff, I was there. But I mean, if you're talking – I don't understand what you're saying. I mean, if they had a personal party and they had friends over, you know, sometimes I would go, if I was invited, and sometimes I wouldn't. I mean it didn't matter to me. I don't know what you're trying to ask.

Q. Did you attend the annual quail hunt?

A. Oh, I always did.

Q. What is it?

A. I shot a bunch of branches. I've never shot a rifle in my life. We just get together, we go – we spend time together, we eat, we watch movies. It's a bonding time. And we shoot quail which I don't really like to kill animals, but I went. But everyone made me walk in front of them.

[Page 99]

Q. Why did you have to walk in front of them?

A. Because I'm not good with a rifle.

Q. Why do they kill animals as part of that corporate event?

A. Well, Sam Walton has a quail ranch. He had I think it's a quail ranch, a hunting ranch. And the Waltons, Jim Walton and them, would always come spend time with us, the family. Mostly Jim and John sometimes, but mostly Jim. And – because, you know, they like to hunt. And it was a tradition really.

Q. Were there any women executives who didn't like to hunt?

A. We all got into it pretty much. They all went. We all went. We had fun.

Q. My question is were there any women who ever expressed to you that they didn't like hunting?

A. No, no. We all had a good time. We all – we all talked about maybe let's do something different. And Tom is open, he was open to that, you know. But some of the guys were too scared to ski, you know, or stuff like that.

Q. You talked to Tom Coughlin about doing something different?

A. We had mentioned it, you know, maybe year after year maybe look at doing something different. **[Page 100]** But I only went a couple years.

Q. Who was the we who mentioned it to Tom Coughlin doing something different?

A. Oh, I don't remember. You know, I know that – I don't remember. I mean maybe me and – I don't know. I hate to say a name because I don't remember who it was.

Q. You feel it was yourself and at least some other person?

A. Yeah. But it wasn't a big deal. We were just thinking of another – whitewater rafting, you know, other outdoor activities that may be fun and at the same time build teamwork.

Q. Would it have been appropriate for the senior executives to all get together and go to a spa and have facials and massages, would that have fit into the Wal-Mart corporate culture?

A. The guys probably would have liked it. But it was nothing that we ever really – we didn't talk about it. But it's not like – I mean it's just kind of funny. But Tom was willing to do something different.

But it was a tradition that they had done since Sam Walton was alive. It was just something that they all always did. And so, you know, it's **[Page 101]** like in New Mexico we eat posole for Christmas, we always eat posole. And so it's just a tradition.

Q. And do you know if they're still doing it now?

A. I don't know. I haven't asked. I really don't talk to many people anymore over there.

Q. Who are you in touch with regularly at Wal-Mart, anybody?

A. I have good friends. But I really – I really have lost contact with a lot of them.

Q. And who do you have regular contact with?

A. I talk to – well, she left, Zoe Aponte, she was a friend of mine. But she left Wal-Mart to work for IKIA. Vera Morales is a very good friend of mine. I really don't talk – you know, Marie Hughes is a dear friend of mine, but we haven't spoken in awhile. I mean I have – that was my family for 15 years so I could list a lot of names. But I don't talk to anybody regularly anymore.

Q. Okay. Were you aware of any effort by Wal-Mart to analyze pay differences between men and women in the same jobs?

A. No.

Q. And did you ever receive a complaint from any woman that a man was being paid more for doing***

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES and PATRICIA SURGESON, on behalf of themselves and all others similarly situated, Plaintiffs, -vs- WAL-MART STORES, INC., Defendant.	No. C-01-2252MJJ

DEPOSITION OF SHARON M. BILGISCHER
OCTOBER 15, 2002
9:00 A.M.

The videotaped deposition of SHARON M. BILGISCHER, taken pursuant to the Rules of Civil Procedure for the United States District Courts pertaining to the taking of depositions, taken before Jerry Satterlee, a Certified Shorthand Reporter within and for the State of Illinois, at Eleven South LaSalle Street, Suite 1150, Chicago, Illinois, on October 15, 2002, at the hour of 9:00 a.m.

* * *

[Page 42]

were associated with it?

A. One that comes to mind would be MaryAnn McDonough who is a regional vice president and then Dana Keane over at Sam's who at the time was also a regional vice president.

Q. Did any male employees attend any of your meetings?

A. They might come in to share information, but they were not regular participants.

Q. Was the Women in Leadership Group open to having males regularly participate?

A. If they desired.

Q. Who assumed the role that you had with respect to the Women in Leadership when you left it?

A. Francesca Spinelli.

Q. Have you attended any of the Women in Leadership programs since you turned over the role to Miss Spinelli?

A. No.

Q. Has the Women in Leadership Group continued in operation since you left your role with it?

A. I am not sure that it continued, no. **[Page 43]** I am not sure.

Q. Even though you left your association with the Women in Leadership Group, would you have had occasion to see announcements of its events?

A. I would assume – and I don't know this – that the Womenfuture Main Event may be something that that group would have implemented.

I don't know.

Q. I am sorry. I didn't understand your testimony.

Are you saying that the Womenfuture group has replaced in Women in Leadership or –

A. No.

Q. – or it is one of the programs that Women in Leadership may have sponsored?

A. Exactly.

Q. And when was the Womenfuture program offered?

A. In April of this year.

Q. Between the time that you left the Women in Leadership Group in 1996 and April of this year, are you aware of any activities in which the Women in Leadership Group was engaged?

A. No.

MR. SELLERS: Let's have this marked as***

* * *

[Page 184]

Q. I thought you just told me maybe that you didn't expect it to be the responsibility of the manager?

A. I don't know that it is or isn't because I don't know what the expectation is in the field.

Q. Well, at whatever level the goals are used to serve as a benchmark against which performance in attaining those goals is measured, are there consequences if managers fail to attain the goals?

A. Again, I don't know what level it goes to, so I wouldn't know if there are consequences or not.

Q. Do you believe it is important that there be consequences associated with failing to attain diversity goals at whatever level that responsibility may be assigned?

MS. DIAS: Objection to the form of the question.

BY THE WITNESS:

A. I can speak for myself. If I have a goal, then I want to achieve it.

BY MR. SELLERS:

Q. My question was would you have **[Page 185]** expected that – did you think that it was important that if managers failed to attain diversity goals that there would be consequences associated with that failure?

MS. DIAS: Same objection.

BY MR. SELLERS:

Q. I am asking for your view.

A. Obviously, if there are consequences attached to it, it is more likely to be accomplished, but I don't know that they are or not.

Q. I understand. You don't have knowledge about how it is done in the field. I am asking about your view as to how you think that would best operate, not what actually happens.

A. How I believe it would best operate?

Q. Yes.

A. That there is some form of accountability, yes.

Q. Now did you – was there a point at which you were involved in some way in succession planning?

A. In Organizational Development, I would have simply formatted information that was corning from the various divisions.

* * *

[Page 198]

A. Yes, she is.

Q. Do you know what her position is?

A. No.

Q. Were you involved in reviewing the results of the survey?

A. I believe so, yes.

Q. And what was your role?

A. I believe Carla and I looked at those possibly with Andy Wilson or Maxie Carpenter to determine if it was something that we wanted to pursue.

Q. I am sorry. When you say something you wanted to pursue, this was after the survey had already been administered; is that right?

A. Yes.

Q. What was it you were trying to decide what to pursue?

A. If we felt there was anything that Chuck Shelton could do for Wal-Mart in regard to diversity as a consultant.

Q. I am sorry. Did you finish your answer? Did you finish your answer?

A. Yes, sir.

Q. What did you conclude?

A. The best of my recollection – and **[Page 199]** that has been awhile – many of the things that he suggested were things that were already underway and it didn't appear that he had anything new or different to offer.

Q. And as a result, you recommended that this – that Wal-Mart not continue working with him to follow up on that survey?

A. I don't know that I recommended it. It was – The best of my recollection, it was Carla and whomever she was working with's decision.

Q. What was the decision?

A. We did not continue working with him.

MR. SELLERS: This is Exhibit 25.

(The document was thereupon marked for identification as S. Bilgischer Deposition Exhibit No. 25, as of 10/9/02.)

BY MR. SELLERS:

Q. This is a memo from Mr. Shelton to a group of people including you entitled, "Recommendations for Wal-Mart's Diversity Strategy/1999-2001."

Have you seen that before today?

A. Yes, I have.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES,
PATRICIA SURGESON,
on behalf of themselves
and all others similarly
situated,

Plaintiffs, No. C-01-2252-MJJ

vs.

WAL-MART STORES,
INC.,

Defendant.

The videotaped deposition of MARK O. BOSLER, taken in the above-entitled case, before Karyn Chalem, CSR, RPR, on the 15th day of May, 2002, commencing at 9:00 a.m. at the offices of 122 South Michigan Avenue, Suite 1850, Chicago, Illinois, pursuant to agreement of counsel.

Reported by: Karyn H. Chalem
License No.: 084-004167

* * *

[Page 40]

A Two divisions.

Q Looking at Exhibit 105 under your education, it refers to Walton Institute 2?

A Yes.

Q Was that management training or what kind of training was that?

A To the best of my knowledge, it was seven years ago, but it encompassed everything to do with being an effective manager.

Q Is that a – were your classmates – strike that.

Did you have classmates when you did that program?

A Yes.

Q Approximately how many people?

A I don't recall, but approximately 40 maybe.

Q Okay. Were they all Sam's Club or were they also regular Wal-Mart?

A No, there was a variety across the company.

Q So Sam's and Wal-Mart?

A Yes.

Q Do you know if there were people***

* * *

[Page 85]

Q Less than half?

A It's less than half.

Q Less than a quarter?

A Probably a quarter or a little more.

Q Are you aware of any goals for promotion of women into management trainee programs?

A I'm not aware of goals.

Q Are you aware of any goals for promotion of women into any position at Sam's?

A I've not seen any goals for Sam's, percent of women in management, no.

Q Okay.

MR. CATLETT: Let's take a short break.

THE VIDEOGRAPHER: We're going off the record. The time on the monitor is 10:24.

(A recess was taken.)

THE VIDEOGRAPHER: We're going back on the record. The time on the monitor is 10:34.

BY MR. SELIGMAN:

Q Earlier, when we were talking about the selection process to become a bakery or meat***

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES and PATRICIA SURGESON, et al. Plaintiffs, vs. WAL-MART STORES, INC., Defendants.	Case No.: C-01-2252-MJJ

DEPOSITION of BRENDA J. DENO, held pursuant to Notice and Subpoena on October 21, 2002, at Accurate Court Reporting, 1618 Genesee Street, Utica, New York, commencing at 9:15 a.m., before Joseph A. Adamkiewicz, Shorthand Reporter and Notary Public in and for the State of New York.

* * *

[Page 166]

women who were disciplined for taking long breaks or leaving the area, is that correct?

A. That's correct.

Q. Is other problems you had with Vinnie that you believe were discriminatory against you in some way other than Vinnie's being allowed to leave the store for long periods?

A. Yes. Do you want to get into that now?

Q. I want to get a list of any other problems, and then we'll break. Any other concerns you had about discriminatory treatment from Vinnie?

A. Yes. When I talked to Don Defeo at the time and told him that I wanted to work the – have the opportunity to work, you know, some overtime, if it's being offered. And, you know, his comment was, "Well, what is good for the goose isn't good for the gander."

I wasn't happy with that, so I **[Page 167]** called the home office, and the next day at work I was called into the personnel department and, you know, was basically told by John Emory was there, Tony Rotundo, Vinnie Piccola, and a girl was pulled off the floor, and John Emory wanted to know what my problem was.

Q. Okay. So there were what you thought was – did you think the meeting was discriminatory?

A. Yes, very much so.

Q. Any other problems you had with Vinnie that you thought were discriminatory based on your sex?

A. There could have been. I'm not sure right now.

Q. Do you recall any others right now?

A. It was an ongoing thing with him. He was pretty aggressive with every woman that worked in the deli.

Q. Do you recall any other specific problems you had with Vinnie or treatment by***

* * *

[Page 234]

to you?

A. Okay. There was one incident when Tony Burkett had to go out of town to one of our stores that we're opening. I'm not sure exactly which store. It was down closer to the New York area. And a woman manager store manager had gotten that job, Tony Burkett was one of if not several people in the area that had to go and prepare the store for opening.

And his conversation that I heard with I believe it was Tony Rotundo and Vinnie Piccola was the company had to meet their quota one more time by hiring a female manager that is dumb as a bag of rocks and knows nothing, and women should be home barefoot and pregnant, and I was not very happy with that at all, and I was standing right there waiting to speak to Tony at the time, and that's how I heard all that.

That is my reason to believe that he has no respect for women that are in or want **[Page 235]** management positions with Wal-Mart.

Q. So you said you were waiting to speak to Tony. Tony Rotundo or Tony Burkett?

A. Tony Rotundo. And there was also a produce manager there, too.

Q. Do you know who that was?

A. Mike Sabino.

Q. So, you were – were they in an office?

A. No, they were right outside the meat door and like a little casual circle.

Q. And you overheard Tony Burkett make these remarks?

A. Oh, yes.

Q. Did you talk to anyone about the remarks that Tony made?

A. I made a comment myself.

Q. What did you say?

A. I says, what makes you feel that all women who get management positions in Wal-Mart aren't actually qualified.

[Page 236]

Q. Was there any response when you made that comment?

A. Mike Sabino commented that it's a known fact that men have one extra rib. What that means is beyond me. I have no idea.

Q. Anyone say anything else?

A. No. Everybody kind of broke up after that, and that was the end of that.

Q. Any other reason you believe Tony Burkett did not have respect for women or was not interested in talking to you about promotions because you're a woman?

A. I don't think I need any more reasons, no.

Q. Did you ever complain to anyone about Tony's comments that you considered inappropriate?

A. I don't remember. It was obviously a losing battle. Actually, yes, I did speak to my physician about it.

Q. Did you speak to anyone in Wal-Mart***

* * *

2001 Company Accountability Goals

Category	Goals	
	Division 01	Supercenter
Comparative Sales Increase	5.8%	7.5%
Gross Profit on Sales	24.1%	23.2%
Markdowns	5.5%	4.0%
Shrink	.59%	.59%
Expense Reduction	.1%	.1%
Pre-tax Profit	5.7%	5.2%
Turns	7.5%	10.0%
Turnover Reduction	15%	15%
Accident Reduction	25%	25%
Focus 560 Accident Reduction	35%	35%

STAR

Overview

The Store Total Activity Review (STAR) is a quarterly operational checklist to be completed by the District Manager. This is the sixth year STAR has been conducted. We must continue to keep it simple but ensure we include all divisions of our Company. To ensure our focus is on the entire store, additions and changes are made to the 2001 STAR. The 2001 STAR is divided into these nineteen sections that require all aspects of the business to be reviewed:

Operational Controls

- Management
- Department Manager
- Merchandising
- Operations/Controls
- Front-end

Legal/Shrink Controls

- Loss Prevention
- Risk Control
- Quality Assurance
- Firearms

Specialty Groups

- Photo Center
- Jewelry/Shoes
- TLE
- Pharmacy
- Vision Center

People/Office Controls

- People
- Accounting
- Back Office
- Backroom
- Claims

Objectives and Benefits

The objective of STAR is to ensure stores are following proper policies and procedures. These are the benefits of conducting a quarterly STAR:

- Sets expectations for all Associates.
- Ensures proper controls are in place.
- Gives a complete overview of the store's operation.
- Ensures consistent store standards exist within a District.
- Provides good training by involving Assistant Managers and Co-Managers in the process.
- Reduces shrinkage, cuts accident costs, and

increases profit for the store and the Company.

Additions

- These are new sections added to the 2001 STAR:
    - Backroom
    - Department Manager
    - Firearms
    - Pharmacy
    - Vision Center
- The system now answers 31 questions automatically. (Refer to the Automated Questions Benchmark/Judgment Criteria.)

STAR Guidelines

These are the guidelines to conduct a quarterly STAR.

Preparing for STAR

- The District Manager **must** balance the Accounting Office prior to each quarterly STAR.
- Due to the change of the week 52 review report, the District Manager **must** print a Personnel File 52 – Week Review form from this link, to complete the week 52 review question in the People section of STAR.
- The District Manager conducts s STAR for each store in their district during the 1st, 2nd, and 3rd quarters.
- Each STAR must be finalized by the 25th of the last month of the quarter (e.g. April 25, July 25, and October 25). STAR can **not** be submitted after

these dates.

- Only one review can be entered into the system for each quarter in the first three quarters.
- In the 4th quarter, the District Manager conducts a follow-up STAR (on a printed STAR **only**) focusing on the exceptions of the 3rd quarter STAR and emphasizing holiday priorities. (Do not enter the 4th quarter STAR into the system.)

NOTE: To ensure the most current version is completed, print a blank STAR at the beginning of each quarter. (Updates are entered at the end of each quarter.)

- The Division 01 District Manager coordinates STAR dates with the Jewelry/Shoes and Vision Center District Managers and the District Loss Prevention Supervisor. (A minimum of two-week notice is required before a STAR is conducted.)
- The Division 01 District Manager conducts the Pharmacy, Photo Center and TLE sections.
- The Division 01 District Manager, and District Loss Prevention Supervisor are both responsible for the completion of the Firearms section.

Entering the STAR

- Stores must have a 95% overall score to receive a satisfactory score.
- Most questions contain individual sub-questions. To complete a question, answer each sub-question **YES** or **NO**.
- If all sub-questions are answered yes, the entire question is automatically answered yes.
- If any sub-question is answered no, the entire question is automatically answered no.

- Before finalizing, the District Manager can change the main answer from **YES** to **NO** by selecting the answer box. (This option is available for manually entered questions **only**.)
- Questions can **not** be changed from **NO** to **YES**.
- Any question that is **not** applicable **must** be answered **YES**.
- All questions requiring interpretation are based on District Manager expectations.
- Automated questions can **not** be changed. Use these questions as a preliminary STAR score.
- The Monthly Store Manager Review (MSMR) is a subunit of STAR, which the Store Manager **must** complete by the 25th of each month.

After completing the STAR

- The District Manager and all affected Associates **must** hold a wrap-up session at the end of the review.
- One copy of the STAR is retained at the store. Another copy is retained in the District Office.
- The Store Manager **must** complete a detailed plan of action to correct opportunities noted on the STAR. Send a copy of the plan of action to the Regional Vice President and the District Manager within ten working days.
- The District Manager completes a follow-up review using the plan of action when necessary.

STAR – New Stores

Follow these guidelines to conduct a STAR in a new store.

- The District Manager conducts a STAR within the first 30 days after Grand Opening.
- The District Manager completes a follow-up review on the exceptions set during the second month.
- The District Manager conducts another STAR during the third month.
- The District Manager must continue this process for the first six months of operation. After the first six months, the District Manager conducts a STAR based on Company guidelines.
- Only one review can be entered into the system for each quarter in the first three quarters.
- In the 4th quarter, the District Manager completes a follow-up STAR (on a printed STAR only) focusing on the exceptions of the 3rd quarter STAR and emphasizing holiday priorities. (Do **not** enter the 4th quarter STAR into the system.)

NOTE: To ensure the most current version is completed, print a blank STAR at the beginning of each quarter. (Updates are entered at the end of each quarter.)

STAR – High Shrink Scores

Follow these guidelines to conduct a STAR in high shrink scores.

- The District Manager conducts a STAR every other month, beginning in February or from the time the store is designated as high shrink, for the 1st, 2nd, and 3rd quarters.
- The months a STAR is not conducted, the District Manager must complete a follow-up review on the exceptions from the previous month's STAR.
- The District Manager continues this process until

the store is no longer designated a high shrink store.

- Only one review can be entered into the system for each quarter in the first three quarters.
- In the 4th quarter, the District Manager completes a follow-up STAR (on a printed STAR only).
- In the 4th quarter, the District Manager completes a follow-up STAR (on a printed STAR only) focusing on the exceptions of the 3rd quarter STAR and emphasizing holiday priorities. (Do **not** enter the 4th quarter STAR into the system.)

NOTE: To ensure the most current version is completed, print a blank STAR at the beginning of each quarter, (Updates are entered at the end of each quarter.)

MSMR

The Monthly Store Manager Review (MSMR) is a review to be completed by Store Management. It is divided into fifteen sections and requires all aspects of the business and all areas of the store to be reviewed:

Operational Controls	**Legal/Shrink Controls**	**Specialty Groups**
· Management	· Loss Prevention	· Photo Center
· Department Manager	· Risk Control	· Jewelry/ Shoes
· Merchandising	· Quality Assurance	· TLE
· Operations/ Controls	· Firearms	· Pharmacy
· Front-end		· Vision Center

People/Office Controls

- People
- Accounting
- Back Office
- Backroom
- Claims

MSMR Key Points

These are the key points to the MSMR.

- The 2001 MSMR is a total store MSMR.
- The Store Manager **must** balance the Accounting Office prior to each MSMR. (A question referring to this procedure will be added to the 2nd quarter STAR.)
- The Store Manager obtains STAR information from DD101 STAR/MSMR 2001 the store Manager's Merchant Workbench.
- Scores are entered into the STAR screen on the Store Manager's Merchant Workbench. (Refer to DD101 STAR/MSMR 2001.).
- The system automatically scores 30 MSMR questions when accessed. This can be used as a preliminary MSMR score. (Refer to the Automated Questions Benchmark / Judgement Criteria.)
- Special emphasis has been placed on Department 05 and 46. These two departments account for 43% of our total Company shrink.

MSMR Guidelines

These are the guidelines to conduct the MSMR.

- Stores must have a 95% overall score to receive a satisfactory score.
- Most questions contain individual sub-questions. To complete a question, answer each sub-question **YES** or **NO**.
- If any part of a checkpoint is not 100% correct, it **must** be answered **NO**.
- Before finalizing, the Store Manager can change the main answer from **YES to NO** by selecting the answer box but **not** from **NO to YES**. (This option is available for manually entered questions **only**.)
- Any question that is not applicable must be answered **YES**.

Store Manager

- The Store Manager is responsible to ensure salaried management completes an audit in the Accounting Office prior to each quarterly STAR.
- Print the *Monthly Store Manager Review* from the Store Manager's Merchant Workbench.
- Conduct a *Monthly Store Manager Review*.
- Each exception must have an action plan on the "*Monthly Store Manager Review Recap*."
- Enter MSMR information into the Store Manager's Merchant Workbench by the 25th of each month.
- Mail a completed copy of the store's Monthly Store Manager Review to the District Manager by the 25th of each month.

- Retain each completed review in a binder for follow-up.

District Manager

- Follow-up on the exceptions of the monthly reviews completed by Store Management.
- Follow-up on stores that did not complete the Monthly Store Manager Review.

Note: It is recommended that affected Associates perform a monthly self-audit for their own benefit.

Store Within A Store (SWAS)

SWAS Background

Sam Walton developed the SWAS (Store Within A Store) program in 1986. From that time to the present, the purpose of the SWAS program has remained unchanged:

> **To develop better merchants by focusing on the importance of merchandise planning and the understanding of departmental performance figures.**

SWAS continues to be a tool for our supervisors to improve their:

- Merchandising Skills
- Operational Skills
- People Skills

SWAS focuses on the combination of **people**, **merchandising**, and **numbers**.

District Manager's Role in SWAS

Following is a list of the District Manager's responsibilities regarding SWAS. (For additional information on the SWAS Program, refer to Pipeline, Wal-Mart Stores, Store Resources, Training Resources, SWAS/VPI.)

- Tour with the Department Managers and Assistant Managers on the salesfloor with a hand-held terminal.
- Meet with Assistant Managers and Department Managers once quarterly to review the 30-60-90-day plans.
- Review the correction of errors for the previous and current year.
- Review all seasonal events for the upcoming quarter.
- Review and teach about seasonal build-ups.
- Review operational and special promotional plans.
- Review past numerical performance.
- Review Department Managers' VPIs.
- Review and reinforce key points from Display Guide and District Manager Checklist.
- Ensure store is using the Item Performance screens.

Store Manager's Role in SWAS

Following is a list of the Store Manager's responsibilities regarding SWAS. (For additional information on the SWAS Program, refer to Pipeline, Wal-Mart

Stores, Store Resources, Training Resources, SWAS/VPI.)

- *Review Store Manager Recap Report* daily.
- Meet with Assistant Managers and Department Managers monthly.
- Review and approve all 30-60-90 day plans developed by Assistant Managers and Department Managers.
- Review and approve Assistant Managers operational plans.
- Check Correction of Errors from the previous year to make corrections for the current season.
- Cover numerical performance of each Department and Assistant Manager's area with entire group.
- Ensure all Assistant Managers are holding monthly SWAS meetings.
- Ensure all Department Managers are involved in the VPI program.

Assistant Manager's Role in SWAS

Following is a list of the Assistant Manager's responsibilities regarding SWAS. (For additional information on the SWAS Program, refer to Pipeline, Wal-Mart Stores, Store Resources, Training Resources, SWAS/VPI.)

- Review Assistant Manager SWAS Report.
- Meet with Department Managers by the 15th of each month.
- Review performance numbers for the past month.
- Cover Home Office bought merchandise from

Department Manager SWAS Recap Report.

- Review Display Guide and District Manager's Checklist.
- Plan special local store events.
- Plan seasonal layouts and merchandise needs above and beyond Home Office bought merchandise.
- Plan seasonal operations (e.g. staffing implementation, execution of Company plan, etc.).
- Plan VPI items with Department Managers.
- Review tab item selection, quantities, and item location during tab.
- Work as a team to create 30-60-90 day plans.
- Develop Correction of Errors.
- Tour with Department Managers on the salesfloor.

Department Manager Role as SWAS

The following should be achieved in the monthly SWAS meeting. (For additional information on the SWAS Program, refer to Pipeline, Wal-Mart Stores, Store Resources, Training Resources, SWAS/VPI.)

- *Purchase Recap Report* and *Departmental Sales Recap Report* reviewed in detail for the previous month.
- Departmental profit and inventory turns recorded.
- *P&L* reviewed and plans made to correct opportunities.
- Weekly sales plans reviewed.
- Merchandise plans made for 30-60-90 days out

with future orders placed.

- Utilize the Item Performance screen.
- Special events planned (e.g. Company and store promotions, community events, etc.).
- Review Merchandise Display Guide.
- Review Home Office bought merchandise.
- Review the POS Top Items per Department (formally the Top 50) and Top 15 reports from last year.
- Competition discussed and action plans developed.
- VPI items reviewed and planned.

SWAS Tools

Utilize these tools when completing SWAS plans.

Reports

Home Office Bought Merchandise

The *Home Office Bought Merchandise Report* shows all merchandise the Buyers have bought for the stores by department. This is forecast for current week plus five weeks. It also includes new items, seasonal build up, new modular, and return sheet merchandise. By reviewing this report weekly with the Department Managers, plans can be made for features and also staging of the merchandise. Assistant Managers can use this report as a tool for 30-60-90 day planning. This information is also printed on the *SWAS Department Manager Recap Report*. They can reference back to it at any time. This report does not print automatically but can be printed from the message system.

Top 300 Report

These are the key points of this report:

- Check sales and quantities sold during peak weekend business hours.
- Shows previous weeks sales and quantities sold for the items listed.
- Provides an analysis of which items should be ordered to maximize sales.
- Can tell you when you run out of items and suggest stocking times.
- Helps the store plan features for weekend business.

Future Orders Extract Report

The *Future Orders Extract Report* prints into these two reports:

1. A report prints for all assembly items appearing that week in the "New Order" column of the order review sheets.
2. A report prints for all warehouse items appearing that week in order batches.

- The arrival date is an estimated calculation for assembly items and is based on the order review date plus the lead time. For warehouse items, it is based on the order date plus four days.
- Review these reports each Saturday to plan all ordered features.

Future Orders Review Report

The *Future Orders Review Report* lists merchandise that is ordered. These are the key points of this report.

- List future orders.
    - Future orders are in addition to any POS replenishment orders.
    - The week in which the future order appears is when the order is placed **not** when the order arrives.
- Lists ordered features. (Use this when touring with Department or Assistant Managers to discuss where coming features are to be placed.)
- Must be printed manually.
- Lists all outstanding orders for up to 12 weeks.
- Shows the week ordered, estimated arrival date, order type, and markup percent.

Terminal Screens

Use these screens to manage inventory.

Sales History Screen

The Sales History screen provides additional information concerning item movement and maintenance. The following is a list of key points about the Sales History screen to help in planning for future sales. (Refer to the Perpetual Inventory Guide, Be A Merchant Section, page 25.)

- Displays sales and profit information for the previous ten weeks for a specified item.

- Ability to view last year's sales and profit for the item.
- Utilize the information to analyze sales trends to help plan features

Max Sales Screen

The Max Sales screen shows the following: (Refer to the Perpetual Inventory Guide, Be A Merchant section, page 27.)

- Top ten selling items from previous week for a specific department.
- Information for a particular week for last year for the department.
- Useful tool for feature planning and item build up.

Item Performance Screen

The Store Manager is responsible to train Assistant Managers to use the Item Performance screen that is located on the Merchant Workbench. These are key points of this screen.

- To develop SWAS plans with Department Managers.
- To analyze sales performance by department, modular category, or item for the last 52 weeks.
- To evaluate peak selling periods by modular category to more effectively plan future orders and choose VPIs.

Item Locator

The Item Locator option searches stores for specific item information. After scanning or entering the UPC number of item, the system searches for the closest stores, district stores, or a specific store number.

- In Stock - identifies stores currently in-stock with the item needed in your store.
- Out of Stock - identifies stores needing merchandise that is currently overstocked in your store.
- Best Sales - identifies stores selling an item well. Use this function to eliminate an overstocked item at your store.

Keep it Stocked Screen

The Keep it Stocked screen helps Associates get merchandise back in-stock. The Keep it Stocked screen suggests orders for merchandise based on the current on-hand and last 5-week sales history. The suggested order amount for assembly orders is what the system calculates to keep the merchandise in-stock to establish a rate of sale on the item. Once the rate of sale is established and the on-hand is correct, the POS system begins to properly replenish the item.

Perpetual Inventory

The Perpetual Inventory system is a "view only" screen that tracts the on-hands of each item as it comes in and goes out of the store. The PI system uses Point of Sale (POS) to update on-hands as items are sold through registers. POS replenishment is a very important part of managing inventory in our stores. This system provides many benefits to our Company. The continual monitoring of on-hand counts through perpetual inventory ensures the POS replenishment system is working properly, and merchandise is replenished in proper quantities.

Piece Count

The Piece Count function provides a quick and efficient method of counting items using the handheld terminal. The system counts the number of scans for each item scanned. This count then replaces the current on-hand for the item. Use the Piece Count function to count areas where many items are mixed together.

- Use only one handheld terminal to perform a piece count in a department.
- As an item is scanned, the system automatically separates the counts and places them with the correct item number.
- Do **not** use the Piece Count function on departments with a large number of items.

List Count

The List Count function is used to correct on-hands for all items in a department or category. Following is some of the benefits of using the List Count function to correct on-hands.

- Multiple handheld terminals can be used to enter counts for the same item from different locations in the store.

- Manual calculations are not necessary.
- Multiple departments can be counted at the same time, and the counts are accumulated and suspended in the same list.

Receiving/Stockroom

Follow these guidelines, and Backroom Conversion Guide on the Store Manager's Workbench to maintain a successful backroom.

7/14/30 Day Rule

- All merchandise brought to the backroom must be labeled with the date.
- Use color-coded event tags to identify promos, freatures, new modulars, and seasonal merchandise.
- Use inventory prep labels on all basic backstock/
- All basic warehouse merchandise must be out of the backroom within 7 days from its arrival.
- All basic assembly merchandise must be out of the backroom within 14 days from its arrival.
- All promotional, future modular, and tab merchandise must be out of the backroom within 30 days of its arrival.

Picklist

Department Managers must create picklists daily to itentify merchandise to take to the salesfloor. (Refer to the Merchandise Systems Guide section MSG 1112.)

Reports

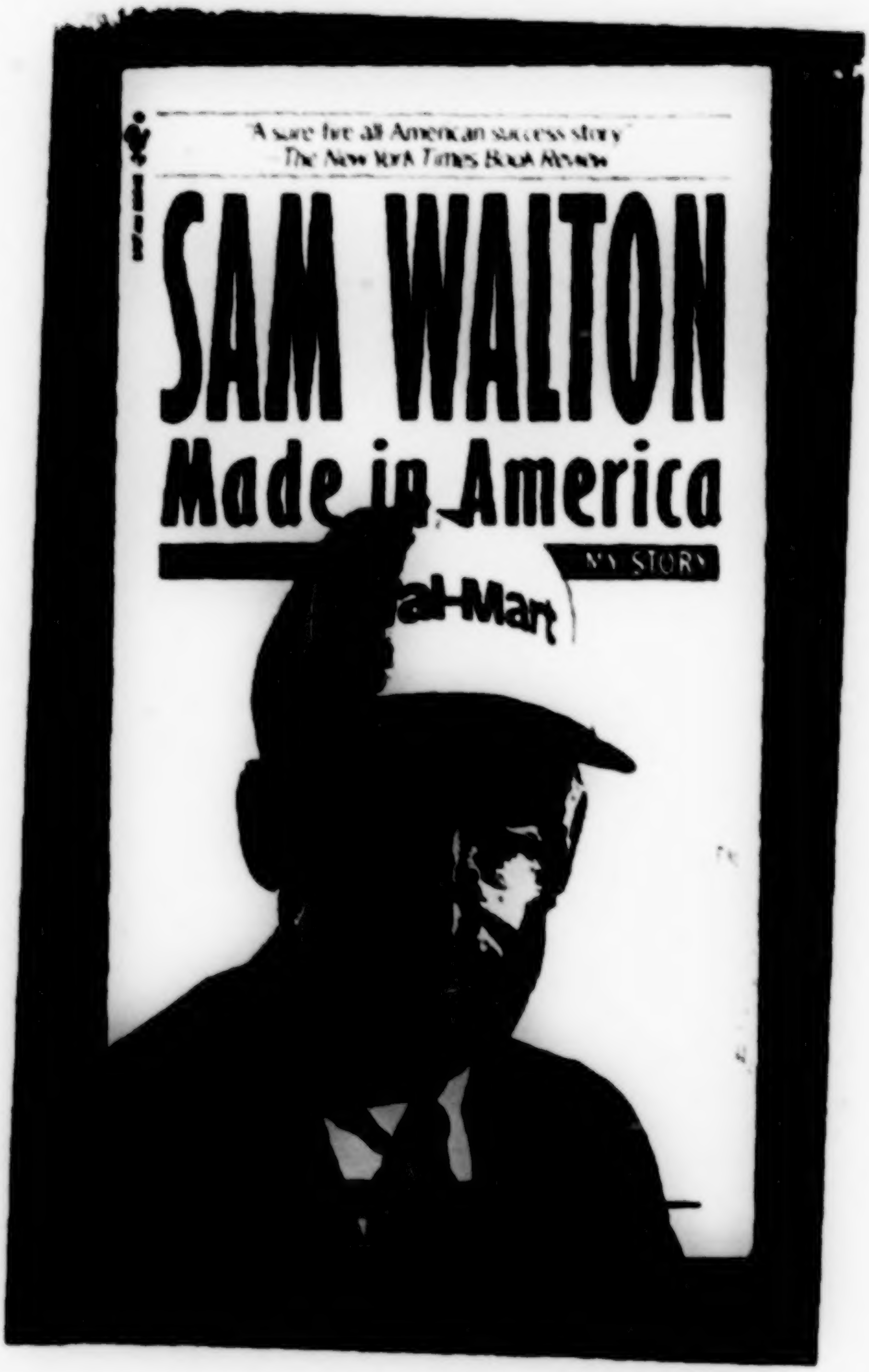
Utilize these reports to develop a plan-of-action to maintain an effective backroom program.

Backroom Receiving Report	Prints monthly after the *P&L Report* and recaps the following for the backroom Associate's job codes **only**: • Preferred and actual hours • Inventory turns • Associate turn over • Associate accidents • Associate productivity vs. actual hours • On-hand changes A portion of this report prints weekly on the *Store Manager's Recap Report*.
Pre-Notification Report	This report is divided into two sections that lists truck totals on each event received and a description of each item received. It allows management to develop a more effective plan-of-action for stocking the merchandise received. To enable this report to print automatically, refer

	to the Invoice Receiving Guide section IRG 301
Overnight Staffing Report	This report improves productivity while stocking departments overnight. The schedule assigns overnight stockers to departments based on the amount of freight received each night. This allows the management to develop an efficient plan-of-action for the unloading and stocking process.
Stocking Schedule Report	This report prints daily at 6:00 a.m. and lists case productivity information for each department, and a Stocking Schedule that assigns departments to scheduled Associates. To manually print the "***Overnight Stocking Schedule***", refer to the Payroll Scheduling Guide section PSG 616.
In Transit Out of Stock Report	This report prints when trucks are expected and lists items in transit that are showing a zero on-hand in the P.I. screen. Utilize this report to research the items with zero on-hands to correct P.I. issues. These are some reasons for zero on-hands on in transit merchandise: • Initial shipment for new modulars. • Non replenishable special or-

	ders from H.O. • Seasonal merchandise. • Merchandise ordered from negative on-hands.
P.I. Supplemental Report	This report prints Monday through Friday and lists manually ordered Assembly merchandise. This report shows the following: • The current on hand. • The previous four weeks sales history. • The amount ordered. Review and utilize this report to: • Correct issues with slow moving merchandise. • Correct over stock issues. • To develop a "plan of action" for incoming seasonal merchandise or special orders from H.O. • To execute the currently developed "plan of action".
On-hand Change Report	This report prints daily. Utilize this report to verify: • On-band changes by department. • On hand changes by Associate. • The amount of the adjustment.

	Refer to the Perpetual Inventory Guide section PI Reports.
Supplemental Order Report	This report prints daily and is used to verify manually placed orders from the previous day are finalized. (Refer to the Perpetual Inventory Guide section PI Reports.)
Future Order Review Report	This report is printed manually and lists up to 12 weeks of outstanding assembly and warehouse orders. (Refer to the Perpetual Inventory Guide section PI Reports.) • Assembly and warehouse orders may be requested separately.



"A sure fire all American success story"
—*The New York Times Book Review*

SAM WALTON
Made in America
MY STORY

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* * *

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***tor by taking on challengers in a no-holds-barred persimmon-seed-spitting contest using Robert Rhoads, our company general counsel, as the official target. Most companies also don't have a gospel group called the Singing Truck Drivers, or a management singing group called Jimmy Walker and the Accountants.

My feeling is that just because we work so hard, we don't have to go around with long faces all the time, taking ourselves seriously, pretending we're lost in thought over weighty problems. At Wal-Mart, if you have some important business problem on your mind, you should be bringing it out in the open at a Friday morning session called the merchandising meeting or at the Saturday morning meeting, so we can all try to solve it together. But while we're doing all this work, we like to have a good time. It's sort of a "whistle while you work" philosophy, and we not only have a heck of a good time with it, we work better because of it. We build spirit and excitement. We capture the attention of our folks and keep them interested, simply because they never know what's coming next. We break down barriers, which helps us communicate better with one another. And we make our people feel part of a family in which no one is too important or too puffed up to lead a cheer or be the butt of a joke—or the target in a persimmon-seed-spitting contest.

We don't pretend to have invented the idea of a strong corporate culture, and we've been aware of a lot of the others that have come before us. In the early days of IBM, some of the things Tom Watson did with his slogans and group activities weren't all that different from the things we do. And, as I've said, we've certainly borrowed every good idea we've come across. Helen and I picked up several ideas on a trip we took **[Page 202]** to Korea and Japan in 1975. A lot of the things they do over there are very easy to apply to doing business over here. Culturally, things seem so different—like sitting on the floor eating eels and snails—but people are people, and what motivates one group generally will motivate another.

> HELEN WALTON:
>
> "Sam took me out to see this tennis ball factory, somewhere east of Seoul. The company sold balls to Wal-Mart, I guess, and they treated us very well. It was the dirtiest place I ever saw in my life, but Sam was very impressed. It was the first place he ever saw a group of workers have a company cheer. And he liked the idea of everybody doing calisthenics together at the beginning of the day. He couldn't wait to get home and try those ideas out in the stores and at the Saturday morning meeting."

Back in 1984, people outside the company began to realize just how different we folks at Wal-Mart are. That was the year I lost a bet to David Glass and had to pay up by wearing a grass skirt and doing the hula on Wall Street. I thought I would slip down there and dance, and David would videotape it so he could prove to everyone back at the Saturday morning meeting that I really did it, but when we got there, it turned out David had hired a truckload of real hula dancers and ukulele players—and he had alerted the newspapers and TV networks. We had all kinds of trouble with the police about permits, and the dancers' union wouldn't let them dance without heaters because it was so cold, and we finally had to get permission from the head of***

* * *

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***doing things, and really believe it's the best way, they develop a tendency to think that's exactly the way things should always be done. So I've made it my own personal mission to ensure that constant change is a vital part of the Wal-Mart culture itself. I've forced change—sometimes for change's sake alone—at every turn in our company's development. In fact, I think one of the greatest strengths of Wal-Mart's ingrained culture is its ability to drop everything and turn on a dime.

We're great at that kind of change when it comes to operating challenges, but sometimes not so great on matters that have more to do with the culture of the company. In the early days, for example, all our old variety store managers had a tremendous prejudice against us hiring college boys because they didn't think they would work hard enough. Three of the first ones we hired—Bill Fields, Dean Sanders, and Colon Washburn—are still with us and, in fact, are among our brightest stars. But they had a heck of a time fitting in at first and could probably tell some real horror stories.

> BILL FIELDS, EXECUTIVE VICE PRESIDENT — MERCHANDISING AND SALES, WAL-MART:
>
> "I had been with the company about five days, and we were opening a store in Idabel, Oklahoma. We had thirteen days to open it, which is still a record. They worked me about 125 hours or more the first week. The second week it was getting worse. Then Sam—who knew who I was because I was a local Bentonville boy—comes walking up to me and says, 'Who hired you?' I told him that Ferold Arend had, and he said, 'Well, do you think you'll ever be a merchant?' Just the way he said it **[Page 217]** made me mad enough to want to quit. Then Don Whitaker

> came walking up to me and looked at me almost like he smelled something bad, and said, 'Who in the *hell* hired you?' At the time, it didn't seem like going to college was much of an advantage in this company. We really had to prove ourselves to those old guys."

Obviously if we were going to grow, we had to bring in college-educated folks. But at first, the culture tried to reject them. And now that we have even more complicated needs—in technology, finance, marketing, legal, whatever—our demand for a more sophisticated work force is growing all the time. All this requires some basic changes in the way we think about ourselves, about who's a good Wal-Mart hire for tomorrow and about what we can do for the folks already on board. That's one reason Helen and I started the Walton Institute down at the University of Arkansas in Fort Smith. It's a place where our managers can go and get exposure to some of the educational opportunities they may not have had earlier on. Also, we as a company need to do whatever we can to encourage and help our associates earn their college degrees. We need these folks to get the best training they possibly can. It opens up their career opportunities, and it benefits us.

Traditionally, we've had this attitude that if you wanted to be a manager at Wal-Mart, you basically had to be willing to move on a moment's notice. You get a call that says you're going to open a new store 500 miles away, you don't ask questions. You just pack and go, then sometime later you worry about selling your house and moving your family. Maybe that was necessary back in the old days, and maybe it was more rigid **[Page 218]** than it needed to be.

Now, though, it's not really appropriate anymore for several reasons. First, as the company grows bigger, we need to find more ways to stay in touch with the communities where we operate, and one of the best ways to do that is by hiring locally, developing managers locally, and letting them have a career in their home community—if they perform. Second, the old way really put good, smart women at a disadvantage in our company because at that time they weren't as free to pick up and move as many men were. Now I've seen the light on the opportunities we missed out on with women. (I have to admit that Helen and my daughter Alice have helped me come around to this way of thinking.)

In the old days, retailers felt the same way about women that they did about college boys, only more so. In addition to thinking women weren't free to move, they didn't think women could handle anything but the clerk jobs because the managers usually did so much physical labor—unloading trucks and hauling merchandise out of the stockroom on a two-wheeler, mopping the floors and cleaning the windows if necessary. Nowadays, the industry has waked up to the fact that women make great retailers. So we at Wal-Mart, along with everybody else, have to do everything we possibly can to recruit and attract women.

One other aspect of the Wal-Mart culture which has attracted some attention is simply a matter of lifestyle, but it is one that has bothered me ever since we began to be really successful. The fact is, a lot of folks in our company have made an awful lot of money. We've had lots and lots of millionaires in our ranks. And it just drives me crazy when they flaunt it. Maybe it's none of my business, but I've done everything I can***

* * *

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, et al., Plaintiffs, v. WAL-MART STORES, INC., Defendant.	Case No. C-01-2252-MJJ **DEFENDANT'S SUPPLEMENTAL OBJECTIONS AND ANSWERS TO PLAINTIFFS' FIRST AND SECOND SETS OF INTERROGATORIES**

* * *

INTERROGATORY NO. 11:

Does Wal-Mart contend that its female hourly employees are generally less qualified for management positions in the retail stores than its male hourly employees?

ANSWER:

Wal-Mart objects to this Interrogatory on the grounds that the terms "generally less qualified" and "management positions" are ambiguous generally and as they relate to Wal-Mart specifically. Wal-Mart further objects to this Interrogatory on the grounds that it is overly broad and seeks to impose burdens greater than that required by the Federal Rules of Civil Procedure in that it asks Wal-Mart to summarize the specific job skills and qualifications of Wal-Mart's large and diverse employee population and to draw conclusions regarding each associate's relative qualifications for the numerous "management positions" – many of which have different qualifications – throughout the different geographical and organizational levels of Wal-Mart. Moreover, as written, the Interrogatory oversimplifies the variety of factors that can impact the selection of a candidate for a particular job. Subject to and without waiving these specific objections and Wal-Mart's General Objections, Wal-Mart states that females are not less qualified for "management positions" than males.

* * *

INTERROGATORY NO. 17:

Does Wal-Mart contend that its female hourly employees are more frequently disciplined or coached than its male hourly employees in the retail stores?

ANSWER:

Wal-Mart objects to this Interrogatory on the grounds that the term "frequently disciplined or coached" is ambiguous generally and as it relates to Wal-Mart specifically. Subject to and without waiving these specific objections and Wal-Mart's General Objections, Wal-Mart states that an associate's gender has no bearing on whether he or she is subject to discipline or coaching in the retail divisions.

* * *

INTERROGATORY NO. 22:

What are the minimum qualifications required for an employee to be eligible for promotion to entry level management positions?

ANSWER:

Wal-Mart objects to this Interrogatory on the grounds that the phrases "minimum qualifications," "eligible for promotion" and "entry level management positions" are vague and ambiguous in general and as they relate to Wal-Mart specifically. Wal-Mart further objects to this Interrogatory on the grounds that it is overly broad and unduly burdensome, as it is impossible to investigate the "minimum qualifications" that have been formulated by thousands of relevant decision makers to fit the particular needs of hundreds of thousands of entry level management positions at Wal-Mart.

Subject to and without waiving these specific objections and Wal-Mart's General Objections, Wal-Mart states that there is no uniform set of "minimum qualifications" for entry level management positions that applies across all of its Retail Divisions and their respective subdivisions. The set of requirements for each position is dictated by the unique business considerations applicable to that specific location at that time and is determined on a case-by-case basis. Promotional guidelines in various Retail Divisions and at all levels of their respective subdivisions have varied over time and can vary by position. Members of management have autonomy to adapt these guidelines to meet the needs of the dynamic business environments in which they operate and may supplement higher-level guidelines by instituting additional requirements for the selection of individuals for promotion.

While it is impossible to describe promotional requirements for all positions throughout the company due to the vast number of promotional decisions and the decentralized way in which they are made, Wal-

Mart refers Plaintiffs to the 30(b)(6) witnesses who have testified or will be testifying on this topic, as well as all other depositions in which promotion to entry level management positions has been discussed. In addition, Wal-Mart provides the following as non-exhaustive examples of the guidance offered to relevant decision makers, as well as examples of some of the additional criteria for selection of entry level managers that pertain to certain organizational and geographic subdivisions of the Retail Divisions:

Wal-Mart Division 1 Stores And SuperCenters:

Hourly Managers. Pursuant to the Job Announcements Policy (document Bates labeled WMHO 217434), applicants for hourly manager positions such as Support Manager, Department Manager, Customer Service Manager and ICS Team Leader must first apply on the Computer Based Learning (CBL) terminal, successfully complete the applicable Job Selection questionnaire that is maintained on the Job Announcements system, and answer "No" to the following questions: (1) Have you been in your current position less than six months? (2) Have you had any documented coachings in the last 12 months? and (3) Was your last evaluation below standard? The Regional Personnel Manager may waive the 6-month-in-position requirement for long-term associates when there is no other qualified applicant. Applicants who have met the above criteria or obtained an appropriate waiver are then recommended for, and must successfully complete, an interview. Under some circumstances, the applicable decision-maker may consider applicants who are not "recommended"; for example an applicant with a coaching may be considered depending on the nature of the offense, how long ago it occurred, and whether the applicant's performance has improved significantly. Successful candidates must be able to work the hours required for the position and must generally meet the job requirements outlined in the applicable Job Description.

In addition, the Divisional, Regional and/or District offices are authorized to set guidelines for selection of positions at Stores within their areas. At one time, for example, Division A required Support Manager candidates to come from an hourly supervisor role with a minimum of one year existing service. The District Manager was authorized to make exceptions to fill the position in new stores. (*See, e.g.*, document Bates labeled WMHO 389556 – WMHO 389557, 7/17/98 Div. 1A RPM Memo to Andy Wilson and Maxie Carpenter re: Div 1A Support Manager Program.) Additional requirements for promotion into hourly manager positions are determined at Store level to ensure that the qualifications sought are dictated by the needs for the particular position at that Store at that time. If a Department is particularly large, for example, the Manager(s) in charge of the Department may require that the Department Manager have a certain amount of experience working in that or a similar Department. (*See, e.g.*, the May 9, 2002 30(b)(6) deposition of Kimberly Weaver for a discussion of some of the criteria, such as good attendance and leadership skills, that she has utilized in promotional decisions pertaining to hourly manager positions at her Store.)

First In Line Trainees. Some of the general guidelines that relate to becoming a First In Line trainee include: (1) an expressed interest in the First In Line Program, (2) status as a junior or senior in college with at least a 2.5 Grade Point Average,

(3) status as a full-time student (12 hours/semester), (4) having a minimum of 90 days as a Wal-Mart associate, (5) willingness to work a minimum of 16 hours per week, and (6) willingness to relocate after graduation from college. First In Line Trainees must also meet any additional requirements in place for promotion to the Management Training Program established by the Divisions, Regions and Districts that feature the First in Line Program. (*See* information regarding Management Trainee position, below.) To remain in the program, First In Line trainees must pass a drug test and make reasonable progress toward graduation. (*See, e.g.*, document Bates labeled WMHO 352256-60; WMHO 369965-66.)

Management Trainee. Default promotional guidelines for Division 01 Store and SuperCenter Management Trainees suggest the following criteria for promotion to the Management Training Program: (1) an evaluation rating of 3.5 or higher, (2) one year in present hourly supervisor position, (3) department not classified as High Shrink, although exceptions are approved by the Regional Vice President, (4) 100 percent current on CBL's, and (5) willingness to relocate. (*See, e.g.*, documents Bates labeled WMHO 217236-37.) Associates also generally must be on the Rising Star list (*See, e.g.*, Rising Star Candidate form and Candidate Assessment form for Rising Star selection criteria, which has changed over time), able to work the hours required for the position, and, after receiving an offer to become a Trainee, must pass a drug test to continue in the program.

In addition, Divisions, Regions and Districts are permitted to establish their own promotional guidelines and/or requirements applicable to promotion to Management Trainee positions in their areas. These guidelines may require higher evaluation scores than the broader guidelines discussed above, may otherwise alter the time in current position or relocation guidelines, and may add guidelines regarding, for example, receiving the recommendation of one's Store Manager or having worked in certain areas of the Store. Divisional, Regional and District Guidelines relating to willingness to relocate differ depending on factors such as the business climate, nature of the market, and the Company's growth and management turnover in the applicable areas. Certain Regions or Districts have at various times required that candidates be "100% relocatable," although the scope of "relocatable" differs Region by Region and District by District. For example, Management Trainees in some areas must be willing to relocate to another Store in their District, in others candidates should be willing to work at any store within the Region, while still other Regions or Districts set out a particular geographic area or ask for a number of states to which the Trainee could relocate. (*See, e.g.*, document Bates labeled WMHO 200512, District 42 form to Trainees from Danny Carter, and document Bates labeled WMHO 151902-03, form letter to Trainees from Vince Martinez, RPM Region 16.)

Increasingly specific guidelines and processes for promotion to Management Trainee may be implemented at the District level. For example, District 200 Manager Debbie Kintzele has established an Assessment Center in which Store Managers submit candidates to the District office for approval and conduct opinion surveys on the approved candidates. Each candidate must complete a personal survey, write an essay, and successfully complete two 30 minute interviews in which two teams of managers score answers to each question. (*See, e.g.*, documents

Bates labeled WMHO 714944 - 714958.) In other Districts, the District Manager may accept resumes from Management Trainee candidates and/or require them to fill out an application (*see, e.g.*, the September 24,2002 deposition of Disclosed Class Member Katheryn Johnson; *see also* the May 8, 2002 30(b)(6) deposition of Lisa Heilman and the May 9,2002 30(b)(6) deposition of Kimberly Weaver for a discussion of some additional practices that relate to promotion to Management Trainee.)

Salaried Management. Other positions at Division 01 Wal-Mart Stores and SuperCenters that might be considered entry level include, for example, Assistant Manager, Fresh Manager (SuperCenters only) and, where applicable, Resident Assistant Manager. In addition to requiring mastery of the components set forth in the applicable training guide for Management or First In Line Trainees (see documents Bates labeled WMHO 214651-215071 and WMHO 217245-49), various Divisions, Regions and Districts may set specific guidelines and/or requirements for promotion to Assistant Manager. For example, in Region 16, the Regional Vice President and Regional Personnel Manager provided Store Managers with a list to help determine when Management Trainees were ready for promotion to Assistant Manager. (*See, e.g.*, document Bates labeled WMHO 371294 - 95, Memo from Jon Sims, Marcus Ludwig and Parrish Graumann re: Trainee Promotion Knowledge Checklist.) Some Regions or Districts have at various times required Assistant Managers to be fully "relocatable," a term that may have different meanings in different Divisions, Regions or Districts, as described above under *Management Trainee*. (*See, e.g.*, document Bates labeled WMHO 151902-03, form letter from Vince Martinez, RPM

Region 16; see also the May 8,2002 30(b)(6) deposition of Lisa Heilman for a discussion of some of the practices that relate to promotion to salaried management-level positions.) Trainees must accept an assignment at a Wal-Mart or SuperCenter with an opening for Assistant Manager; First In Line participants must also graduate from college before being promoted.

In addition to fulfilling any Divisional, Regional and/or District requirements for Fresh Manager, an associate must successfully complete the Fresh Manager Training Program (see documents Bates labeled WMHO 214109-214390) or, in some areas, have food-related training or experience, to be promoted to SuperCenter Fresh Manager. In those areas featuring the Resident Assistant Manager program, an associate must meet any applicable Divisional, Regional or District requirements, be willing to work in a Store with an available Resident Assistant Manager position, complete the Management Training Program, and have and maintain a 3.5 or better performance evaluation rating in order to be promoted to Resident Assistant Manager. (*See* document Bates labeled WMHO 215699 for a description of the Resident Assistant Manager Program.)

Specialty Divisions (Division 1 Stores And SuperCenters):

Tire & Lube Express:

Hourly Managers. Applicants for TLE Support Manager, TLE Service Manager, and TLE Department Manager must be able to work the hours required for the position and must generally meet job requirements outlined in the applicable job description, as well as fulfilling additional requirements established by the TLE Manager. The Job Announcements criteria apply, although the TLE Manager has authority to waive certain requirements. Wal-Mart directs Plaintiffs to the July 31, 2002 30(b)(6) deposition of Kirk Guthrie and the August 30, 2002 deposition of Disclosed Class Member Dedra Farmer for examples of some of the guidelines for promotion to hourly TLE Manager positions, such as leadership abilities, enthusiasm, ability to "stay busy," previous supervisory experience, experience as a Service Technician, and having experience with inventory management.

TLE Management Trainee. TLE Management Trainees are selected by TLE District Managers with TLE Manager and Store Manager recommendation. The required interview process has varied over time. At one point, TLE had a program in which several District Managers in each region were chosen to interview candidates interested in entering the Management Training Program. (*See*, for example, the documents Bates labeled WMHO 551957-59 setting forth the interview and selection process for this program.) TLE District Managers, and others participating in this particular promotion decision, may consider one or more, or any variation, of the following factors when deciding who to promote to TLE Management Trainee: (1) experience in training people, (2) leadership abilities, (3) communication skills, (4) listening skills, (5) prior evaluations, (6) dependability, (7) geographic preference, (8) scores on certification tests, (9) lack of coachings, (10) the ability to relocate, (11) the ability to handle significant responsibility, (12) desire, (13) the ability to grow, and (14) the capacity to take on more responsibility. Individuals who want to be promoted to the TLE Management Training Program should fill out a TLE Geographic Availability Form. (*See* document Bates-labeled WMHO 384404.) However, the importance of relocatability depends on the business climate in the geographic region that an individual is willing to work in.

TLE Managers. TLE District Managers interview candidates finishing up the TLE Management Training program to determine whether promotion is appropriate given the needs of the business in the Store, District, and Region. In addition to the requirements that correspond to the specific position, some of general guidelines for promotion to TLE Manager include, but are not limited to: being willing to work in a Store with a TLE Department, successful completion of the TLE Management Training Program, and accepting a Store within the agreed upon area of restriction in accordance with the TLE Geographic Availability Sheet.

Shoes and Jewelry:

Hourly Managers. Promotions for Shoe Department Manager and Jewelry Department Manager are conducted through the Job Announcements system, with exceptions to the general criteria when specific business needs arise. The relevant decision makers may determine specific criteria for Shoe Department Manager positions, and may consider the ability to handle heavy merchandise at a high volume and an individual's adaptability to change (*e.g.*, the ability to merchandise galoshes when it happens to be raining). In addition to location-specific requirements, applicants for Jewelry Department Manager may in some situations need the ability to work with high security merchandise.

Assistant Managers. For some of the general guidelines to be promoted to Assistant Manager over the Shoes & Jewelry Departments, see the discussion *supra* relating to promotion to *Salaried Management* for Wal-Mart Division 1 Stores and SuperCenters.

District Manager Trainees. Candidates for Shoes and Jewelry District Manager Trainee must successfully complete interviews at the Home Office (*see* the documents Bates-labeled WMHO 552843-50 for examples of the types of questions that are asked during this interview process). In addition to meeting District and Regional requirements, applicants must be a Rising Star Department Manager (*see* document Bates labeled WMHO 552810-15 for criteria relating to the Shoes & Jewelry Rising Star Department Manager Program).

District Manager. Candidates must be able to work the hours required for the position and must generally meet the job requirements outlined in the applicable Job Description as well as any additional requirements listed for that particular position by the Manager(s) in charge of that District. Additionally, the candidate must generally have successfully completed the Shoes & Jewelry District Manager Training Program. (*See, e.g.*, documents Bates labeled 552827-42 for a discussion of the selection and training process for Shoes & Jewelry District Managers.) Additionally, the Shoes & Jewelry Division has a special program in which one Shoes or Jewelry Department Manager per division per year will be chosen to go through the regular District Manager Training Program *and* spend about a year as an Assistant Manager in Division 1 before being promoted to Shoes & Jewelry District Manager.

Pharmacy

OTC Manager. In addition to the Job Announcements criteria, ability to work the hours required for the position, ability to meet job requirements outlined in the job description, and any additional requirements set by the Region, District or Store, candidates must pass a stringent drug test if they have never worked in Pharmacy. Additional factors such as experience or, depending on the State, having a license or certification as a Pharmacy technician, may be considered. (*See, e.g.*, the July 30, 2002 30(b)(6) deposition of David Perkins for a discussion of situational factors that go into determining requirements for OTC Manager positions.)

Staff Pharmacist. In addition to requirements established at Store, District and Regional levels and the requirements set out in the applicable job description, an individual must graduate from an accredited Pharmacy School and comply with the applicable State licensing and certification requirements in order to be promoted from Intern to Staff Pharmacist.

Assistant Pharmacy Manager. In Stores that have an Assistant Pharmacy Manager, candidates must be able to work the hours required and meet the requirements described in the job description, as well as any requirements established by the Pharmacy Manager, District Manager, or Regional Manager. A successful candidate must be willing and interested in becoming a Pharmacy Manager. Depending on the situation within the Store or District, other criteria could include the ability to take on additional responsibility, leadership skills, willingness to assume the Pharmacy Manager role within a reasonable area (although not required to "relocate," this reasonable area could mean different things to different District Managers), and the ability to handle stress. A successful candidate must have graduated from an accredited Pharmacy School and have complied with the applicable State licensing and certification requirements.

Pharmacy Manager. Depending on the business environment of the Store and District, criteria can include leadership skills, organizational skills, people skills, and accuracy skills. A successful candidate must have graduated from an accredited Pharmacy School and have complied with the applicable State licensing and certification requirements. The process for promotion to Pharmacy Manager differs from District to District. (*See, e.g.*, the July 30, 2002 30(b)(6) deposition of David Perkins for a discussion of the process he uses, in which he allows, in certain circumstances, Rising Star Pharmacy Managers to conduct interviews of candidates.)

Optical:

Hourly Managers. There are no hourly manager positions in the Optical Division.

Vision Center Manager. In some circumstances, applicants must use a posting process to apply for Vision Center Manager. The criteria for selection varies. (*See, e.g.*, the July 30, 2002 deposition of Sue Pozar for a discussion of some of these criteria and variances, such as knowledge of markdown procedures, lab procedures and the basic systems in place in the Vision Center, a sense of urgency in taking care of the customer, attendance, punctuality, previous management experience and ABO and NCLE certifications. In some instances, the Vision Center Manager may be required to be a licensed and/or certified Optician.

In Optical Regions 1 and 10, Vision Center Manager candidates must have completed the Optical Management Training Program. The following are some of the criteria for promotion to the Optical Management Training Program in these regions: (1) ability to relocate, (2) ABO/NCLE certified, licensed, or have a degree or previous management experience in management or retail, (3) above standard performance (3.5 evaluation), (4) successful interviews with three District Managers, (5) approval by Regional Manager/ Regional Personnel Manager, and (6) passing a drug test. (*See, e.g.*, document Bates-labeled WMHO 504349 and WMHO 504350-51, discussing the process for promotion to the Optical Management Training Program in Optical Regions 1 and 10.)

Photo

Hourly Manager. In certain areas of the country, the Photo Division has added an additional Department-the Wireless Department. In those Stores with both Photo and Wireless Departments, there are two hourly manager positions: the Photo Department Manager and the Wireless Department Manager. Candidates for both positions should meet Job Announcements criteria, the job description requirements, be able to work the hours required for the position, and meet any additional criteria based on the needs of the Store, District or Region.

Photo Center Manager. In April 2002, the Photo Division implemented a Photo Division Management Training Program, which candidates for Photo Center Manager must complete. Before April 2002, completion of the Picture-Your-Future program was, under some circumstances, required for promotion to Photo Center Manager. Candidates must have completed the Photo Technician and Photo Specialist training. (*See, e.g.*, document Bates labeled WMHO 552108-14, the Photo Center Training Program

Guide.) In addition, candidates must be able to work the hours required for the position, must, in some circumstances, meet some relocation requirements, obtain the recommendation of the Photo Center Manager, score at least a meets expectations on his or her last evaluation, have no coachings in the last 12 months, and have been in his or her position for at least six months.

Sam's Club

Hourly Managers. Promotional requirements for positions such as Team Leader, Check-Out Supervisor and Audit Lead are set at Club level to meet the needs of each open position. Sam's Club Job Announcement guidelines suggest that candidates for these and other positions have: (1) at least six months in their current position, (2) no written Coaching for Improvements in the last 12 months, and (3) a Meets Expectations (standard) rating or above on the latest performance evaluation. (*See* document Bates labeled WMHO 384141 - 45, 8/17/98 Memo re: Sam's Club Job Announcements Program.) Individuals first generally must express interest in the position by signing up for an interview. In addition to the ability to meet the job requirements outlined in the applicable Job Description, which have changed over time, and work the hours required for the position, candidates must meet all additional criteria established for the position by the relevant decision maker. Programs such as Calling All Management Potential (CAMP) are also used to identify and develop associates, helping them gain skills that will increase their chances for promotion (*See, e.g.*, document Bates labeled WMHO 716097 and WMHO 716108-13 for discussion of selection procedures and suggested criteria.)

Area Managers. Promotional requirements for the salaried positions of Front End Area Manager and Receiving Area Manager vary from Division to Division and from Region to Region, and may include such factors as: (1) expressed interest in the position, (2) ability to work the hours required for the job, (3) standard or above performance, especially in a Team Leader position, (4) no performance coachings in the past 12 months, (5) receiving General Manager's recommendation, (6) successful completion of an interview or interviews, and (7) any other requirements established by the Division or Region. In some areas, relevant Receiving or Front End work experience is required. Finally, associates generally must successfully complete either the New Receiving Area Coach Development Program or the New Front End Area Coach Development Program.

First in Line Trainees. In addition to meeting Divisional and Regional requirements for Manager in Training (*see* below), candidates for First in Line should possess the following qualifications: (1) Junior or senior in college, (2) minimum 90 days as a Sam's Club Associate, (3) full time student (9 hours per semester) with minimum 2.5 grade point average, (4) working minimum 16 hours/ week, (5) business-related or complimentary degree program, (6) demonstrated management/leadership behaviors, (7) able to relocate after college graduation, (8) ability to move up two levels, and (8) satisfactorily complete interview with General Manager. (*See, e.g.*, documents Bates labeled WMHO 716096 and WMHO 716101-07; *see also* document Bates labeled WMHO 499851 - 52.)

Manager In Training. The selection process and criteria for choosing Sam's Club Management Trainees varies from Division to Division and from Region to Region. Some require team leader experience, rotation through specific or all Club areas, or a set minimum amount of time in a position. Regions may require candidates to sign up in the Club, receive a General Manager's recommendation, and/or complete a Candidate Survey. Some may require the ability to relocate, though the scope of "relocation" differs depending on the needs of the Region and/or Division. Directors of Operations and General Managers may use the CAMP program (*see, e.g.*, information under *Hourly Managers* above) or the Rising Star program to identify talented associates and provide them with opportunities to develop skills relevant to Management Training positions. (*See, e.g.*, documents Bates labeled WMHO 716095 and WMHO 716100 for discussion of programs and suggested criteria.) In some areas, experience as an Area Manager is preferred to be selected as a Management Trainee. Directors of Operations and General Managers can use criteria cited in Sam's Club Succession Development Planning to identify and develop Area Managers with: (1)no active coachings, (2) leadership qualities and capacity, (3) current evaluation of 3.0 or better, (4) minimum two years of service with company, (5) promotable minimum of two levels initially, (6) survey minimum of 70% or higher, and (7) specific targeted skills that apply across business: visionary, communication, leadership, and organization skills. Additional criteria for promotion to Manager in Training includes willingness to work the hours required for the job.

Assistant And Fresh Managers. Requirements for promotion to Sam's Club Assistant Manager or Fresh Manager are developed to meet the needs of individual Divisions, Regions and Clubs. Aside from satisfying requirements of relevant Divisions and Regions, candidates must demonstrate competency in all modules of the appropriate training program. (*See* documents Bates labeled WMHO 215787-216114 for Sam's Club New Assistant Coach Development Program and New Fresh Coach Development Program.) The number and content of modules, as well as the requirement to complete a written exam, for each module, has varied over time. Alternatively, individuals can be promoted to Assistant Manager/Fresh Manager after successful completion of the Sam's Club First In Line training program, which has featured demonstration of proficiency in each unit, completion of a competency exam, a New Coach Development assessment, an evaluation and approval by the Director of Operations, shared responsibility of an area of management for four months, completion of management New Coach Development class, and graduation from college. (*See* document labeled WMHO 499853-499856.) Promotion to Fresh Manager can also require prior Fresh Team Leader experience. (*See* document Bates labeled WMHO 716109.)

Certain other Company Divisions not specifically enumerated here have different structures than those discussed above as well as different procedures and criteria for promotion. (*See, e.g.*, document Bates labeled WMHO 365688-365692 for guidelines applicable to Neighborhood Markets). Due to the organizational and geographic variances in guidelines for promotion to entry level management positions as set forth above, Wal-Mart continues to investigate this Interrogatory and will supplement its Answer as appropriate.

* * *

Promotional Guidelines

The following outlines the Management Selection Process for promotion. The criteria has been set to help clearly state the expectations that must be fulfilled in order to be promoted. All members of management must be on the current Rising Star List to be considered for any promotion.

Associate to Assistant Manager

- Evaluation of 3.5 or higher
- 1 year in present hourly supervisor position
- 1 Year total experience
- Department not classified as High Shrink**
- Be 100% current on CBL's
- Willing to relocate***

Assistant to Co-Manager

- Evaluation of 3.5 or above.
- 1 yr. in current store
- 2 yrs total experience
- Total store not classified as High Shrink**
- 100% up to date on CBL's
- Willing to relocate***
    - Completed rotation in store of all areas: Hardlines, Softlines, Homelines, Receiving, Offices/Front End, and Food*
    - Be 100% current on Training Matrix: Both Distance Learning and Assistant Videos.

Assistant to Small Store Manager (65,000sqft. and less)

- Evaluation of 3.5 or above
- 1 yr. in current store
- 2 years of total experience

- Total store not classified as High Shrink**
- 100% up to date on CBL's
- Willing to relocate
- Completed rotation in store of all areas: Hardlines Softlines Homelines, Receiving, Offices/Front End and Food*
- Be 100% current on Training Matrix: Both Distance Learning and Assistant Videos

Co-Manager To Store Manager

- Evaluation of 3.5 or above
- 1 yr./ 18months in position*
- A six-month exception will be made with Co-Managers who have previous Store Manager experience.
- Total store not classified as High Shrink**
- 100% up to date on CBL"s
- Willing to relocate
- Completed rotation in store of all areas: General Merchandise and Food*
- A survey will be administered with a positive outcome expected.

Small Store Manager (65,000sqft. and less) to Co-Manager

- Evaluations of 3.5 or above
- 2 years in Current Store
- Total store not classified as High Shrink**
- Store not recognized as high UPI
- 100% up to date on CBL's
- Willing to relocate

Small Store Manager (65,000sqft. and less) to Larger Store

- Evaluation of 3.5 or above

- 2 years in Current Store
- Total store not classified as High Shrink**
- Store not recognized as high UPI
- 100% on CBL's
- Willing to relocate

*SuperCenter only.

**This provides performance incentive to candidates to be below high-shrink guidelines, exceptions to this are approved by Senior VP.

*** Each store allows for one "resident assistant" as described by corporate guidelines. Any exception must be approved by Senior VP.

Last Updated: March 19, 2001

WAL★MART

WAL-MART
STORES, INC.
CORPORATE OFFICES
702 S.W. 8TH STREET
BENTONVILLE, AR
72716

To: RVPs/RPMs
From: Andy Wilson
Date: November 20, 2000
Subject: Management Selection Process

cc. Tom Coughlin
Don Harris
Charlyn Jerrells
Porter
Divisionals
People Directors
District Managers

Promotional Guidelines

The following outlines the Management Selection Process for promotion. The criteria has been set to help clearly state the expectations that must be fulfilled in order to be promoted. All members of management must be on the current Rising Star List to be considered for any promotion.

Associate to Assistant Manager Trainee

Evaluation of 3.5 or above
1 year in present hourly supervisor position
1 year total experience in company
Department not classified as High Shrink**
Be 100% current on CBLs
Willing to relocate***

First In Line Associate to Assistant Manager

Evaluation of 3.5 or above
1 year total experience in company
Completion of all FIL training
Be 100% current on CBLs
Willing to relocate

Assistant Manager to Co-Manager

Evaluation of 3.5 or above
Must be on Rising Star List
1 year in current store
2 years total experience
Total store not classified as High Shrink**
Be 100% current on CBLs
Willing to relocate***
Completed rotation in all areas of store: Hardlines, Softlines, Homelines, Receiving, Offices/Front End, and Food*
Be 100% current on Training

Assistant Manager to Small Store Manager (60,000 sq. ft. and less)

Evaluation of 3.5 or above
Must be on Rising Star List
1 year in current store
2 years of total experience
Total store not classified as High Shrink**
Be 100% current on CBLs
Willing to relocate***
Completed rotation in all areas of store: Hardlines, Softlines, Homelines, Receiving, Offices/Front End, and Food*
Be 100% current on Training
A survey will be administered with a positive outcome expected.

Co-Manager to Store Manager

Evaluation of 3.5 or above
Must be on Rising Star List
1 year in position - Wal-Mart Stores
18 months in position – SuperCenter

> A six-month exception will be made with Co-Managers who have previous Store Manager experience.

Total store not classified as High Shrink**
Be 100% current on CBLs
Willing to relocate***
Completed rotation in store of all areas: General Merchandise and Food*
A survey will be administered with a positive outcome expected.

Small Store Manager (60,000 sq. ft. and less) to Co-Manager

Evaluation of 3.5 or above
Must be on Rising Star List
2 years in current store
Total store not classified as High Shrink**
Total store not classified as High UPI
Be 100% current on CBLs
Willing to relocate***

Small Store Manager (60,000 sq. ft. and less) to Larger Store

Evaluation of 3.5 or above
Must be on Rising Star List
2 years in current store
Total store not classified as High Shrink**
Total store not classified as High UPI
Be 100% current on CBLs
Willing to relocate***

Store Manager to District Manager

Evaluation of 3.5 or above
Must be on Rising Star List
2 years in current store as a Store Manager
Total store not classified as High Shrink**
Total store not classified as High UPI
Interviewed in Bentonville, Arkansas (Home Office) and approved
Be 100% current on CBLs

Have attended Walton Food Institute

* SuperCenter only

** This provides performance incentive to candidates to be below high shrink guidelines, exceptions to this are approved by Senior VP.

*** Each store allows for one "resident assistant" as described by corporate guidelines. Any exception must be approved by Senior VP.

RETAIL
BENCHMARKS
ON
DIVERSITY

March 1999 June 2000

EXECUTIVE SUMMARY

- Wal-Mart's representation of women and minorities has steadily improved over the last five years:
  - Women represented in management has increased from 27.1% to 32.4%, a 19.5% increase.
  - Minority management increased to 14.8% from 11.1% in this same period, a 33.6% increase.
- While we have continued to improve, we are behind other selected retailers and industry averages.

(Note: these numbers are based on EEO-1 reports for 1993 and 1998.)

BENCHMARKING

- We requested a data exchange with 15 companies of which 5 have responded

- Companies reporting are:
  - Comp USA – Will know Monday
  - Dayton Hudson – will Know Monday
  - Home Depot – Received new 5/12
  - May Department Stores – Will Know Monday
  - Toys-R-Us – will Know Monday

- Those declining or not responding are:
  - ~~Circuit City~~ ✓ – Not interested
  - ~~Costco~~ Unable to release
  - ~~Dollar General~~ – No Interest last year
  - ~~Dollar Tree~~ – Unable to release
  - ~~K-Mart~~ No Interest last year
  - ~~Office Depot~~ – NO INTEREST LAST YEAR.
  - Sears – Will Know Monday
  - ~~Service Merchandise~~ – No Answer
  - ~~Shopko~~ – NO INTEREST last year
  - Montgomery Ward – Will Know Monday
  - – BJ's → Will Know Monday

- We also utilized the Equal Employment Opportunity Commission report entitled "Job Patterns for Minorities and Women in Private Industry – 1997" to compare U.S. and retail industry workforces

FINDINGS: TOTAL EMPLOYMENT (Pg. 4)

62.6%

- Of those companies reporting, Wal-Mart is among the highest in women as a per cent of the total company workforce ([redacted]).

8

- Retail and the U.S. workforce only report women at 55.7% and 47.[illegible]% respectively.

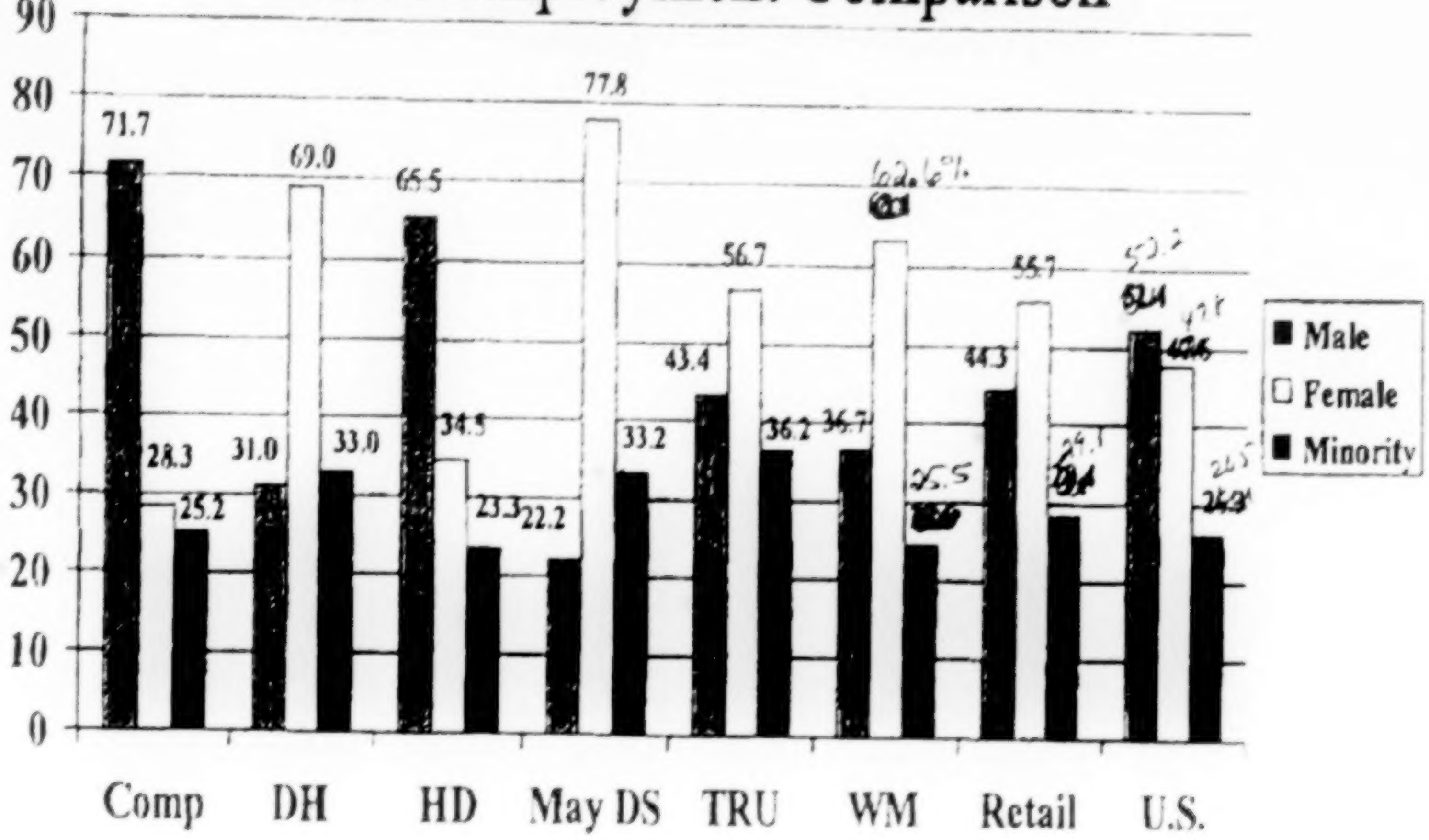
28.1 26.5

- Retail and the U.S. workforce report minorities at [illegible]% and 2[illegible]% respectively.

25.5%

- Wal-Mart is behind the retail industry and U.S. workforce at [redacted] minority in the company workforce

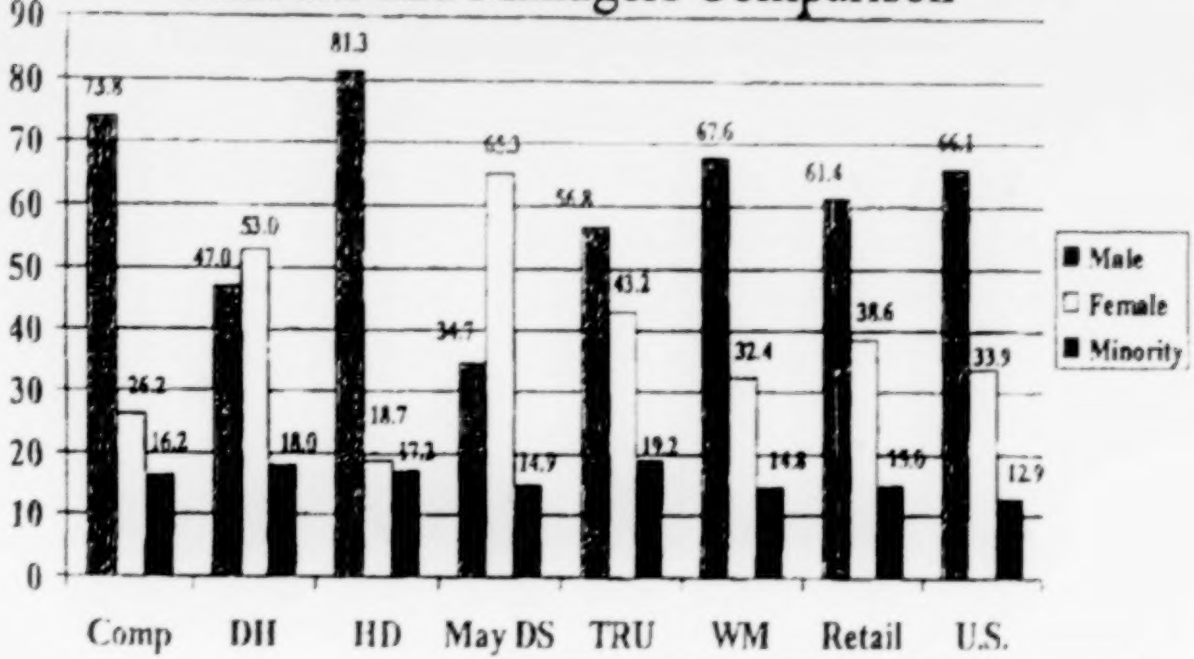
Total Employment Comparison



FINDINGS: OFFICIALS & MANAGERS (Pg. 6)

- Wal-Mart's women in management per cent (32.4%) is significantly behind several of the other retailers reporting (43.2% to 65.3%). Home Depot and Comp USA are lower at 18.7% and 26.2%.
- It should be noted, however, that department stores traditionally include the department manager category as officials and managers (i.e., Dayton Hudson and May Department Stores).
- Our Wal-Mart per cent of women trails both the retail industry and workforce averages (32.4% versus 38.6% and 33.9%).
- Our minority management representation (14.8%) is better than the U.S. workforce average (12.9%). We trail, however, both the retail average and the other reporting companies.

Officials and Managers Comparison



As of 1/31/99	*Dept Mgrs*	*Mgmt w/o Dept Mgrs*	*Mgmt w/Dept Mgrs*
Male	22.50%	65.21%	40.58%
Female	77.50%	34.79%	59.42%
Minority	17.99%	14.02%	16.31%

Retail Diversity Comparison

	Year	Employee Total						Officials and Managers											
		Male		Female		Minority		Male		Female		Black		Hispanic		Other		Minority Total	
		#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%
Comp USA	1998	12,287	71.66%	4,860	28.34%	4,312	25.15%	1,704	73.80%	605	26.20%	156	6.76%	134	5.80%	85	3.68%	375	16.24%
Dayton Hudson	1997	71,300	31.00%	158,700	69.00%	75,900	33.00%		47.00%		53.00%								18.00%
Home Depot	1998	73,015	65.48%	38,488	34.52%	25,998	23.32%	4,872	81.27%	1,123	18.73%	582	9.71%	356	5.94%	90	1.50%	1,028	17.15%
May Department Stores Company	1997	26,502	22.20%	92,875	77.80%	39,633	33.20%	3,688	34.70%	6,940	65.30%	829	7.80%	478	2.50%	287	2.70%	1,584	14.90%
Toys "R" Us	1996	18,795	43.35%	24,560	56.65%	15,686	36.18%	3,035	56.79%	2,309	43.21%	525	9.82%	317	5.93%	184	3.44%	1,026	19.20%
Wal-Mart	1997	294,959	36.69%	508,864	63.31%	197,448	24.56%	23,692	67.57%	11,373	32.43%	2,748	7.83%	1,887	5.38%	568	1.62%	5,202	14.84%
Retail Industry	1997	3,060,598	44.33%	3,844,014	55.67%	1,957,877	28.36%	373,026	61.39%	234,603	38.61%	43,823	7.21%	33,303	5.48%	14,263	2.35%	91,389	15.04%
U.S. Workforce	1997	25,261,487	52.31%	23,033,522	47.69%	12,728,160	26.35%	2,525,599	66.10%	1,301,438	33.90%	317,824	8.30%	211,497	5.52%	153,982	4.02%	683,303	17.85%

Coleman Peterson
Senior Vice President, People Group

I was in a store recently and ran into a seven-year associate. She informed me that she was leaving Wal-Mart to go to work for a university. When I asked her why she was leaving the company, her response was that she wanted a job with more of a sense of purpose, and with less stress.

She had to make a decision.

One of the best People talents in the industry is an Hispanic gentleman who is currently in Chicago. He won't come to Northwest Arkansas because he "can't see himself" here. There is another great talent who is an African American who lives in Wisconsin who "can't see himself" here. We have a challenge in getting good talent to believe that they can find balance and success in the Home Office.

For the last three years, we've exceeded our own diversity goals, but are still 200 basis points behind the industry. We're behind the rest of the world.

The Diversity reporting will change to reflect a comparison to the "real world", not just to what our own goals were.

MINUTES OF MEETING OF THE COMPENSATION AND NOMINATING COMMITTEE OF THE BOARD OF DIRECTORS OF WAL-MART STORES, INC.

March 4, 1999

A meeting of the Compensation and Nominating Committee (the "Committee") of the Board of Directors of Wal-Mart Stores, Inc.(the "Company") was held on March 4, 1999, beginning at 8:00 a.m. CST in the Training Room at Distribution Center #6059 located in Olney, Illinois.

Committee members present:	Frederick S. Humphries Jose Villarreal John Walton
Committee members present by telephone:	John Cooper, Jr.
Others present:	Ann Curry Cato Fred Disch Coleman Peterson Rob Walton *

* Present for a portion of the meeting only.

The meeting was called to order by John Walton, acting Chairman of the Committee. Ann Curry Cato acted as Secretary for the meeting. Upon motion duly made and seconded, the Committee unanimously approved the minutes of the Committee meetings held on November 12, 1998, and January 14, 1999.

* * *

[REDACTED]

* * *

Diversity Report

Coleman Peterson led the discussion on diversity. Comparing fourth quarter Fiscal Year Ending January 31, 1999 and fourth quarter Fiscal Year Ending January 31, 1998, we exceeded total Company goals in women and minority representation by 0.37% and 1.96% respectively. Female representation increased from 33.84% in Fiscal Year Ending January 31, 1998 to 34.79% in Fiscal Year Ending January 31, 1999. Minority representation increased from 13.51% in Fiscal Year Ending January 31, 1998 to 14.02% Fiscal Year Ending January 31, 1999. The breakdown of minority areas is as follows: Black 6.61% to 6.77%, Hispanic 5.03% to 5.17%, Asian 1.45% to 1.60%, Indian 0.41% to 0.48%. These numbers are still reflect the Fiscal Year Ending January 31, 1998 year-end reclassification of management pharmacy associates in the specialty division to hourly status, of which a large number were women. Results for fourth quarter Fiscal Year Ending January 31, 1999, show increases in female representation and flat performance in minority representation when compared to third quarter year to date Fiscal Year Ending January 31, 1999. Female representation increased from 34.48% to 34.79%. Minority representation changed from 14.04% to 14.02%.

Wal-Mart's representation of women and minorities has steadily improved over the last five years. Women represented in management has increased from 27.1% to 32.4% over the last five years, a 19.5 % increase. Minority management increased to 14.8% from 11.1% in this same period, a 33.6% increase. While Wal-Mart has continued to improve, we are behind other selected retailers and industry averages. We requested a data exchange with fifteen companies of which five have responded, Comp USA, Dayton Hudson, Home Depot, May Department Stores, and Toys-R-Us. We also utilized the Equal Employment Opportunity Commission report entitled "Job Patterns for Minorities and Women in Private Industry – 1997" to compare U.S. and retail industry workforces. Of those companies reporting, Wal-Mart is among the highest in women as a percent of the total company workforce at 63.4%. Retail and the U.S. workforce only report women at 55.7% and 47.6% respectively. Retail and U.S. workforce report minorities at 28.4% and 26.3% respectively. Wal-Mart is behind the retail industry and U.S. workforce at 24.6% minority in the company workforce.

Wal-Mart's women in management percent of 32.4% is significantly behind several of the other retailers reporting between 43.2% and 65.3%. Home Depot and Comp USA are lower at 18.7% and 26.2% respectively. Department stores traditionally include the department manager category as officials and managers (i.e., Dayton Hudson and May Department Stores). The Wal-Mart percent of women (32.4%) trails both the retail industry of 38.6% and workforce averages of 33.9%. Wal-Mart's minority management representation of 14.8% is better than the U.S. workforce average of 12.9%. Wal-Mart trails both the retail average and the other reporting companies.

There being no further business to come before the meeting, it was adjourned at 1 1:00 a.m.

Dated this Fourth Day of March, 1999.

Ann Curry Cato
Acting Secretary
Compensation and
Nominating Committee

APPROVED:

John Walton, Acting Committee Chairperson

WAL-MART STORES
BENTONVILLE, AR

MEMORANDUM

CONFIDENTIAL

TO:	Executive Committee Division Heads	CC: People Directors
FROM:	Cole Peterson	
DATE:	February 13, 2001	
REF:	2000 Catalyst Census of Women Corporate Officers and Top Earners	

Attached is the Catalyst Census of Women Corporate Officers and Top Earners. This report, first published in 1996, determines and distributes facts about women in top positions within the Fortune 500 Companies. The information provided in the report is based on information through March 31, 2000.

The report allows Wal-Mart to take a look at our progress in promoting high talent female associates to Officer level. Although Wal-Mart has made improvements over the last five years in this endeavor, we are still behind both the Fortune 500 and General Merchandisers in the development of women into Corporate Officers.

As you begin to prepare your Spring People Asset Review, this report should be a reminder that we should be identifying, developing and promoting high potential females in all areas of our business. With our continued efforts, Wal-Mart will be able to attract and retain the talent necessary to meet our strategic objectives.

Executive Summary of the *2000 Catalyst Census of Women Corporate Officers and Top Earners*

The Catalyst Census of Women Corporate Officers and Top Earners was first published in 1996 to determine and distribute facts about women in top positions within Fortune 500 Companies. The goal of Catalyst was to publish the comparative number of women corporate officers and top earners among the Fortune 500, "because in business, what gets measures gets done." **The information provided is based on information through March 31, 2000.**

Women Corporate Officers

- The average percent of women corporate officers of the Fortune 500 was 12.5%, up from 8.7% in 1995. The number is expected to grow to 16.50% in 2005 and 20.10% in 2010.
- The average percent of women corporate officers in the reporting "General Merchandisers and "Wholesalers" was 15.4% and 10.4% respectively
- Ninety companies have no women corporate officers 18%
- Fifty companies, including Target, Gap, JC Penney's and the Limited, have at least 25% women corporate officers.
- Sixteen companies, including BJ's Wholesale Club and Southwest Airlines, have at least 33.3% women corporate officers.
- Wal-Mart has 10% women corporate officers.

Women of Color

- Women of color make up 1.3% of all officers and 10.3% of all women corporate officers within the Fortune 500
- At Wal-Mart, women of color make up 1.4% of all officers and 13.6% of all women officers.

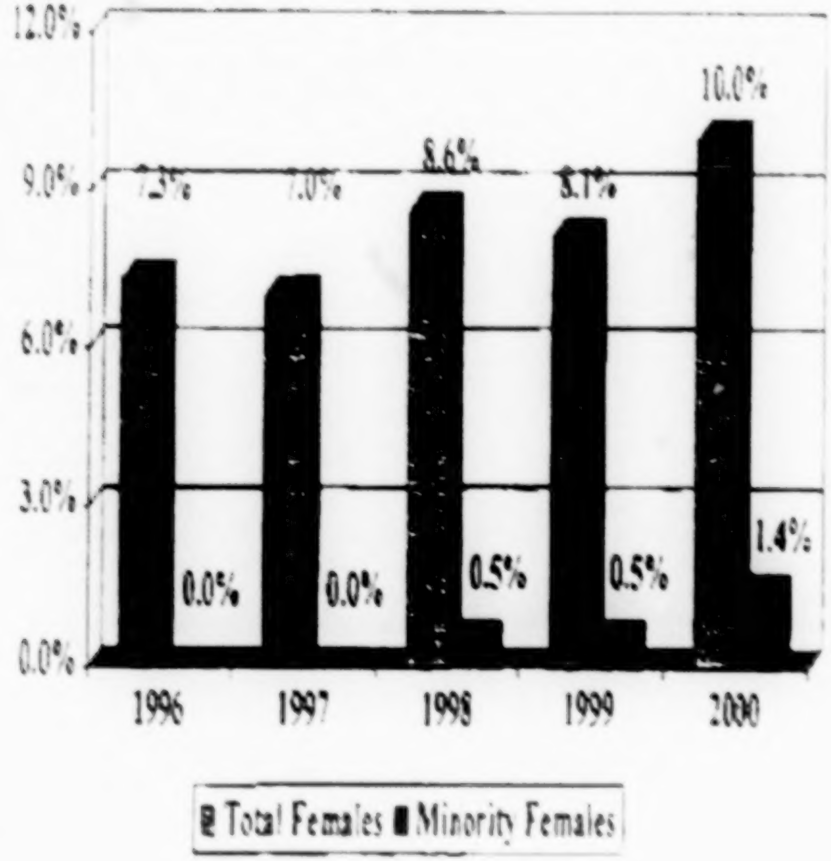
Positions and Titles

- Only 7.3% of the women corporate officers were in line positions (those with P&L or direct client responsibilities). This number has increased from 5.3% in 1995.
- 59% of Wal-Mart's women corporate officers hold line positions.
- Only 6.2% of the women corporate officers held "clout titles" such as CEO, Chairman, Vice Chairman, President, COO, Senior Executive Vice President and Executive Vice President.
- Ninety-three women, or 4.1%, were among the most highly compensated officers, up from 1.2% in 1995.
- Wal-Mart reported no women in the "clout title" or "most highly compensated officers" categories.

Summary

Wal-Mart is behind both the Fortune 500 and General Merchandisers in the development of women into Corporate Officers. Over the past five years, the number of female officers has increased from 7.3% to 10.00%. This coming year, Wal-Mart will show improvement in the "clout title" category with the promotion of Celia Swanson to Executive Vice President. However, there needs to be continued focus on the identification and development of our female associates in order to continue to attract and retain the talent necessary to meet our strategic objectives.

History of Wal-Mart's Female Corporate Officers*



*Reporting is through March 31st of each year

FROM: susan smith DATE: Mon May 13 14:35:40 1996 SUB: Women in Leadershi

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The regular meeting of Women in Leadership on May 2 was well attended. Thanks to all who took time out of their schedule to be there. Congratulation to Sharon Garmon on her move to RPM in Warehouse Adm.

Charlyn Jarrells and Debbie Davis Campbell reported on the Division 07 project. The turnover survey results were received from Paragon.

There were no gender-related issues identified. The results were given to Mike Duke and John Bell. Charlyn mentioned that there was an impression that career advancement was dependent on relocation and this impression discouraged many women. It was agreed this impression is a general one and anything that can be done to dispel it in the divisions where it does not apply would be good.

On the subject of special speakers, it has been pointed out that there is a perception of these events as a "woman thing". It was agreed that members of the group need to discuss the events in their departmental meetings and explain that all associates are welcome. A special effort should be made to invite all Division Heads. The suggestion was made that perhaps it would be better to leave the "sponsored by Women in Leadership" off the marketing for these events.

A discussion on the subject of mentoring was sparked by Brenda Hester's report. A summary of the results of the benchmarking trip to J C Penney was given. The mentoring program there is quite formalized. It is for management in the home office only. The program our mentoring team has developed would eventually be available to all associates. Their goal is to have it ready for formal proposal by July 1. It would be rolled out in 4 stages. Stage 1 would be a test in Logistics International.

Kim Richardson pointed out that there is a sponsorship program in place in the stores that is intended to accomplish many of the objectives of the proposed mentoring program. It was suggested that the success of the existing program could be measured by looking at turnover rates, exit interviews and 90-day evaluations in stores using the sponsorship program versus stores that are not using it.

Debbie Davis Campbell remarked that executives would probably be more interested in the development of long term associates and reduction of turnover after 2 years.

Brenda asked that anyone who is genuinely interested in helping with this project please get in contact with her.

Sharon Garmon discussed briefly the articles which had been sent out. Members were encouraged to share this kind of information with associates in their department.

In attendance were: Chelle Moore (for Celia Swanson), Maureen Walters, Lisa Allen, Renee Bell, Jan Hudgins, Debbie Kocks, Brenda Hester, Lisa Cowden, Kim Richardson, Jill Wesbecher, Linda Tipton, Sharon Garmon, Charlyn Jarrells, Debbie Davis Campbell, Sharon Stewart

Diversity Ideas

- Review People P&L: need to ensure we have the right mix of ethnicity as well as gender when opening a new store. We have access to People P&L prior to store opening to look at local community demographics. Semm to have a right mix of associates but not in management.
- Take existing minority management and place them on the recruiting team.
- College internships (12 weeks program) look for diversity in this program so that when a person graduates from school he or she will have a concept of how Wal-Mart works and have less of a chance of failing on the Management Training program.
- Diversity in the Co-Manager ranks needs to be a DM focus point for 2002.
- Have existing DM's and Store Managers of diverse backgrounds brainstorm on what they did to get into their position (perhaps Gwen Cannon.)
- Find someone to mentor different than yourself!
- It was a wonderful idea to have DM's and Regionals be mentors for women. What are we actually doing to mentor them? Is there a plan laid out for the future with real expectations that are realistic where they know and feel the changes taking place? We say quite freely that we have a mentor or we are mentoring someone, but what tools can I get from that?

- Set realistic goals and guidelines for every district, and FOLLOW THEM! This should be completed and given to the DM's in Kansas City.
- The importance of this has to be stressed to the DM's when surfacing candidates. This should be a key area in their evaluations.
- College recruiting needs to know what we are looking for so we meet our goals.
- Attend college recruiting at institutes that have a high minority base.
- Look for institutions in our areas that have a high minority base and personally recruit from those areas.
- We could attract more female management if we could reduce the guidelines on relocation.
- Look at the Assistant Managers schedule and have them close once a week instead of two (of course this would apply to all management.)
- Female associates lack the self-confidence in their ability to do more with our company. They need more mentoring and they do need more time developing their strengths.
- Need training on how to communicate with people that are different than them and how to actively recruit diverse candidates.
- Educate them on where we were in the past as a company and where we need to go and what our goals are.
- Involvement in recruiting at all female colleges.
- Better utilize the Resident Assistant Program.

- In addition to hiring diversity, we also need to work at retention. This goes hand in hand.
- Ask DM's that are struggling with Diversity numbers to develop a plan of action for FYE 03.
- Discuss recruiting/retention of diversity at the Regional Meeting.
- Increase female diversity by utilizing Resident Assistant Program.

WAL★MART

WAL★MART STORES, INC.
CORPORATE OFFICES
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DISTRICT
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CHERYL WILLS
DISTRICT ASSISTANT
4625 REDWOOD DRIVE
ROHNERT PARK,CA 94928

Upon entering the Management Training Program for Wal-Mart Stores, Inc., I hereby understand that I must be willing to transfer to any location within the Wal-Mart trading area, within the United States. I also understand that at the completion of my training program I will be asked to transfer to any Wal-Mart location where there is an opening for an Assistant Manager.

I, ______________________ fully understand and agree with the above statement concerning management transfers as it relates to the Wal-Mart Management Program.

Signature: ______________________

Date: ______________________

Witness Signature: ______________________

Witness Name Printed: ______________________

Date: ______________________

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF MARK BENDICK, JR., Ph.D. IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

Note: This Declaration is identical to my report titled "The Representation of Women in Store Management at Wal-Mart Stores, Inc." (January 6, 2003), (Exhibit 2 to my deposition of March 5, 2003), except that it has been placed in declaration form, and 10 corrections have been made. These 10 corrections are those listed in my memorandum to Joseph Sellers, Esq., dated February 22, 2003 (exhibit 3 to my deposition of March 5, 2003).

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I. Introduction

1. I am a principal in Bendick and Egan Economic Consultants, Inc., located at 4411 Westover Place, NW, Washington, D.C. 20016. I earned a Ph.D. in economics from the University of Wisconsin in 1975 and have engaged in the full-time practice of economics, specializing in employment and related issues, for approximately 30 years. I am the author, co-author, or editor of more than 100 pieces of scholarly research, including books, monographs, articles in refereed journals, and Congressional testimony. My resume is provided as Attachment A to this report.

2. Since 1980, my professional activities have included litigation on employment discrimination, including analysis of the availability of job-seekers in different demographic groups; processes for recruiting, hiring, training, assigning, evaluating, compensating, promoting, and discharging employees; voluntary and involuntary initiatives to manage demographically-diverse workforces; and monetary damages associated with denial or diminution of employment opportunities. Attachment B to this report lists the approximately 114 cases in which I have participated, representing both employers and employees. That list indicates that my expert testimony has been accepted in 14 federal courts and 7 state courts or administrative tribunals.

3. In the case of Dukes et al. v. Wal-Mart Stores, Inc., I was requested by plaintiffs' counsel to analyze the employment of women among employees, especially in-store management employees, at Wal-Mart, Inc.[1]

4. In preparing the analyses presented in this report, I have utilized modes of analysis, computational procedures, information sources, and standards of care identical to or comparable to those I use throughout my scholarly research, and I apply theories, models, concepts, reasoning, and assumptions that command general acceptance among my professional peers. I hold the opinions I present in this report to a reasonable degree of scientific certainty.

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[1] Unless otherwise noted, throughout this report, the phrase "Wal-Mart" refers to the entire firm Wal-Mart Stores, Inc. rather than the subset of the firm's retail establishments that operate under the Wal-Mart brand.

5. For my work in this case, I am being compensated at the rate of $225 per hour, plus out-of-pocket expenses.

6. In part, the present report represents an updated, refined version of my earlier report entitled *The Representation of Women among Managers at Wal-Mart: A Preliminary Analysis Based on EEO-1 Data* (June 2001). As in that previous report, in preparing the present report, I have relied on information available as of the date of this report. If at a future date this information is refined, corrected, or supplemented, I would like the opportunity to modify this report to reflect this additional information.

7. In preparing my analysis, I have reviewed the information sources listed in Attachment C to this report.

8. The core of the analysis presented in this report involves "EEO-1" data collected by the federal Equal Employment Opportunity Commission annually from large private employers. This mandatory survey covers all private sector establishments with 100 or more employees and documents the employment representation of different demographic groups, such as women, among 43 million employees in nearly 200,000 workplaces nationwide. As essentially a census of workers employed by the nation's largest firms, it is a widely used, authoritative source of information on employment patterns from which results are published annually by the EEOC.[2] EEO-

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[2] For general background on EEO-1 data, see the instructions, reporting form, and latest published data from this reporting system at www.eeoc.gov. See also Marc Bendick, Jr., *Using EEO-1 Data to Analyze Allegations of Employment Discrimination*, A Presentation to the Section on Labor and Em-

1 data are widely used by the EEOC and other EEO enforcement agencies to analyze employers' compliance with anti-discrimination laws, by researchers and public policy analysts to measure demographic patterns in the U.S. labor market, and by employers reviewing their employment practices and developing affirmative action or workforce diversity management initiatives.

9. At the time this report was prepared, the latest EEO-1 data released by the EEOC for use outside the Agency is for the year 2000, and only partial data has been released for that year.[3] Therefore, my primary focus for detailed analysis is the most recent year for which apparently complete data has been released, 1999.

II. Basic Facts about Wal-Mart Employment

10. Attachment D presents some basic facts about the Wal-Mart work force based on EEO-1 data for 2000.[4] As is well known, Wal-Mart is a very large firm – in fact, the largest private employer in

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[Footnote continued from previous page]

ployment Law, American Bar Association Annual Meeting, New York, July 10, 2000, at www.bendickegan.com.

[3] In releasing EEO-1 data for 2000, it appears that the EEOC deleted more data than it had deleted in releasing comparable data for 1999 and earlier years. In particular, a record for Wal-Mart's headquarters establishment was included in 1999 but not in 2000. Similarly, in 1999, separate records were provided for 3,026 Wal-Mart establishments but in 2000, for only 764 establishments.

[4] This attachment is based on data from the firm's company-wide "consolidated record," which appears to be complete for 2000, even if records for individual establishments are not.

the nation. According to the first table in Attachment D, in its EEO-1 data for 2000, the company reported 967,247 employees, and that figure was growing at an annual rate of 8.3 per cent. Not surprisingly for a retail firm, Wal-Mart's largest category of workers is Sales Workers accounting for 58.0 percent of all employees in 2000.

11. The firm's 43,489 managers in 2000 represented 4.5 percent of all its employees. EEO-1 data do not subdivide this category, so it is not possible to distinguish, for example, between senior executives and middle managers or, within stores, between store managers and assistant store managers. Hence, the present analysis examines only the representation of women among managers as a group, as Wal-Mart as defined them in filing its EEO-1 reports. It is my understanding that in store employees reported as in-store managers in Wal-Mart's EEO-1 data consist of salaried employees typically bearing the job titles of store manager, co-manager, or assistant manager.[5]

12. Attachment D also reveals that, in 2000, Wal-Mart employed 600,569 women company-wide, constituting 62.1 percent of its total work force. Within this total, women accounted for 63.4 percent

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[5] Unless otherwise noted, throughout this document, phrases such as "store managers" and "store management" refer to all in-store employees holding any of these titles, not just the one person within each store holding the title "store manager."

Wal-Mart's inclusion of assistant managers in the EEO-1 manager category and exclusion of support managers from that category is confirmed by the company in *Defendant's Answers and Objections to Plaintiffs' Second Set of Interrogatories*, September 13, 2002, Interrogatories 36 and 37.

of the firm's non-managerial employees and 33.6 percent of its managers.

III. Benchmarking Wal-Mart Against Comparator Companies

13. The analysis in this report involves "benchmarking" – that is, comparing – employment patterns in Wal-Mart to those of comparable large retail firms. The practice of benchmarking a company's performance against those of similar firms is a standard management technique used throughout the private sector, not only with respect to employment matters but also with respect to a variety of financial and operational concerns.[6] Applying this procedure to human resource management, companies very commonly participate in multi-firm salary information pools, read industry-wide surveys on fringe benefits, and study and adopt "best practices" in human resource management based on practices successfully implemented by other firms. Comparing

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[6] In one example of retail benchmarking selected almost at random, the website www.bizstatsw.com/realworld.htm reports three common measures of retail operations – average sales per square foot, gross profit margins, and inventory turnover – for Wal-Mart and other large retail chains such as Costco, Home Depot, and Nordstrom.

In another example also encountered almost at random, *The Wall Street Journal* (February 19, 2002), page A-2, reported findings from a nationwide study of consumer satisfaction conducted by the University of Michigan and the American Society for Quality. The article compared Wal-Mart's Stores scores in this study to Target discount stores, Target department stores, Nordstrom, Sears, Dillard's, JC Penney, May Department Stores, AAFES (Army and Air Force post exchanges), Kmart, and Federated Department Stores. It compared Sam's Club to Costco, Lowe's, and Home Depot.

the representation of different demographic groups in their own workforce to that in the workforces of comparator firms is a very common way for firms to estimate the expected representation of that group among its own employees, for example in preparing affirmative action plans or developing workforce diversity management initiatives.

14. Like virtually all large American corporations, Wal-Mart commonly engages benchmarking its human resource management practices and outcomes. In a deposition taken for this case, Mr. Coleman Peterson, Wal-Mart's Executive Vice President-People Division, described Wal-Mart's activities as follows:[7]

> Best practices, in my definition, . . . means to make efforts to really understand what practices, be they in finance or information systems or logistics or human resources, understanding what is it that people are doing in their businesses that seem to be successful processes of programs . . . We haven't done a benchmark at one of these companies and immediately run back and say hey, that's something we'll want to go and do. I do think what is helpful is to kind of reaffirm the areas of focus that they are working on, the challenges they are facing, things of that nature, are things that kind of reinforce. *Are we on the right track?* Are we looking at the right things? Are we working on the right

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[7] Deposition of Coleman Peterson taken December 18, 2002, p. 49 09:07 24 – p. 50 09:07 4; p. 52 09:10 12-20; p. 104 10:38 6-9, p.54 09:12 3-4; italics added.

> things? . . . It's kind of like running a race, okay. You look to the left or the right and just kind of have a feel for, you know, where other people are. It kind of encourages you to run faster . . . [Benchmarking] can be used interchangeably with the term best practices.

15. Continuing the description just quoted, Mr. Peterson identified large, nationwide retail chains as key comparators for Wal-Mart benchmarking, specifically mentioning Target, JC Penney, Home Depot, and Kmart as companies with which Wal-Mart has had discussions concerning employment best practices.[8] Mr. Peterson also discussed a presentation he had made to Wal-Mart's Board of Directors on August 15-16, 2001 that included an analysis of profit per employee in which Wal-Mart compared itself against 11 other large retail chains: Home Depot, Costco, Lowe's, Gap, Dollar General, Target, Sears Roebuck, Nordstrom, Dillard's, Kmart, and JC Penny.[9] Mr. Peterson also described an effort by Wal-Mart in 2000 to initiate an exchange of information on the demographic characteristics of their workforces among 15 of the largest retailers in the nation: Comp USA, Dayton Hudson, Home Depot, May Department Stores, Toys-R-Us, Circuit City, Costco, Dollar General, Dollar Tree, Kmart, Office Depot, Sears, Service Merchandise, Shopko, and Montgomery Ward.[10] In reporting to the Compensa-

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[8] Deposition of Coleman Peterson taken December 18, 2002, p. 51, 09:09 8-20.

[9] Deposition of Coleman Peterson taken December 18, 2002, p. 76, 09:53 1 – 09:57 9; Exhibit 4 to that deposition, p. 9.

[10] Deposition of Coleman Peterson taken December 18, 2002, p. 104 10:38 10-p. 105 10:39 13; Exhibit 6 to that deposition,

tion and Nominating Committee of the Wal-Mart Board on March 4, 1999, Mr. Coleman compared the demographic characteristic of the Wal-Mart workforce to that of all workers in the U.S. labor force and all workers in the retail industry as reported in EEO-1 data.[11]

16. In examining issues such as the demographic characteristics of a firm's workforce, benchmarking using comparator firms addresses the important issue of "labor supply" – the availability of persons in the demographic group being examined (here, women) who are interested in and qualified to hold the positions in question (here, Wal-Mart in-store management). The logic in benchmarking is that, if retail chains comparable to Wal-Mart are successfully employing women at some rate, then women are presumably available, interested, and qualified to hold comparable positions at Wal-Mart at a similar rate. Therefore, if the representation of women among store managers at Wal-Mart is substantially lower than at the comparator large retail chains, the cause of the "shortfall" is to be found in how Wal-Mart hires, trains, selects, assigns, treats, promotes, or retains women employees rather than lack of available, interested, qualified women job candidates.

[Footnote continued from previous page]

Bates WMHO 502704; WMH0510433 (also marked WMH051043); deposition of Rebecca Carter, a Wal-Mart Corporate Human Resources Analyst, taken June 13, 2002, WMH0160229.

[11] Deposition of Coleman Peterson taken December 18, 2002, Exhibit 6, WMHO 502704.

17. Wal-Mart itself has benchmarked the level of representation of women among its management employees. For example, through a memorandum to all division heads dated March 29, 1999,[12] the company compared itself to five large retail chains – Comp USA, Dayton Hudson, Home Depot, May Department Stores, and Toys-R-Us – and concluded that ". . . Wal-Mart's women in management percent (32.4%) is significantly behind several of the other retailers reporting (43.2% to 65.3%)." Using nationwide average EEO-1 data for 1997, this same report also concluded, ". . . Our Wal-Mart percent of women trails both the retail industry and workforce averages. . ."

18. Such benchmarking of Wal-Mart's representation of women among managers using five retail chains and simple nationwide averages represent a relatively crude benchmarking analysis. In this report, I refine Wal-Mart's procedures in three important ways:

- First, Wal-Mart's analysis was limited to data readily available to Wal-Mart: national averages published by the EEOC and data provided by five firms that had agreed to share workforce demographic information. My analysis begins by defining appropriate comparator firms as those large, multi-state retail chains that are widely recognized by Wal-Mart itself and by standard sources of business and financial information as comparable to Wal-Mart in such terms as products, services, market niche, size, scope, operational style, and expected financial and operational results. I then systematically search EEO-1 data to identify firms matching this definition. The approximately 20 comparator firms identified through this process represent a more comprehensive, more conceptual set of comparators than Wal-Mart itself sought out.

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[12] WMHO510430-WMHO510438.

o Second, Wal-Mart's analysis simply examined the representation of women among managers wherever they work within the company. My analysis separates Wal-Mart's retail stores from its other establishments, such as corporate headquarters and distribution centers, and I do the same for the 20 comparator firms. This separation allows more precise comparison of the representation of women in in-store managerial positions, which I understand to be the current focus of this case.

o Third, Wal-Mart's analysis simply examined the average representation of women among managers nation-wide. My analysis separately examines 375 local labor markets, thereby removing from the comparison differences between Wal-Mart stores and their comparators attributable to local labor markets where the participation of women in paid employment is higher or lower than the national average.[13]

All three of these refinements are designed to ensure that this benchmarking analysis presents an "apples to apples" comparison. In such a comparison, differences in the representation of women in management between Wal-Mart and its comparators can appropriately be attributed to differences in Wal-Mart's employment policies and practices, not flaws in the comparisons.

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[13] For example, in 2000, women accounted for 48.5 percent of the civilian labor force in Vermont but 43.4 percent in Utah (U.S. Bureau of the Census, *Statistical Abstract of the United States*, Table 572, at www.census.gov/statab).

19. To accomplish the first of these three refinements, I need to identify those firms that are appropriate comparators to Wal-Mart. As noted in paragraph 15 above, Mr. Peterson identified large retail chains as Wal-Mart's key comparators, and he repeatedly relied on data from such chains in his own work. Echoing this corporate positioning, Wal-Mart's 10K/A Annual Report to the Securities and Exchange Commission (SEC) for the fiscal year ended January 31, 2001, filed April 17, 2001, pages 4 and 6, states:

> Wal-Mart discount stores compete with other discount, department, drug, variety, and specialty stores, many of which are national chains. Wal-Mart Supercenters compete with other super-center type stores, discount stores, supermarkets, and specialty stores, many of which are national or regional chains. . . .the Wal-Mart Stores segment ranked first among all retail department store chains and among all discount department store chains. . . .[The SAM'S Club segment] competes with other warehouse clubs, as well as with discount retailers, wholesale grocers and general merchandise wholesalers and distributors.

20. Consistent with this description, in its 1999 EEO-1 report to the EEOC, Wal-Mart places itself in Standard Industrial Code (SIC) 53, General Merchandise Stores. This category encompasses de-

partment stores, variety stores, and miscellaneous general merchandise stores. Some EEO-1 reports filed for individual Wal-Mart's retail establishments place the establishment in SIC 531 (Department Stores), others in SIC 533 (Variety Stores), and still others in SIC 539 (Miscellaneous General Merchandise Stores).

21. Taking my lead from Wal-Mart's own description, I compare Wal-Mart to a set of large, multi-state chains of general merchandise stores identified by applying the following criteria to EEO-1 data for each year I examine: (1) The firm was not Wal-Mart; (2) the EEO-1 "parent company" record placed the firm in a retail industry other than eating and drinking places: Standard Industrial Codes (SIC) 52, 53, 54, 55, 56, 57, or 59; and (3) the parent company had at least 100 separately-reporting establishments in the General Merchandise Stores industry (SIC 53).

22. In 1999, 20 firms met these criteria and are used as comparators.[14] Selected characteristics of these 20 firms, as of 1999, are reported in the following table:

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[14] In earlier years, the number of comparator large retail chains varies somewhat: 21 in 1998, 22 in 1997, 23 in 1996, 18 in 1995, 15 in 1990, 19 in 1985, 18 in 1980, and 14 in 1975

Firm	SIC for the Parent Company	Industry for the Parent Company	Total Employees	Establishments Nationwide
A	531	Department Stores	279,255	1,168
B	531	Department Stores	271,171	2,111
C	531	Department Stores	264,581	1,254
D	569	Misc. Apparel & Accessories Stores	190,063	1,030
E	531	Department Stores	150,942	415
F	531	Department Stores	133,906	434
G	531	Department Stores	85,421	356
H	531	Department Stores	63,285	340

I	565	Family Clothing Stores	58,228	214
J	539	Misc. General Merchandise Stores	54,845	247
K	539	Misc. General Merchandise Stores	54,171	336
L	531	Department Stores	37,152	244
M	531	Department Stores	37,039	297
N	531	Department Stores	34,600	391
0	531	Department Stores	18,837	167
P	531	Department Stores	15,895	198
Q	539	Misc. General Merchandise Stores	15,693	187
R	531	Department Stores	14,512	109
S	539	Misc. General Merchandise Stores	12,943	102

T	531	Department Stores	10,547	105
Wal Mart	**533**[15]	**Variety Stores**	**887,383**	**3,027**

23. Because the EEO-1 data publicly released by the EEOC do not include firms' names, I do not individually identify firms A through T by name. However, standard analyses of Wal-Mart repeatedly mention a limited number of large firms as Wal-Mart's direct counterparts. In its 2001 "Fortune 1000" list of the nation's largest firms, Fortune magazine places Wal-Mart in the category of "General Merchandise Stores" with 15 other companies: Sears Roebuck, Kmart, Target, JC Penny, Federated Department Stores, May Department Stores, Dillard's, Saks, Kohl's, Nordstrom, Dollar General, Ames Department Stores, Family Dollar Stores, Belk, and Value City. The online investment guide Forbes.com places Wal-Mart in the "retail/stores/discount" group and compares it to: Ames Department Stores, Big Lot, Bradlees, Dollar General, Dollar Tree, Duckwall-Alco Stores, Family Dollar Stores, Freds, Kmart, Liquidation World, Mazel Stores, 99 Cents Only Stores, Shopko Stores,

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[15] Individual Wal-Mart retail establishments that variously report themselves in SIC 531 (Department Stores), 533 (Variety Stores), or 539 (Miscellaneous General Merchandise Stores) do not appear to be distinct from each other in obvious ways. For example, in 1999, total employees per store averaged 294 for those in SIC 531, 272 in SIC 533, and 284 in SIC 539, all within a few percentage points of each other. Moreover, between 1996 and 1999, more than 700 Wal-Mart establishments changed their SIC one or more times.

Denninghouse, Target, TJX Companies, Toys-R-Us, and Value City. The on-line business information system Hoovers.com lists Wal-Mart's top three competitors as Costco, Kmart, and Target. Many of these same firms appear in Mr. Peterson's description of Wal-Mart's own benchmarking, discussed in paragraphs 15 and 17 above. I am confident that the comparator firms in my EEO-1 analyses substantially overlap these lists.

24. The second refinement listed in paragraph 18 is to subdivide the 3,027 establishments for which Wal-Mart's provided separate EEO-1 reports in 1999 into six mutually- exclusive groups, so that they can be benchmarked separately:

o Corporate headquarters (1 Wal-Mart establishment), identified as the firm's headquarters in the company's EEO-1 report.

- Stores (2,909 Wal-Mart establishments), in which more than 50% of each establishment's staff are Sales or Service Workers.[16] [17]

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[16] 2,837 of the Wal-Mart establishments that I categorize as stores are reported by Wal-Mart in some category within SIC 53, the General Merchandise Stores industry. 71 other Wal-Mart establishments that I categorize as stores are reported by Wal-Mart in SIC 421, Trucking and Courier Services. My justification for counting such establishments as retail stores is that their staffing reported in 1999 EEO-1 data are very similar to other Wal-Mart stores and entirely unlike other establishments in Trucking and Couriers Services industry, as the italicized rows in the following table show:

Job Group	Other Wal-Mart "Stores"	Wal-Mart "Stores" Establishments in SIC 421	SIC 421 Not Wal-Mart
Managers	3.6%	3.5%	6.5%
Professional	1.0%	0.9%	1.9%
Technical	0.0%	0.0%	0.6%
Sales	**64.1%**	**64.0%**	**1.8%**
Clerical	4.3%	3.8%	7.4%
Craft	8.5%	9.6%	5.0%
Operatives	***0.6%***	***0.0%***	***46.0%***
Laborers	15.8%	17.1%	30.3%
Service	2.2%	1.0%	0.6%
TOTAL	100.0%	100.0%	100.0%

The 72nd Wal-Mart establishment from outside SIC 53 that I call a "store" was reported in SIC 549, Miscellaneous Food Stores.

[17] In describing its retail operations, Wal-Mart often distinguishes its Wal-Mart operating segment from its SAM's Clubs

o Non-Store Establishments—Managerial / Professional (4 Wal-Mart establishments), in which more than 50% of employees are Officials and Managers or Professionals.

o Non-Store Establishments—Blue Collar (72 Wal-Mart establishments), in which more than 50% of employees are Craft Workers, Operatives, or Laborers.

o Non-Store Establishments—Other (41 Wal-Mart establishments), which fall into none of the previous four categories.

o Employees not Locationally-Identified These employees appear in the firm's count of all employees but not in any of the establishments for which a separated EEO-1 report has been filed.

25. The third refinement listed in Paragraph 18 is to replace Wal-Mart's comparisons of national averages with more precise comparisons between Wal-Mart and its comparators in local labor markets across the nation.

26. The diagram in Attachment E illustrates my procedure for analyzing each local labor market, using 1999 EEO-1 data for the Bakersfield, California Metropolitan Area as an example. The diagram

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[Footnote continued from previous page]

segment or refers to other categories of retail establishments such as Supercenters or Neighborhood Markets. I have not subdivided Wal-Mart "stores" into such categories for two reasons. First, I could not readily assign Wal-Mart stores for which I had a separate EEO-1 reports to segments based on information in their EEO-1 reports (such as employees per store; see footnote 15). Second, I could not readily assign the individual establishments of comparator chains to comparable categories.

reports that, in the Bakersfield area in 1999, Wal-Mart operated four stores (represented by shaded bars), while its comparator chains operated 18 stores (represented by white bars). At the Wal-Mart stores, the proportion of women among managers ranged from 0.0 percent to 25.0 percent, while at the comparators, it ranged from 0.0 percent to 83.3 percent. If Wal-Mart had utilized women as managers in its four stores at the same rate as the average of those 18 comparators stores which was 54.7 percent, then Wal-Mart would have employed 14.6 more women managers in the Bakersfield area in 1999 than it actually did. More conservatively, if Wal-Mart had utilized women among managers at the same rate as they were utilized in the total "large chain general merchandise industry" in the Bakersfield area – the 18 comparator stores plus the four Wal-Mart stores – then Wal-Mart would have had 12.0 more women managers in the Bakersfield area than it actually did. Throughout this report, I present figures such as this latter one as my conservative estimate of Wal-Mart's shortfall in women managers.[18]

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[18] Inclusion of Wal-Mart establishments in the standard of availability against which Wal-Mart's employment is compared implicitly corresponds to the conservative assumption that the only persons available to enhance Wal-Mart's number of female managers are women who have demonstrated their interest and ability to perform as Wal-Mart store managers by already being employed in comparable positions at Wal-Mart's comparator firms. The alternative way of calculating shortfall, in which Wal-Mart is compared against the level of utilization at its comparators excluding itself corresponds to an assumption that the sources from which Wal-Mart could expand its number of female store managers are broader, so that Wal-Mart shortfall could be reduced without reducing the number of women managers at the comparator firms. These more diverse sources

27. To develop my estimate of Wal-Mart's shortfall nationwide, I first compute the shortfall in each local labor market in which Wal-Mart and at least one comparator operate retail stores. In analyzing EEO-1 data for 1999, I made such comparisons for 375 separate locations, including 327 Metropolitan Statistical Areas as defined by the U.S. Census Bureau (for example, the Bakersfield, California Metropolitan Area) and 48 "balance of states" (the areas within each state outside all Metropolitan Statistical Areas).

IV. Wal-Mart's Shortfall of Women in Store Management in 1999

28. Attachment F presents, in its column (m), the estimate of Wal-Mart's shortfall in female managers in 1999 that emerges when the procedure illustrated for Bakersfield is applied company-wide. Row (2) of this table focuses specifically on managers employed within the 2,909 Wal-Mart establishments I have identified as retail stores.[19] According to this table, *in 1999, Wal-Mart had a shortfall of 4,004 female in-store managers*, compared to the expected number based on the representation of women among in-store managers in the large chain retail

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[Footnote continued from previous page]

might include hiring new women Wal-Mart managers from outside the large chain retail industry. Most prominently, however, it includes promoting women to Wal-Mart management from among non-managerial Wal-Mart employees. According to the Wal-Mart annual report 2002, page 6, "More than 60 percent of our store managers were 'grown' through the Wal-Mart organization, starting as store Associates."

[19] See paragraph 24 above.

industry consisting of Wal-Mart itself and 20 comparator large retail chains.

29. Column (q) of the table presents a second, alternate estimate of Wal-Mart's shortfall in female in-store mangers, based on a benchmark that includes the 20 large comparator chains but not Wal-Mart itself. As in the Bakersfield example, this alternative estimate is larger than the estimate based on a benchmark including Wal-Mart itself. Row (2) of the table reports a total shortfall in column (q) of 6,445 female managers, 61.0 percent more than the shortfall of 4,004 reported in column (m).

30. The first, more conservative of these two estimates, – 4,004 female in-store managers – can be restated several different ways. First, while Wal-Mart actually employed about *seven* women out of every 20 in-store managers, it would be expected to have employed *ten*. Second, for every *seven* women managers Wal-Mart actually employed, *three* additional women managers were "missing."

31. One reason that this estimated shortfall is so large is that Wal-Mart is such a large employer that even a modest percentage difference in female representation would generate a large shortfall; as row (2) of column (d) of the table in Attachment F reports, in 1999, Wal-Mart employed 29,462 in-store managers.[20] However, Wal-Mart's *size* is not the only source of this large shortfall. Columns (i)

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[20] As previously noted in footnote 5, the term "in-store managers" here refers not to the one individual per store bearing the title store manager but all salaried Wal-Mart in-store managerial personnel, including store managers, co-managers and assistant managers.

through (k) of the table report that the percentage difference between the representation of women among managers at Wal-Mart and its comparators is itself very large: across all Wal-Mart retail stores in 1999, the difference is *22.0 percent of all Wal-Mart in-store managers* – the gap between Wal-Mart's in-store managerial workforce with 34.5 percent women and its comparators' corresponding 56.5 percent.

32. Could a shortfall as large as 4,004 have arisen by chance alone? In many research contexts as well as legal proceedings, a figure such as this shortfall is considered "statistically significant," and therefore not attributable to chance, if the figure corresponds to a number larger than two to three when translated into statisticians' units called "standard deviations." In the present case, column (o) of row (8) of Attachment Three reports that a shortfall of 4,004 corresponds to 47.0 standard deviations, much larger than two to three. Indeed, this figure is so large that the probability that this result could be due to chance alone would be written with several hundred zeros after the decimal point, reflecting a probability very many times less than one chance in many billions. A shortfall as large as 4,004 definitely did not arise by chance alone.

V. Is this Shortfall Attributable to Differences in Reporting?

33. When Wal-Mart conducted its own benchmarking, it also observed a shortfall in its female managers. However, the company discounted the meaningfulness of its own comparisons. As the company's most senior human resources executive, Mr. Peterson, stated in his deposition, ". . . [T]he reason it's so difficult to compare apples to oranges is that a number of the comparators we are looking at put de-

partment managers in their management category when they are talking about performance. And had we [Wal-Mart] put department managers in these numbers we would be almost without exception better than every last one of the retailers that is reflected here."[21]

34. Mr. Peterson bases his statements about the comparator firms' reporting practices on his long experience in the retail industry, including 16 years as a senior human resource executive at the May Company;[22] May Company operates department stores, where, according to Mr. Peterson, including department managers in the EEO-1 category of managers is common practice.[23] In addition, Mr. Peterson had held discussions with various comparators firms over the years, including Target, Kmart, and Home Depot.[24]

35. Apparently, Mr. Peterson believes that even large differences in the representation of women among in-store managers can be explained by differ-

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[21] Deposition of Coleman Peterson taken December 18, 2002, p. 107 10:41 6 – 10:42 12.

[22] Deposition of Coleman Peterson taken December 18, 2002, p. 125 11:16 9 – 11:17 15.

[23] Deposition of Coleman Peterson taken December 18, 2002, p. 128, 11:20 9 – 11:20 16.

[24] Deposition of Coleman Peterson taken December 18, 2002, p. 111 10:46 2 — 10:47 24. These discussions appear to have focused on whether department managers in the retail industry should be classified as hourly or salaried employees for purposes of the wages and hours laws, rather than specifically on their classification in EEO-1 reports. The two issues are potentially related but not identical.

ences in firms' reporting practices. For example, in his deposition, he was asked to comment on a comparison, which he had presented to the Wal-Mart Executive Committee, in which the Target Corporation was estimated to have 52 percent women among its managers, compared to 33 percent for Wal-Mart.[25] Mr. Peterson replied that, although the Target discount stores owned by the Target Corporation were similar to Wal-Mart in terms of their product lines and store size,[26] the figure for Target Corporation was high because it included data from department stores operated by the Target Corporation, not just Target discount stores, [27] and such department stores tended to report department managers as managers, while Wal-Mart does not. Because of such differences in reporting, Mr. Peterson felt that such a comparison, ". . . absolutely positively . . ." does not fairly reflect what should be conveyed about the relative performance of Wal-Mart and its comparators.[28]

36. To test whether Mr. Peterson's rejection of these comparisons make sense, I calculated the av-

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[25] Deposition of Coleman Peterson taken December 18, 2002, p. 124 11:15 11-22. This comparison appears in a memorandum tiled "Equal Opportunity at Target," dated December 20, 2000 from Cole Peterson to the Wal-Mart Executive Committee (WMH0512710).

[26] Deposition of Coleman Peterson taken December 18, 2002, p. 126 11 18 17-11 18 23.

[27] According to www.hoovers.com, among Target Corporation's 1,475 retail stores, about 75 percent are discount stores (Target and related brands), while 25 percent are department stores (Mervyn's and Marshall Fields).

[28] Deposition of Coleman Peterson taken December 18, 2002, p. 106 10:40 8-17.

erage number of managers per store reported in EEO-1 data for 1999 by Wal-Mart and each of the 20 comparator chains. Among the 20 comparators, this figure averaged 10.2 managers per store, almost identical to Wal-Mart's 10.1 managers per store. Wal-Mart appeared "right in the middle of the pack," reporting a larger number of managers per store than 11 of the chains and a smaller number than 9 of them. Some comparators reported as few as 3.7 managers per store, strongly suggesting they were not reporting as Mr. Peterson claimed. However, one comparator reported 23.6 managers per store, suggesting that it might be doing what Mr. Peterson described.

37. To take account of this consideration, I performed the benchmarking comparisons documented in Attachment G. In section A of Attachment G, I divided the 20 comparators into groups with a similar number of managers per store and total employees per store. In section B, I divided the 20 comparators into groups with a similar number of managers per 100 non-managerial employees and total employees per store. I then benchmarked Wal-Mart against only those comparator chains that closely matched Wal-Mart on these measures, ignoring comparators that appeared possibly to be defining in-store management more broadly or more narrowly than Wal-Mart. In both section A and section B of the attachment, the same two comparator chains turned out to be the most direct matches to Wal-Mart.[29]

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[29] In terms of managers per store, one chain's 9.1 and other's 12.3 put them in the same category as Wal-Mart's 10.1. In term of total employees per store, one chain's 195 employees and the other's 232 put them in the same category as Wal-Mart's 279.

38. The representation of women among in-store managers at these two closely matched comparator chains averaged 57.4 percent, a figure 22.9 percentage points higher than Wal-Mart's 34.5 percent. Thus, closely matching comparators to Wal-Mart in terms of apparent EEO-1 practices did not eliminate Wal-Mart's very large shortfall of women in-store managers, as Mr. Peterson implied it would.

39. In fact, it did the opposite. The 57.4 percent benchmark based on the two closely matching chains is 1.1 percentage points *higher* than the benchmark representation of females among in-store managers based on all 20 comparator chains, which was 56.3 percent. Increasing the benchmark to 57.4 percent benchmark increases the estimated shortfall of women in-store managers in 1999 to 4,328.[30]

40. In his deposition, Mr. Peterson stated, "[H]ad we [Wal-Mart] put department managers in these [in-store manager] numbers we would be almost without exception better than every last one of the retailers that is reflected here."[31] This statement

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[Footnote continued from previous page]

In terms of managers per 100 employees, one chain's 4.9 and other's 5.6 put them in the same category as Wal-Mart's 3.8.

One reason Wal-Mart has fewer in-store managers per store than both these comparators is that Wal-Mart's managerial system assigns a much higher proportion of the firm's managers to its headquarters in Bentonville, Arkansas than their comparators place at their headquarters; see Section X, below.

[30] 1.1 percent of 29,462 in-store managers is 324 persons. 4,004 + 324 = 4,328.

[31] Deposition of Coleman Peterson taken December 18, 2002, p. 107 10:41:6 – 10:42:12.

is equivalent to a frank concession by Mr. Peterson that Wal-Mart's employment exhibits a very strong "glass ceiling" for women at the department manager level. A glass ceiling is signaled by a sharp decrease in the representation of women from one level in a hierarchy to the next one up. The only way that inclusion of department managers could raise a Wal-Mart 34.5 percent representation of women managers to the comparators' 56.3 percent is if the representation of women among Wal-Mart's department managers is well above 56.3 percent and therefore far above Wal-Mart's 34.5 percent representation among assistant managers/co-managers/store managers.

41. In any case, for Wal-Mart to add its department managers to its other in-store managers and then compare the results to in-store manager figures reported by other retailers is clearly inappropriate benchmarking, mixing apples and oranges. Such a procedure would make sense only if the practice of including department managers was widely or universally practiced by the comparators. Mr. Peterson himself asserted only that "some" of the comparators follow the practices, and our data analysis suggests that their number is probably not large. For example, in 1999, only four of the 20 comparator chains reported 15 or more managers per store. The chain that reported 23.6 managers per store appears to be more of an isolated instance rather than typical of the industry as a whole.

VI. Consistency of Shortfall Nationwide

42. The 2,909 retail stores that Wal-Mart reported on in its 1999 EEO-1 data were located in

hundreds of locations in all 50 states.[32] Is the firm's shortfall in female managers limited to only some of these locations, or is it universal across the nation? This question is addressed in Attachment H.

43. One piece of information relevant to this question is provided in column (h) of that attachment. There, I report that in 1999, a shortfall in female managers was present in 79.5 percent of all Wal-Mart stores, some 2,314 stores.[33] With shortfall present in four out of five stores, it is virtually impossible for the pattern to be geographically localized.

44. A more refined way to examine this question is to tabulate shortfall separately for each of the 50 states. This is done in column (g) of Attachment H, which reports state-by-state shortfall for 1999. The column reports shortfall in 49 of the 50 states.[34] The largest shortfalls are found in Texas (473 "miss-

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[32] Wal-Mart had no stores in the District of Columbia.

[33] If the difference in female managers between Wal-Mart and its comparators were due to chance alone, we would expect that 50 percent of Wal-Mart stores would have a shortfall and 50 percent would not. What is the probability that, in a sample of 2,909 stores, we would observe a number as high as 79.5 percent if the true probability of a shortfall was 50 percent? That probability is so small that it would be written with 236 zeros after the decimal point, corresponding to 32.9 standard deviations. Thus, this difference is clearly not due to chance alone.

[34] In the only exception, Vermont, Wal-Mart operated four stores, the smallest number in any state in the nation. Shortfall of women in management arose in two of the four stores, and the statewide representation of women among managers exceeds the expected number by a fraction of one person.

ing" female in-store managers), Florida (322), and California (276).

45. Column (h) of Attachment H also reports that the proportion of stores with a shortfall in women managers is at least 50 percent in every one of the 50 states. The proportion ranges from 100 percent (in Rhode Island and North Dakota) to 50.0 percent (in Vermont). Attachment I tabulates Wal-Mart stores' shortfall in female managers in 1999 by a different geographical dimension – whether stores are located inside or outside of Metropolitan Areas defined by the U.S. Census Bureau. I examine this question separately in each of the four large regions into which the Census Bureau divides the United States: Northeast, Midwest, South and West. According to column (g) of the attachment, substantial shortfall is found both inside and outside Metropolitan Areas in all four of these Census regions. Furthermore, according to column (h) of the attachment, the proportion of stores with shortfall is well above 50 percent both inside and outside Metropolitan Areas in every region.

46. As noted in paragraph 27 of this report, overall counts of shortfall, such as are presented in Attachments H and I, total the results of comparisons between Wal-Mart stores and comparators conducted separately for 375 local labor markets located across the country. Attachment E presented one example of a local comparison, for Bakersfield, California. To illustrate the point that under-representation of women among Wal-Mart in-store managers is not limited geographically, Attachment J provides four additional examples of local-area comparison demonstrating Wal-Mart under-representation, each drawn from a different major region among the four into

which the Census Bureau divides the nation. An example from Portland, Maine, is provided to represent the Northeast. It is joined by Eau Claire, Wisconsin (Midwest), Fayetteville-Springdale-Rogers, Arkansas (South),[35] and Pueblo, Colorado (West).

47. In all four graphs, the shaded bars representing Wal-Mart stores are closer to the left axis of the graph than all, or nearly all, of the white bars representing comparators. The closer to the left axis a bar is located, the smaller the proportion of managers in that store who are women.[36] The four graphs in Attachment J demonstrate that examples of clear Wal-Mart–comparator differences in the rep-

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[35] Wal-Mart's headquarters in Bentonville, Arkansas is located within the Fayetteville-Springdale-Rogers Metropolitan Area. However, because the only establishments included in the graphs in Attachment J are retail stores; data from headquarters are not included.

[36] The four graphs correspond to the following numbers:

Census	Illustrative	Wal-Mart	Comparator	Female % of Managers		Conservative
Region	Local Area	Stores	Stores	Wal-Mart	Comparators	Shortfall
Northeast	Portland, ME	3	7	17%-40%	33%-78%	5.9
Midwest	Eau Claire, WI	2	9	38%-45%	50%-88%	4.3
South	Fayetteville, AR	13	6	0%-40%	20%-91%	19.8
West	Pueblo, CO	3	8	11%-30%	40%-83%	7.6

resentation of women among managers can be found in widely-separated locations in the nation.

VII. Similar Shortfalls in Wal-Mart's Non-Store Establishments

48. It is my understanding that the focus of this case is the representation of women among managers in Wal-Mart's retail stores, not its headquarters or other non-retail establishments such as distribution centers. Nevertheless, Attachment F includes a benchmarking analysis for Wal-Mart's non-retail establishments parallel to that reported in paragraphs 28 and 29 for its retail establishments. I do so because patterns of employment of women throughout an organization can suggest whether a shortfall in female employment observed in part of the organization – such as retail stores – reflects attitudes and practices pervasive throughout the company and deeply embedded in the organization's corporate culture,[37] or isolated or transitory happenstance.

49. Attachment F presents an estimate of Wal-Mart shortfall in 1999 of females among managers for each of the six categories of establishments defined in paragraph 24 of this report: corporate headquarters (row 1); retail stores (row 2); 4 managerial/professional non-store establishments (row 3); 72 "blue collar" non-store establishments (row 4); 41

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[37] An organization's corporate culture is defined as the interdependent system of beliefs, values, and ways of behaving that are common to a workplace. Less formally, it is simply, "the way things are done around here." See Marc Bendick, Jr., and Mary Lou Egan, *Changing Workplace Cultures to Reduce Employment Discrimination*, A Presentation to the Conference on Low Wage Workers in the New Economy, Washington DC, May 2000, at www.bendickegan.com.

other non-store establishments (row 5); and the set of Wal-Mart employees reported in corporate total employment but not allocated to a specific establishments (row 6). According to column (m) of the table, in 1999, Wal-Mart had a shortfall of women among managers in all six categories, including a shortfall of 466 women managers at corporate headquarters, 144 at managerial/professional non-store establishments, 144 in "blue collar" non-store establishments, 107 in other non-store establishments, and 97 among employees outside separately-reporting establishments. According to column (o), each of these shortfalls is "statistically significant," at a level between 6.7 and 15.9 standard deviations.

50. These findings are clearly inconsistent with an interpretation of Wal-Mart's shortfall in women managers as isolated to any particular part of the corporation. Instead, they suggest that Wal-Mart's shortfall of women among in-store managers reflect the firm's company-wide corporate culture and attitudes, perceptions, policies and practices that embody that culture.

VIII. Persistence of Shortfall, 1975-2002

51. A second indicator that under-representation of women in management is deeply rooted in an organization's corporate culture is that the pattern has persisted over time. Attachment K repeats the benchmarking analysis for Wal-Mart in-store managers for every year from 1998 through 1995 and every fifth year from 1995 to 1975.

52. According to column (g) of the table in Attachment K, Wal-Mart had a shortfall of female managers in its retail stores in every year examined, ranging from 4,004 in 1999 (when Wal-Mart was a nationwide retailing giant with 2,909 stores) to a

shortfall of 168 in 1975 (when Wal-Mart was a relatively modest chain with 106 stores). Dividing these shortfalls by the number of stores operated by Wal-Mart in each year demonstrates that the shortfall per store has remained quite stable for nearly a quarter century – 1.6 per store in 1975, 1.4 per store 24 years later.

53. Underlying these persistent shortfalls is the persistent gap between the representation of women among managers at Wal-Mart and its comparators, expressed in percentage terms. The graph in Attachment K makes clear that, although Wal-Mart's representation of women among in-store managers has increased over time, the representation at its comparators has also increased over the same period, and Wal-Mart has never caught up. In the graph, a large and persistent gap is clearly visible between the comparators' line (marked by **c**'s) and Walmart's line (marked by **w**'s). Most dramatically, the **w** representing Wal-Mart in 1999 stands at 34.5 percent and thus is lower than the **c** representing the comparators in 1975, 38.4 percent. That is, in 1999, Wal-Mart had not yet achieved the level of representation of women among managers in its stores that was common to its comparators a quarter of a century earlier.

54. Such long-term persistence is further evidence that the shortfall in female employment observed in 1999 reflects attitudes and practices deeply embedded in the organization's corporate culture.

55. If Wal-Mart's employment of women managers continues to converge to that of its comparators at the same rate it has over the past quarter century, 1999's gap in in-store managers between Wal-Mart and its comparators will require about

29.5 years to disappear.[38] Thus, assuming past historical tends continue in the future, the Wal-Mart and comparator lines in the graph would converge sometime in 2028.

56. However, this estimate is almost certainly far too optimistic. The .75 rate of closure of the gap between Wal-Mart and its comparators is based on all years from 1975 through 1999. In the more recent years within that period, the rate of closure has slowed dramatically. Between 1990 and 1999, it fell to .6 percentage points per year, and between 1995 to 1999, to .25 percentage points per year. At that final rate, convergence between Wal-Mart and its comparators would take about 88 years.

57. If the EEOC follows its historic schedule for releasing EEO-1 data, information for 2002 will not be available from the EEOC until late 2003. However, I can conservatively estimate Wal Mart's shortfall of female in-store managers in 2002 by combining several pieces of information. First, according to the more conservative estimate presented in Attachment F, Wal-Mart's shortfall of female in-store managers in 1999 was 4,004. Second, according to Wal-Mart's annual report for 2002, the company's total employment in 2002 was 1,383,000, or 152.0 percent of the company's employment of 910,000 in 1999. Third, assuming the optimistic .75 percentage points per year rate of closure in the gap in female in-store management representation between Wal-

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[38] The percentage gap between Wal-Mart and its comparators took 24 years to reduce by the17.9 percentage points between 39.9 percent and 22.0 percent. To eliminate the remaining 22.0 percentage points at this closure rate of .75 percentage points a year would require about 29.5 years.

Mart and its comparators continued through 2002, the percentage gap would decline by about 2.24 percentage points between 1999 and 2002, leaving it at 89.8 percent of its 1999 level.[39] Multiplying 4,004 by 1.52 and then by .898 yields a conservatively- estimated shortfall in 2002 of 5,465 female in-store managers.

IX. An Estimate of Shortfall Based on Internal Workforce

58. One striking characteristic of Wal-Mart's in-store work force is the difference between the representation of women among the company's managers and its non-managerial employees (sales workers, craft workers, operatives, service workers, and others). As Attachment D reported, at Wal-Mart in 2000, women accounted for 33.6 percent of the company's managers and 63.4 percent of its non-managerial employees.[40] The ratio of these two proportions – 33.6/63.4 – is 53.0. I call this ratio the female manager-to-non-manager ratio, and it means that, across Wal-Mart, females are found in managerial positions at a little more than half the rate they are found among non-managers. Looking at the other side of the same coin, in 2000, men accounted for 66.4 percent of Wal-Mart managers and 36.6 percent of its non-managers, for a male manager-to-non-manager ratio of 181.4. The difference between 53.0 and 181.4 clearly signals major differences in the employment of women and men at Wal-Mart.

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[39] (22.0-2.24)/22.0 = 89.8

[40] Attachment D is based on Wal-Mart employees company-wide, not just in retail stores.

59. In Attachment L, I compute the female manager-to-non-manager ratio for multiple years, both for Wal-Mart and its comparator firms, restricting this computation to staff employed within retail stores. According to columns (d) and (g) of the attachment, at Wal-Mart in 1999, the female manager to non-manager ratio was 51.7, while at comparator stores, it was 76.7. If Wal-Mart had achieved the same female manager-to-non-manager ratio as its comparator firms, it would have had 4,911 more in-store female managers than it actually employed that year. The figure, an alternative estimate of Wal-Mart's shortfall in 1999 of women in in-store management, falls between the two estimates of in-store shortfall presented in Attachment F (4,004 female in-store managers under a benchmark which includes Wal-Mart and 6,445 under a benchmark which excludes Wal-Mart).

60. Under-representation of women among in-store managers at Wal-Mart cannot be explained by an absence of women among non-managerial Wal-Mart store employees from whom employees might be promoted. Wal-Mart's in-stores non-managerial staff is almost as female as its comparators (in 1999, 66.7 percent at Wal-Mart versus 73.7 percent at the 20 comparators). Instead, the estimate in paragraph 59 suggests that Wal-Mart's shortfall reflects Wal-Mart's lesser success than its comparators in hiring, identifying, developing, and promoting managerial talent among its non-managerial female employees. As noted in footnote 18 of this report, according to the Wal-Mart annual report 2002, more than 60 percent of Wal-Mart store managers had first joined the firm as non-managerial employees. It appears that Wal-Mart is far less likely to provide such upward mobility for its female employees, and far more likely

to provide it for its male employees, than the benchmark experience of 20 large retail comparator chains lead us to expect.

61. The estimated Wal-Mart shortfall of 4,911 in-store female managers in 1999 appears in the first row of column (g) of Attachment L, followed by parallel estimates for earlier years.

62. The graph presented in Attachment L traces the gap in female manger-to-non-manager ratios between Wal-Mart and its comparators over the past quarter century. In this graph, a large and persistent gap is clearly visible between the comparators' line (market by **c**'s) and Walmart's line (marked by **w**'s). Most dramatically, the **w** representing 1999 stands at 51.7 and thus is lower than the **c** for 1975, which was 54.0. Thus, in 1999, Wal-Mart had not yet achieved the female manager-to-non-manager ratio that was typical of its comparators 24 years earlier.[41]

X. Wal-Mart's Management Centralization

63. Various findings in this report document striking consistency in Wal-Mart's employment patterns across locations, types of establishments, and over time. As noted in paragraphs 50 and 54 above, this consistency suggests a strong "corporate culture" that is both perpetuated by and reflected in employment policies and practices that are common company-wide. Attachment M uses EEO-1 data to test for the presence of centralized managerial control

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[41] Assuming the gap between Wal Mart and its comparator continues to close at the same rate as between 1975 and 1999 the remaining gap will require about 22 years to eliminate.

more directly, by comparing the extent to which Wal-Mart and its comparator large retail chains centralize their managerial staff at their respective corporate headquarters.

64. The attachment presents a table reporting "management centralization ratios," which are simply the proportion of all managers in a firm's company-wide EEO-1 report who are located at the company's headquarters. According to columns (d) and (g) of the table, for Wal-Mart in 1999, that figure was 15.4 percent, while at Wal-Mart's comparator firms in the same year, the ratio averaged 8.1 percent, about half as large.

65. Wal-Mart's practice of locating an unusually large fraction of its managers at its corporate headquarters is not restricted to 1999. Columns (d) and (g) of the table in Attachment M report that Wal-Mart's managerial centralization ratio has remained between two and three times that of its comparators in every year examined since 1975. This difference is illustrated in the graph that follows the table, which shows a large and persistent gap between the comparators' line (market by **c**'s) and Wal-mart's line (marked by **w**'s). The persistence of this pattern is particularly striking in that it occurred over a period in which Wal-Mart grew from a modest-sized chain of 106 stores in 1975 to its present scale of nearly 3,000 stores.

XI. Summary and Conclusions

66. In his description of benchmarking quoted in paragraph 14 of this report, Wal-Mart's Executive Vice President-People Division Coleman Peterson stated that benchmarking helps a company determine, "*Are we on the right track?*" When Wal-Mart benchmarked the representation of women among its

in-store managerial employees, evidence of substantial under-representation warned that the firm was *not* on the right track. After carefully refining, expanding, and updating that benchmarking in the ways discussed in report, I conclude that warning was correct.

67. Specifically, based on the analyses presented in paragraphs 10 through 66 of this report, I reach thirteen conclusions supporting this general finding:

o Conclusion One: The representation of women among in-store managers in Wal-Mart is substantially smaller than would be expected based on the availability of qualified, interested women in the local labor markets in which Wal-Mart operates store, as measured by the utilization of women in in-store management in those labor markets by large retail chains widely recognized as comparable to Wal-Mart.

o Conclusion Two: In 1999 – the year for which I have the most recent complete data – a conservative estimate of the extent of this shortfall is 4,004 female in-store managers.

o Conclusion Three: Reasonable alternative estimates of this shortfall in 1999 include: 6,445 female in-store managers (based on the same method as the conservative estimate but excluding Wal-Mart itself in setting the benchmark), 4,911 female in-store managers (based on benchmarking Wal-Mart's managerial/non-managerial employee ratios), and 4,328 (based on comparing Wal-Mart to the two comparator chains most closely matching it in terms of managers per store).[42]

- o Conclusion Four: When conservatively updated to 2002, the conservatively estimated shortfall of 4,004 women in-store managers increases to 5,465.

- o Conclusion Five: Because the rate at which comparator firms employ women in-store managers takes account of the rate at which women are available, interested, and qualified to hold in-store management positions comparable to those at Wal-Mart, the causes of Wal-Mart's shortfall are likely to be found in how Wal-Mart hires, trains, selects, assigns, treats, promotes, or retains women employees, not lack of interested, qualified women candidates.

- o Conclusion Six: Wal-Mart's shortfalls are not simply artifacts of differences between Wal-Mart and its comparators in how they classify and report in-store managerial employees. To the extent these differences exist, they are not sufficiently widespread to invalidate the benchmarking I have performed or to justify an alternative benchmarking procedure in which Wal-Mart would broaden its counts of in-store managers.

- o Conclusion Seven: The estimated shortfalls are "statistically significant" and cannot reasonably be attributed to chance alone. The conservative estimated shortfall of 4,004 corresponds to 47.0

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[42] These alternative estimates – especially those taking account of internal promotional paths to in-store management – may be particularly relevant in calculating economic damages.

standard deviations, representing a probability that a figure this large could have been estimated by chance of less than one chance in many billions.

- Conclusion Eight: Shortfalls of women among Wal-Mart's in-store managers are pervasive among Wal-Mart retail establishments, appearing in approximately four out of five of the firm's stores.
- Conclusion Nine: Shortfalls of women in Wal-Mart's in-store management occur nationwide. They are found in virtually every state in the nation, in every region, and in both urban and non-urban areas.
- Conclusion Ten: Women are also substantially under-represented among managers throughout Wal-Mart's *non-retail* establishments, including corporate headquarters, "white collar" facilities, and "blue collar" facilities such as distribution centers.
- Conclusion Eleven: Substantial shortfalls of women among Wal-Mart's in-store managers were present in every year between 1975 and 1999, and they are likely to have persisted from 1999 through 2002.
- Conclusion Twelve: Throughout its history, Wal-Mart has maintained a degree of centralization of it managerial staff at corporate headquarters that is strikingly higher than its comparator firms.
- Conclusion Thirteen: The scale, pervasiveness, persistence, and consistency of under-representation of women among Wal-Mart's managers suggests that such under-

> representation is deeply rooted in the organization's corporate culture and the company-wide employment attitudes, policies and practices that reflect and maintain that culture.

I declare under penalty of perjury of the laws of the United States and of the District of Columbia, that the foregoing is true and correct This Declaration was signed by me on April 21, 2003, in Washington, DC.

/s/ Marc Bendick, Jr., Ph.D.
Marc Bendick, Jr., Ph.D.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF RICHARD DROGIN, Ph.D. IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

A. INTRODUCTION

I, RICHARD DROGIN, declare:

1. I hold a Ph.D. in statistics from the University of California at Berkeley, earned in 1970. I am currently an Emeritus Professor in the Department of Statistics at California State University, Hayward, where I have taught graduate and undergraduate courses in data analysis, non-parametric methods, regression analysis, sample surveys, probability theory, queuing theory, simulation methods, and design of statistical software. I have been employed at California State University, Hayward, since 1973, and became an Emeritus Professor in 1996.

2. I am a partner in the statistical consulting firm of Drogin, Kakigi & Associates. This firm provides consulting services and computerized database management. We have experience in designing sample surveys, supplying census demographic data, organizing and managing large database systems, stochastic modeling, and performing advanced statistical analysis. Our firm has served as statistical consultants to both governmental agencies and the private sector for over twenty years. I have testified as an expert witness (statistical analysis, computer processing) in numerous state, and federal courts. A copy of my curriculum vitae is attached as Appendix 1.

3. I have been retained by Plaintiffs' counsel to analyze statistical questions raised in the Dukes v. Wal-Mart Stores, Inc. litigation. The purpose of my study was to obtain descriptive summaries of computer data, and prepare various statistical analyses relevant to the issues in the case. I examined statistics pertaining to workforce summaries, advancement patterns, and compensation levels.

4. In order to conduct my study, I was provided with computer-readable personnel and compensation data received through discovery as well as documentation and clarification regarding this data, contained in letters, emails between counsel, depositions, and telephonic conferences with Wal-Mart personnel familiar with their personnel and payroll systems. The first data files turned over by defendants were received in March, 2002.

5. This report will describe the data provided to me, how it was processed, the statistical methodology, and the results of my analysis. The analyses described here are restricted to retail store employ-

ees[1] working in Wal-Mart Discount Stores, Supercenters, Sam's Clubs, and Neighborhood Markers in the United States[2], during 1996 through the first quarter of 2002.

Data Sources

6. In March, 2002 Wal-Mart turned over an electronic copy of its personnel database including data for all U.S. employees who were employed between January, 1996 and March, 2002. There were 3,945,151 persons included in this database. A Complete job history for each of these persons was provided, including job history information prior to 1996, if any. This database is called the *PeopleSoft data*. For each person, the database includes basic identification information such as employee ID, social security number, name, address, phone number, gender, and race, as well as extensive information on the person's job history at Wal-Mart. The job history gives a chronological account of the jobs held, stores where the person worked, salary changes, personnel actions such as promotion or transfers, status changes indicating whether the person was active or on leave or terminated, whether the person was full-time or part-time, whether the person was salaried or hourly.

7. In late April, 2002 Wal-Mart turned over 250 computer tapes which included detailed biweekly payroll information for Wal-Mart U.S. employees. For the most part, this data included the

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[1] Retail store employees are defined in Appendix 2.

[2] In December and January 2003 some data regarding Puerto Rico employees was provided. This data was not used for any analysis in this report.

same persons as those included in the PeopleSoft personnel data. Subsequently, in early July, 2002, Wal-Mart provided year-end summaries of payroll data for each person, for the years 1996-2001. This year-end payroll information was processed, merged into the PeopleSoft data, and is the basis for all earnings studies presented in this report.

8. When Wal-Mart turned over their PeopleSoft data in March, 2002, they also provided two databases known as the *MCS data*, and *Job Posting data*. These are databases that give limited information about employees who bid for job vacancies. The MCS data includes information about employees applying for salary job vacancies and the Job Posting data includes information about employees applying for hourly job vacancies. As described in more detail later in this report, the MCS and Job Posting data do not contain information useful for analyzing promotions into higher store management positions and upper level hourly supervisory jobs.

9. In early January, 2003 Wal-Mart turned over part of its Associate database, which includes information on recent performance review ratings for hourly employees. This data was processed and used in the analyses described below.

10. Salaried PeopleSoft data was received in mid-December, 2002. Performance Review information is included in this data. However, this data was incomplete. Additional salary PeopleSoft data was provided at the end of January 2003, a few days prior to the completion of this report. This data has not been used for any studies presented in this report.

11. Payroll data covering 2nd, 3rd, and 4th quarters 2002 was turned over in late January 2003. This

data has not been used for any studies presented in this report.

12. In late January 2003, a few days prior to completing this report, Wal-Mart turned over additional PeopleSoft data for the 2nd and 3rd of 2002, replacing data provided earlier in January 2003 that was unreadable. This data has not been used for any studies presented in this report.

13. During the period from March 2002 to the present, there were numerous conference calls with defendant and its computer database specialists, as well as emails, and other correspondence with defendant regarding data questions. Several supplementary files were provided by Wal-Mart in response to questions from plaintiffs.

14. The PeopleSoft and payroll data constitute the primary data sources used for the analyses described in this report. From these sources, three main working files were created: A history file, a year-end file, and a file of job moves. The history file includes all the job history records found in the PeopleSoft data, but with only the fields of information relevant for the analyses, and with some additional information merged from other data sources. There are 14,915,700 records in the history file. The year-end file was created from the history file to include one record for each year in which a person worked, for all the people who were included in the data. In addition, yearly payroll information, and hourly performance ratings (if any) were appended to each record. There are 9,082,732 records in the year-end

file, covering the years 1996 through 2002.[3] The moves file was constructed from the history file for use in the promotion analyses. It includes one record for each pair of consecutive history records when there was a change in job or there was an action code indicating a promotion took place.

B. DESCRIPTION OF WORKFORCE

Size and Growth

15. Wal-Mart is big and has been steadily growing. During the time period 1996 through 2001 the number of year-end active employees in retail positions increased about 50%, from about 600,000 to about 930,000. The percentage of women decreased slightly from 67% to 64% during this same period. At year-end 2001, approximately 38% of Wal-Mart employees worked in Wal-Mart Discount stores, 52% worked in Supercenters, nearly 10% worked in Sam's Club stores, and less than 1% worked in Neighborhood Markets. Table 1 below shows the number of men and women working at year end 2001 in each of the four Wal-Mart store types.

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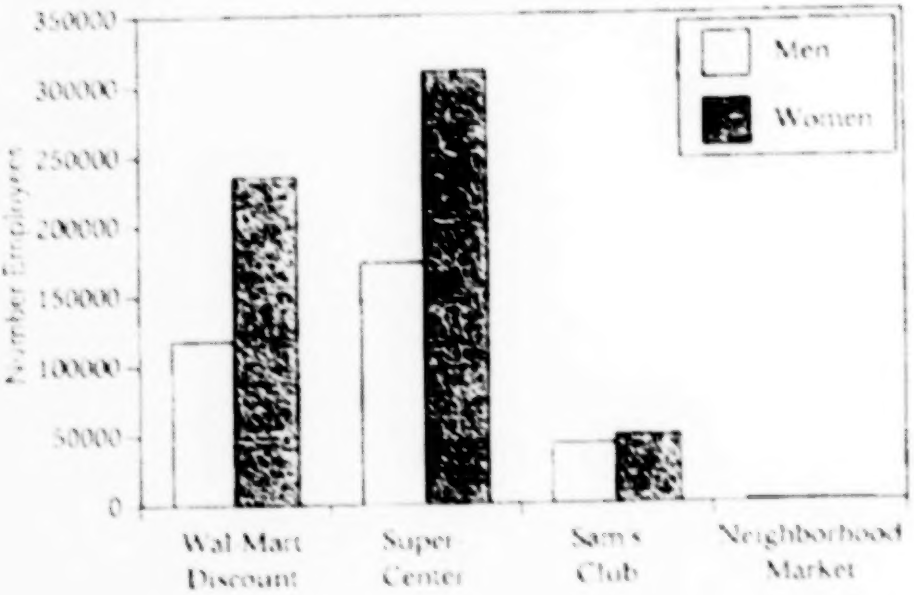
[3] The 2002 data gives employee status only up to end of the first quarter of 2002.

Table 1

Number of Employees by Store Type, 2001



16. Retail store employees include the hourly workforce, the store management, and higher-level level managers such as District Managers and Regional Vice Presidents. The store management positions include Store Manager, Co-Managers, Assistant Managers, and Management trainees. The Management Trainee position is the entry-level position into management and leads directly into the Assistant Manager positions, after a 4-5 month training program. All of the store management positions are salaried jobs, except for the Management Trainee position. A complete list of the retail jobs studied for this report, and how they are classified, is given in Appendix 2.

17. Tables 2a and 2b below show the hierarchical structure of these jobs at Wal-Mart stores (excluding Sam's), and Sam's stores, respectively. This

hierarchy was derived from Wal-Mart documents, and analysis of salaries and job movement patterns.

Table 2a

Job Hierarchy at Wal-Mart

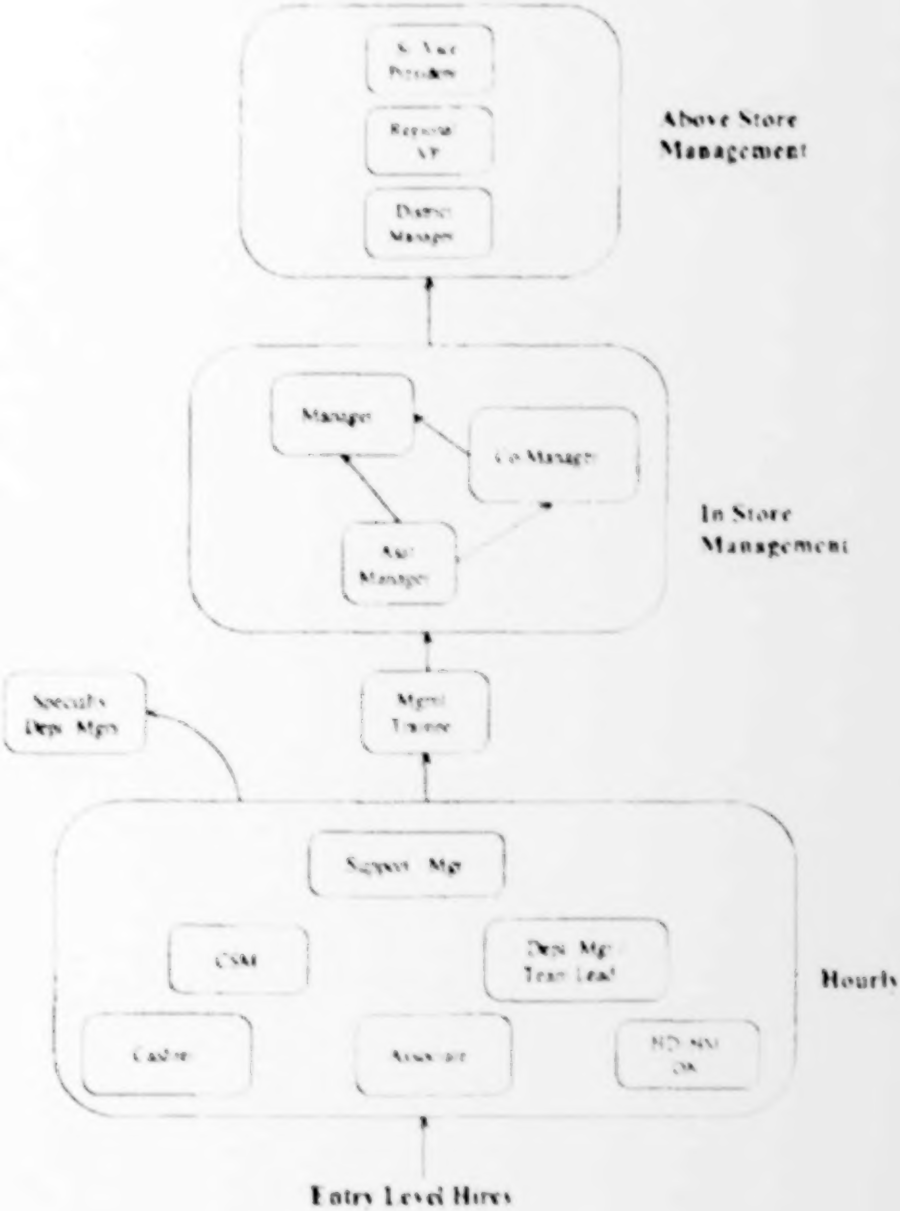
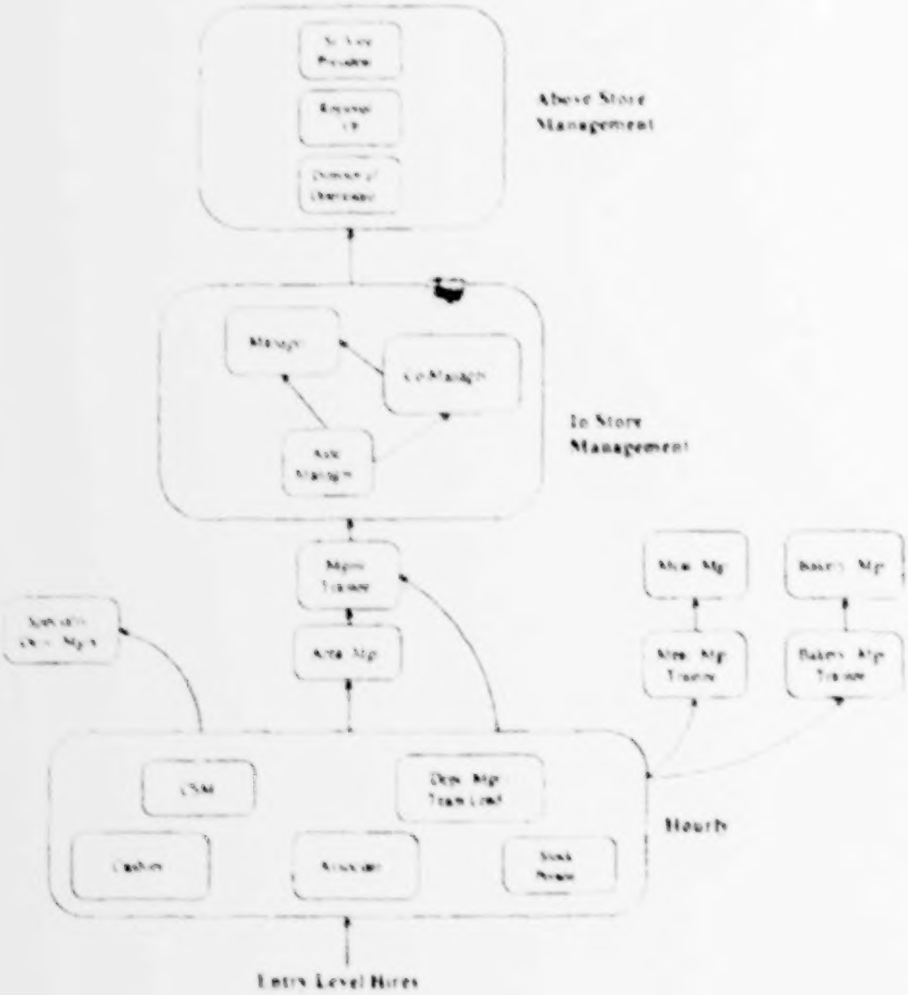

Sr. Vice President
Regional VP
District Manager
Above Store Management
Manager
Co-Manager
Asst Manager
In Store Management
Specialty Dept. Mgrs
Mgmt Trainee
Support Mgr
CSM
Dept. Mgr Team Lead
Cashier
Associate
Hourly
Entry Level Hires

Table 2b

Job Hierarchy at Sam's Club

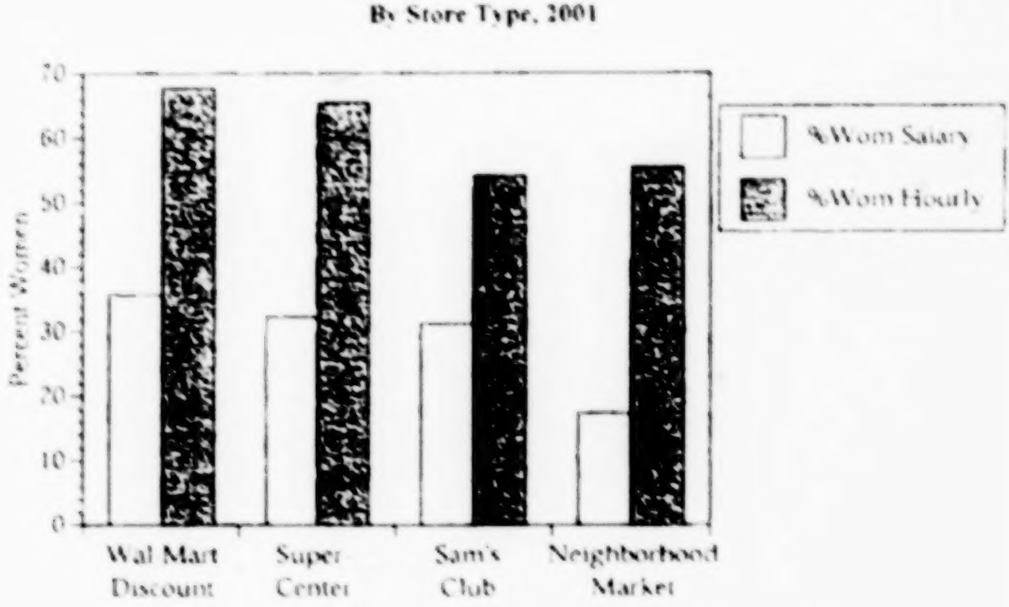

Sr. Vice President
Regional VP
Director of Operations
Above Store Management
Manager
Co-Manager
Asst. Manager
In Store Management
Mgmt Trainee
Area Mgr
Specialty Dept. Mgrs
Meat Mgr
Bakery Mgr
Meat Mgr Trainee
Bakery Mgr Trainee
CSM
Dept. Mgr Team Lead
Cashier
Associate
Stock
Hourly
Entry Level Hires

Gender Hierarchy – Management vs. Hourly

18. Women earn less money than men at Wal-Mart. This fact is due to women working disportionately in the lower paying hourly jobs, and earning less money than men holding the same jobs. Table 3 compares the percentage of women in hourly and salary jobs, in each of the four Wal-Mart store types.

Table 3

Percent Women in Hourly and Salary Jobs By Store Type, 2001



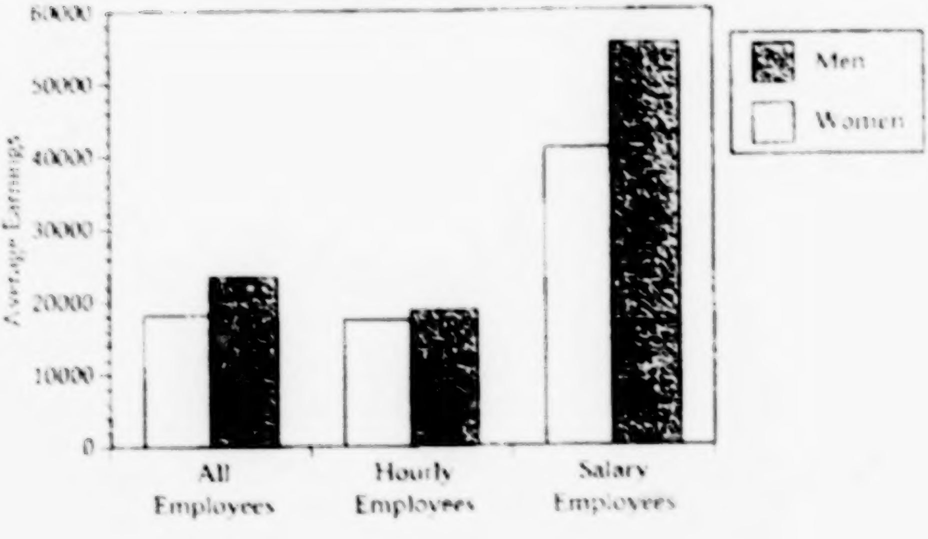
19. Management employees earn much larger salaries than the hourly employees. For example, in 2001, management employees earned about $50,000 on average, compared to the approximately $18,000

earned by hourly employees.[4] Women are disproportionately working in the hourly jobs: about 65% of hourly employees are women while about 33% of management employees are women.

20. Not only are women disproportionately working in the lower paid hourly jobs, but they also earn less than men holding the same job, for nearly all jobs, in each year. Overall, women earned about $5,200 less than men, on the average, in 2001. Within the hourly workforce, women earned about $1,100 less than men, and about $14,500 less among management employees, in 2001.

Table 4

Average Earnings of Men and Women Hourly vs. Salary, 2001



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[4] Average earnings are restricted to year-end active employees with full-time status who worked over 45 weeks in the year. Approximately 85% of Wal-Mart workforce is full-time.

Average Earnings, 2001
Full-Time Employees at Least 45 Weeks

Group	Total	%Fem	Ave$ M	Ave$ F
Total	508724	67.9	23403.	18184.
Hourly	476813	70.2	18609.	17459.
Salary	31911	33.5	55443.	40905.

Consistency of Gender Hierarchy Across Regions

21. Wal-Mart is administratively broken up into 41 regions[5], each including about 80 stores and headed by a Regional Vice President. The gender hierarchy at Wal-Mart nationwide is repeated across all 41 geographic regions in the country. As of year-end 2001, the percent women in hourly jobs ranged between 52% and 73%, while the percent women in salary jobs ranged between 26% and 42% across regions. In every region, the percent women among hourly employees was higher than the percent women among salaried employees. The following chart illustrates the distribution of percent women among hourly employees compared to the percent women among salaried employees, for each of the 41 regions.

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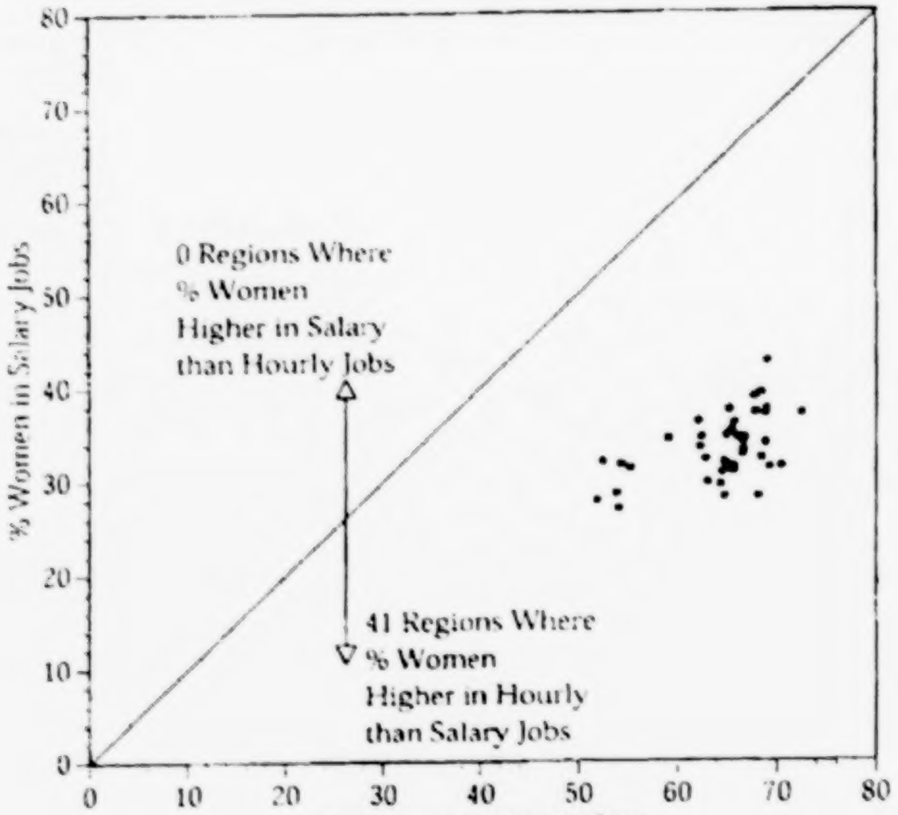
[5] There are 6 Sam's regions, and 35 Wal-Mart only regions.

Table 5

Percent Women among Hourly and Salary Employees, 2001

Each Region Represented by a Point on Graph

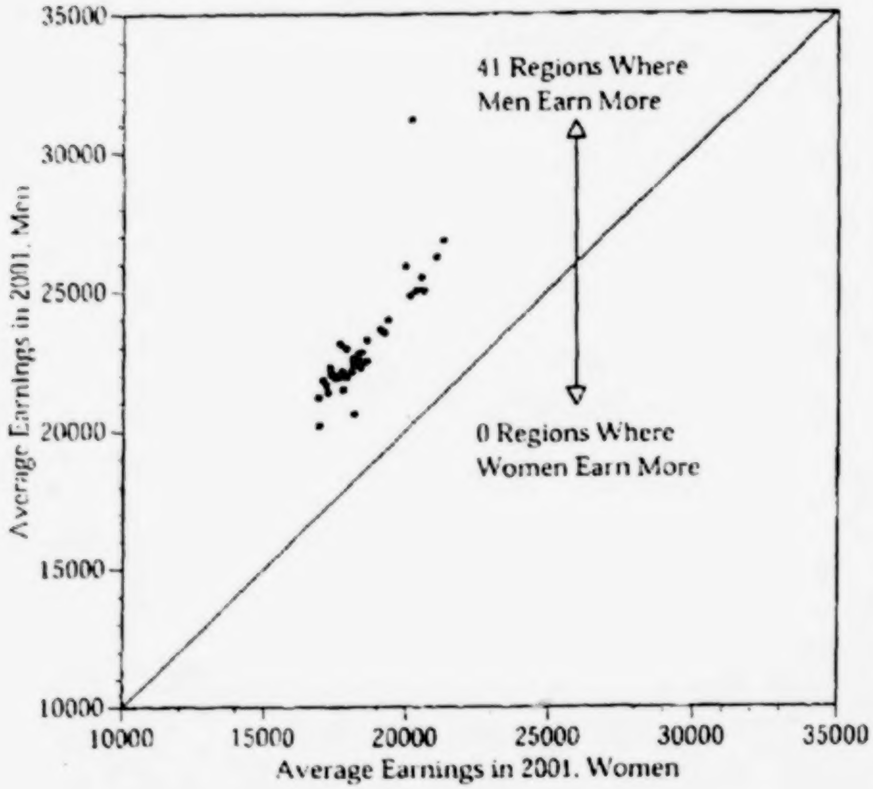


22. The gender hierarchy illustrated in Table 5 leads to lower earnings for women in every region across the country. The following chart shows the distribution of male and female total earnings in 2001, for Full-Time employees active at year-end who worked at least 45 weeks during the year.

Table 6

Average Total Earnings for Men and Women, 2001

Each Region Represented by a Point on Graph

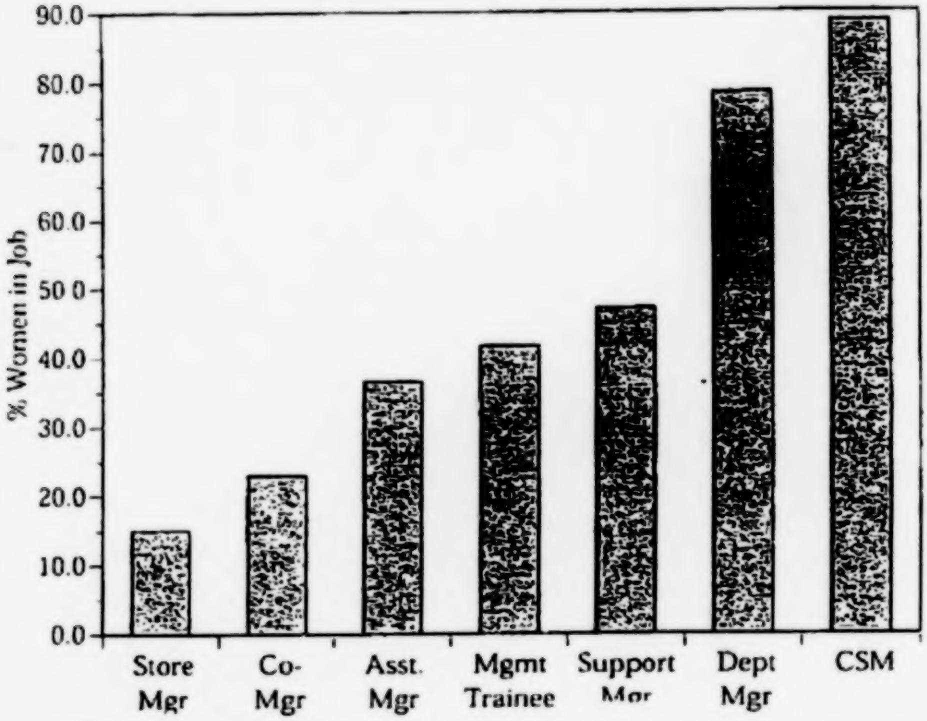


Gender Hierarchy within Management and Hourly Supervisors

23. The pattern of gender hierarchy between management and hourly jobs is further reflected within the management and hourly supervisor positions, as shown in the following table. The Support Manager, Department Manager, and CSM (Customer Service Manager, which is a supervisor of Cashiers) are the main supervisory hourly jobs.

Table 7

Percent Women in Store Management and Hourly Supervisors, 2001



24. Within each of the store management jobs, women earn less than men, on the average, for each year 1999-2001. The following table shows these earnings differences within the store management jobs, for 2001.[6]

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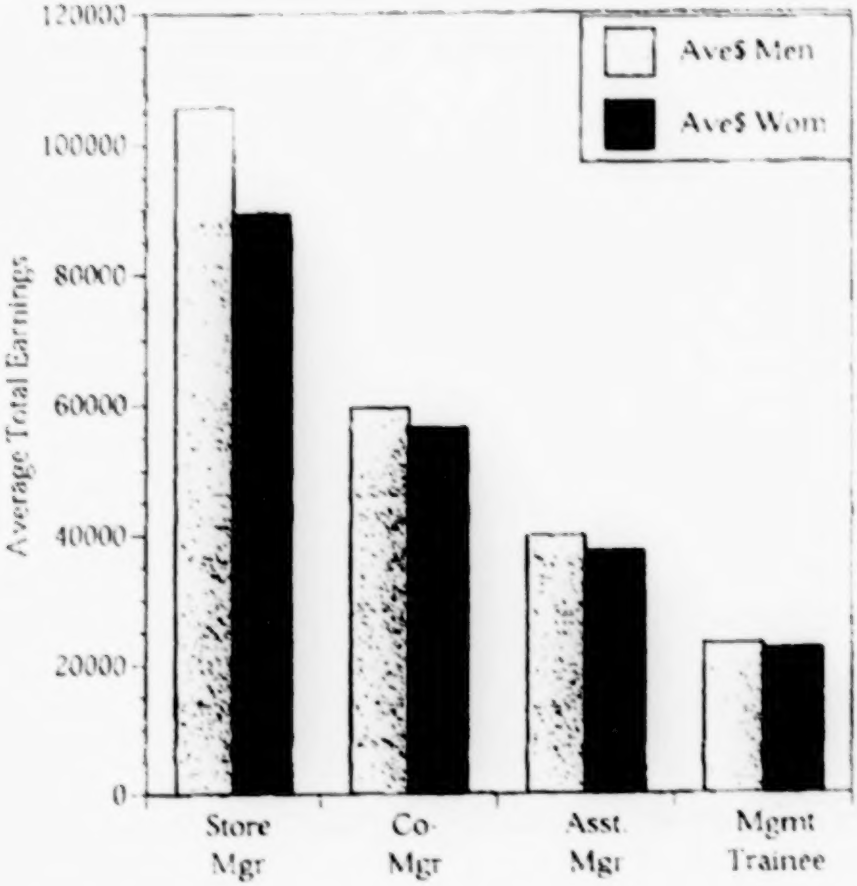
[6] Restricted to year-end actives employees with full-time status who worked over 45 weeks in the year. *See* Appendix 7.

Table 8

Average Earnings of Men and Women in Store Management Jobs, 2001



25. The following table shows the average total earnings for men and women holding store management jobs and above store management jobs.

Table 9
Average Earnings Higher-Level Jobs[7]

Job	Totel EES	% Women	Average Earnings Men	Average Earnings Women
Regional VP	39	10.3	419435.	279772.
District Mgr.	508	9.8	239519.	177149.
Manager	3241	14.3	105682.	89280.
Co-Mgr	2336	23.0	59535.	56317.
Asst Mgr	18731	35.7	37390.	37322.
Mgmt Trainee	1203	41.3	23175.	22371.

Earnings Gap – Within Hourly Jobs

26. Table 10 compares average total earnings, and Table 11 compares the average hourly rates for men and women in the four largest hourly jobs. The chart illustrates the shortfall in female earnings and hourly rates compared to men in the same job. A complete list for all jobs, and for part-time and full-time workers, and for the years 1999-2001 is given in Appendices 6a-d and 8a-d.

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[7] The District Managers included here do not include the Specialty Division District Managers in Tire and Lube, Photo, Shoes and Jewelry, Optical, and Pharmacy. These Specialty Division Managers have a higher percentage of women, but they earn much less money, on the average than the regular District Managers. The Sam's Director of Operations position is included in the District Manager row of this table. A complete summary is given in Appendix 7a.

Table 10

Average Earnings

4 Largest Hourly Jobs, 2001[8]

Job	Totel EES	% Written	Average Earnings Men	Average Earnings Women
000101 Dept Head	63747	78.3	23518.	21709.
000201 Sales Assoc	100003	67.8	16526.	15067.
000469 HD/HM O/N	29333	57.4	19121.	17870.
000501 Cashier	50987	92.5	14525.	13831.
Total All Hourly	476813	70.2	18609.	17459.

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[8] Restricted to employees active at year-end with full-time status, and who worked at least 45 weeks during the year. The 'HD/HM O/N' job refers to 'Hardlines/Home Area Overnight Associates'.

Table 11

Average Earnings Rates
4 Largest Hourly Jobs, 2001[9]

Job	Totel EES	% Written	Average Earnings Men	Average Earnings Women
000101 Dept Head	63010	78.5	11.13	10.62
000201 Sales Assoc	96539	68.1	8.73	8.27
000469 HD/HM O/N	28408	57.8	9.56	9.29
000501 Cashier	49261	92.6	8.33	8.05
Total All Hourly	463526	70.6	9.55	9.26

27. In hourly jobs overall, and in the largest hourly jobs at Wal-Mart, women earned less total compensation and had lower hourly rates than men. This earnings gap persists, even though women have greater average seniority and higher performance ratings, as described below.

Years With Wal-Mart

28. Women stay in the workforce longer than men at Wal-Mart. This is shown by the fact that the average number of years since date of hire is greater for women than men in the workforce. Among full-time women active at year-end 2001, the average

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[9] Restricted to employees active at year-end with full-time status, and at least 1 year since date of hire.

number of years since date of hire was 4.47 years, while the corresponding average for men was only 3.13 years. The average time since hire was greater for women overall, and in salary and hourly jobs separately, for both full-time and part-time employees in 2001. Women had greater time since hire in 97% of the job codes with at least 1000 full time employees active at year-end 2001. The following table shows the average years since hire for full-time employees active at year-end 2001 for the four largest hourly positions. A complete summary for all jobs is given in Appendix 12.

Table 12

Average Years Since Date of Hire
Full-Time Active Employees at Year-End 2001

Job	Men	Women
Total	3.13 Yrs	4.47 Yrs
All Hourly	2.76	4.39
All Salary	6.69	7.39
Sales Associates	2.53	3.41
Dept Mgr	5.29	7.49
Cashier	1.86	2.53
HD/HM O/N	2.28	3.16

Years to Reach Manager and Asst Manager

29. Not only do women generally have more time with Wal-Mart, and hence have lower turnover rates, it takes women longer to work their way up to an Assistant Manager or Manager position, among those who are eventually promoted into these positions. In particular, the average time since date of hire until first being promoted in an Assistant Manager job was 4.38 years for women, but only 2.86 years for men. The same pattern is true for men and

women who eventually became Store Managers: It took women 10.12 years on the average to reach Store Manager, but it took men only 8.64 years.

Performance Ratings — Hourly Employees

30. Wal-Mart uses a database known as the Associate Database to track hourly employee performance review ratings.[10] Historical review ratings are incomplete, prior to 2001. I have analyzed the performance review data for 2001 and have summarized my computations for hourly jobs in Appendix 9. Ratings for hourly employees are given according to a scale of 1, 3, 5, and 7, where 7 is the highest rating. In 2001, among those with ratings, over 95% received ratings of either 3 or 5. Among hourly employees working in 2001 with ratings, women have a higher average rating than men overall, and in 75% of the jobs with over 1000 employees. The following table shows the average ratings for hourly employees in 2001, and for the four largest hourly positions.

Table 13

Average Performance Rating
Hourly Employees, 2001

Job	Men	Women
All Hourly	3.84	3.91
Sales Associates	3.68	3.75
Dept Mgr	4.28	4.38
Cashier	3.58	3.49
HD/HM O/N	3.81	3.96

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[10] Performance rating data for salaried employees was incomplete until a few days prior to the completion of this report, and therefore has not been utilized for this report.

Gender Distribution by Department

31. Men and women are unevenly distributed in departments. The following table shows the employees and percent women in each of the departments that had at least 5000 employees at year-end 2001. The list is sorted by percent women in the department.

Table 14

Gender Composition By Department, 2001 Departments with At Least 5000 Employees

Department	Total	% Women
34 LADIES SPORTSWEAR	10399	99.2
27 HOSIERY	14061	99.1
19 PIECE GOODS	12931	99.1
46 HEALTH AND BEAUTY AIDS	7901	98.7
26 INFANTS/TODDLERS	8838	98.6
32 JEWELRY	18493	97.3
910 BACK OFFICE	27659	94.2
988 DEMOS	7480	93.0
23 MENS WEAR	9040	92.5
20 DOMESTIC GOODS	7565	92.4
38 DIV 10 D38	10218	91.4
940 DIV 10, D38 & D40	6424	90.8
40 PHARMACY	8347	88.8
25 SHOES	15710	88.0
3 STATIONARY AND BOOKS	6771	87.5
916 MERCH DEPTS: 16,18,56	6078	86.7
98 BAKERY	11621	86.5
80 SERVICE DELI	10804	81.4

49 OPTICAL PROFESSIONAL	7233	79.5
14 HOUSEWARES	7136	79.2
903 OVERNIGHT ASSOCIATES	16853	78.6
990 FRONT END	244251	78.2
2 HEALTH AND BEAUTY AIDS	11398	77.7
85 PHOTO LAB	16047	75.4
Total All Departments	**930770**	**64.0**
1 CANDY, TOBACCO, COOKIES	5881	61.0
994 RECEIVING	5178	59.2
7 TOYS	13837	55.9
931 NIGHT RECEIVING	59764	53.6
5 ELECTRONICS	21966	46.7
10 AUTOMOTIVE	10210	42.0
92 GROCERY DRY GOODS	5647	40.3
930 DAY RECEIVING	58245	39.8
16 HORTICULTURE AND ACCESS	23792	39.3
8 PETS AND SUPPLIES	6289	37.6
284 DIV 28 RECEIVING	19057	30.7
9 SPORTING GOODS	15105	30.2
4 PAPER GOODS	9753	19.5
11 HARDWARE	9943	27.7
90 DAIRY PRODUCTS	6525	25.9
93 MEAT	5611	21.9
995 MAINTENANCE	23283	19.6
94 PRODUCE	7780	19.4
996 SECURITY	7748	11.8
37 TBO SERVICE	14706	6.7

Salary Rate Progress after Hire

32. I examined whether the pay rate difference between men and women changed over time, for employees hired in hourly positions in the same year. I examined this for all hourly hires during 1996[11], and followed their progress in salary rate through 2001, and separately for hourly hires into the same job position. I repeated this for 1998 hires. The following chart shows the initial difference in starting hourly rate for men and women hourly hires in 1996, and how this pay gap increased over time during the period 1996 through 2001, for employees remaining in the Wal-Mart workforce. The chart shows the results for all employees hired into hourly jobs in 1996, and for those hired as Sales Associates and Cashiers separately, the jobs with the greatest number of hires. About 65% of new hires start in one of these two positions. The complete summary of this analysis is given in Appendix 11.

33. As shown on the chart below, 1996 women hired in hourly jobs in 1996 were paid $0.35 per hour less than men hired in hourly jobs that year. For those 1996 hourly hires who stayed at Wal-Mart through 2001, the gender gap between men and women increased to $1.16 per hour, on the average. For 1996 hires into the Sales Associate, the largest job, the shortfall in average hourly rate for women when hired was $0.20 per hour. Among employees hired into Sales Associate jobs in 1996 who were still active employees at year-end 2001, men were being paid $1.17 more than women. I also examined the

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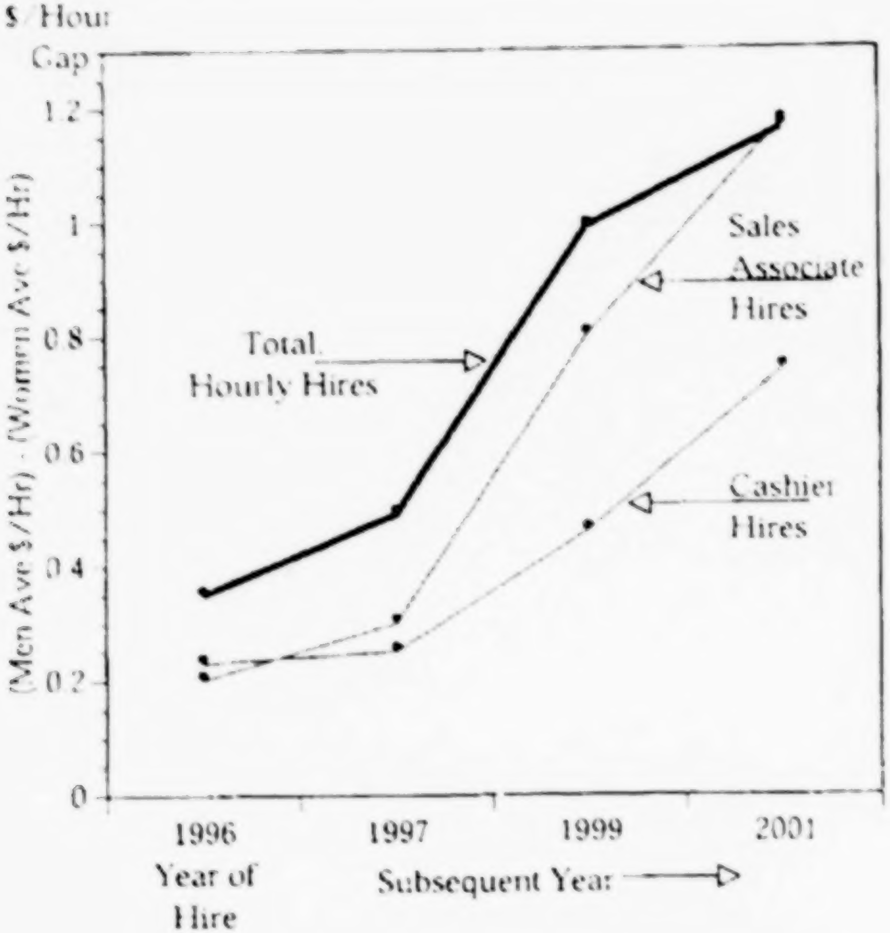
[11] 1996 is the first year for which complete data on hires is available, and 2001 is the latest full year with data.

progress of 1998 hires, and found a similar pattern of increasing salary rate gap over time between men and women hired in same year and job.

Table 15

Gender Gap in Hourly Rate Over Time for 1996 Hires Into Hourly Jobs



Changes in Stores, Districts and Regions

34. Most employees stay in the same store when moving up through hourly positions. Moves into the position of Management Trainee, and higher level positions usually involve a change in store, or

even a change in district and region. The following table shows the percent of times when an employee changed store, district, or region when being promoted into the target jobs listed in the table.

Table 16

Percent of Promotions[12] Where Employee Changed Store, District, or region, 1996 and later

Target Job	Change Store	Change District	Change Region
Store Manager	91.2%	69.4%	35.6%
Co-Manager	81.3	57.0	32.6
Assistant Manager	63.3	40.2	22.0
Management Trainee	62.2	32.5	17.0
Area Manager, Sam's	17.4	5.4	2.8
Support Manager	4.8	7.6	6.0

35. I also examined the number of times store management employees changed store, district, or region after first entering those positions. This is summarized in the following table.

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[12] These include moves during 1996 or later, and also lateral moves classified as promotions in PeopleSoft.

Table 17

Number of Changes in Store, District and Region After Entering Store Management Jobs

	Changed Store		Changed District		Change Region	
Target Job	≥ Once	Ave	≥ Once	Ave	>1 Once	Ave
Store Manager	97.8%	3.60	88.7%	2.77	67.1%	1.72
Co-Manager	95.8	2.96	83.0	2.22	61.5	1.31
Assistant Manager	85.4	2.80	68.9	1.98	49.6	1.17
Management Trainee	86.2	3.04	68.7	2.04	47.8	1.16
Area Manager	48.5	1.15	31.6	0.64	26.5	0.50
Support Manager	36.3	0.82	34.0	0.64	24.4	0.41

C. INFERENTIAL STATISTICS

Statistical Methodology

36. In statistics a distinction is made between *descriptive and inferential* statistics. Descriptive statistics simply report or summarize counts, percentages, or averages, based upon some given data set. Descriptive statistics speak for themselves, they make no assumptions about the underlying population or how the data was selected; there is no probability model assumed. Inferential statistics attempt to measure whether certain disparities, calculated from descriptive statistics, are within the range of what might be expected if variation were due simply to random fluctuation.

37. Inferential statistics ask the question, "Is the observed disparity consistent with what would be expected from random fluctuation?" To answer this question requires some definition of random fluctuation. Random fluctuation is usually represented by a random selection process, where all individuals in a certain pool are assumed to have the same chance of selection. The probability model determines which results are expected and which results are unlikely.

38. The likelihood that a disparity as big as the one actually observed will occur by random fluctuation is called the *significance probability*. If this probability is very low then doubt is raised as to whether the disparity is the result of random fluctuation expected from the model.

39. The significance probability of an observed result can be expressed in terms of a *Z-value*, which gives the size of the disparity in terms of standard deviations. Significance probabilities and Z-values are equivalent. That is, one can be determined from the other. A Z-value of 1.96 indicates that a disparity has 1 chance in 20 of occurring by random fluctuation. A Z-value of 2.58 (+ or -) indicates that a disparity has 1 chance in 100 of occurring by random fluctuation. The following table summarizes the appropriate correspondence between Z-values and significance probabilities:

Table 18

Z-Values and Probability of Occurrence

Z-Value	Probability of Occurrence
1.96	1 chance in 20 (.05)
2.58	1 chance in 100 (.01)
3.08	1 chance in 500 (.002)

3.3	1 chance in 1,000 (.001)
3.9	1 chance in 10,000 (.0001)
5.0	1 chance in 1,000,000 (.000001)
6.0	1 chance in 100,000,000 (.00000001)
20.0	Less than 1 chance in 10 to 88th power

D. ANALYSIS OF PROMOTIONS

Methodology

40. As described above, women are under-represented in management positions compared to their representation in the hourly workforce. Wal-Mart has a strong "promote from within" policy, as shown by its statement that "72% of all Salaried Management started as hourly Associates"[13]. Moreover, most hourly Associates start in the entry level positions of Sales Associate or Cashier. Employees reach Salaried Management positions by first becoming a Management Trainee, which leads directly into the Assistant Manager position. Higher level store management positions of Manager and Co-Manager are filled almost entirely by employees who have been Assistant Managers. The large disparity between the percentage of women in store management positions, and in the hourly workforce is a result of Wal-Mart's failing to promote women at the same rate it promotes similarly situated men. The following sections will describe my analysis of this pattern

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[13] Wal-Mart Stores career opportunities document, Bates WMHO 714869.

for promotion into several positions above the entry level hourly workforce.

41. The promotion analysis of moves into a particular target job compares the percentage of women among those promoted into that job, to the percentage of women in the availability pool for that promotion. To perform this analysis, it is first necessary to specify the target job, and identify the promotions into that job. The definition of the target jobs, and promotion into these jobs, is detailed in Appendix 2. Basically, a person is counted as being promoted into a target job if his or her previous job is a lower position, and his or her job history data shows a change code of 'PRO', indicating that he or she was promoted.[14] Secondly, it is necessary to identify the percentage of women in the availability pool for the promotion.

Determining the Availability Pool for Promotions

42. There are two methods that are often used for determining the availability pool for a promotion. One method is to use applicant flow data, and a second method is to determine the availability pool from the incumbents in historical feeder jobs for the promotion. Using applicant flow data to determine availability is useful when all job vacancies are posted, complete data is maintained on applicants and selections, and the fairness of the job posting system is not contested. If these criteria are not met, then it may be impossible to use applicant flow data,

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[14] Promotions into Support Manager (1050) are defined as any move from a lower job, since Wal-Mart does not use the 'PRO' code for promotions into Support Manager.

or using applicant flow data to determine availability pools will not give meaningful results.

43. Wal-Mart has two systems used to collect some applicant data. Their Job Posting System is used for some hourly job vacancies, and their Management Career Selection System referred to as MCS) is used for some Management job vacancies. These two systems provide no useful data for analyzing promotions into the upper level hourly supervisory, and store management positions considered in this report. The following sections describe the inadequacies of these two databases.

Job Posting Data

44. The job posting data identifies applicants for some hourly jobs, and those who were selected for openings.[15] Support Manager is the only target job analyzed in this report that is included in the job posting data. However, the data included in the job posting system for Support Manager contains only a fraction of the vacancies that were actually filled, as determined from the PeopleSoft personnel database. The job posting data shows only 4504 promotions into Support Manager for the period 1997-2002. However, the PeopleSoft data shows there were 22,388 promotions into Support Manager for the same period[16]. The number of job posting acceptances into Support Manager represents only 20% of the PeopleSoft promotions into Support Manager.

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[15] See February 12, 2002, Steve Catlett letter. The applicant table was named "intvwrq" and identified as Interview_request" table, and the selectees were identified as those with nonblank "offer made date."

[16] Data for 2002 goes through the 1st quarter only.

The following table provides a breakdown of the applicants and acceptances for Support Manager vacancies found in the job posting data, compared to the actual number of promotions found in the PeopleSoft data.

Table 19

Job Posting Data For Promotions into Support Manager Compared to PeopleSoft Data

		Job Posting		PeopleSoft
Job Title	Year	Bids	Accepts	Moves
Support Mgr	1997	1029	173	4316
Support Mgr	1998	7426	729	4559
Support Mgr	1999	9209	823	3939
Support Mgr	2000	12952	1218	4630
Support Mgr	2001	13385	1315	4153
Support Mgr	2002	1155	246	791
Support Mgr	Total	45146	4504	22388

MCS Data

45. The MCS system was intended to allow "Assistant, Store and District Management the opportunity to view and apply for field management openings throughout"[17] the company. Thus, the system was not intended to collecting applicant information for Management Trainee, Assistant Manager and Co-Manager vacancies[18]. MCS data contains no data for any management positions in Sam's

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[17] See Management Career Selection Guide, Bates WMHO 217238.

[18] See deposition of Debra Kintzele, October 2, 2002, page 41-42.

stores[19]. The MCS allows for the collection of information on applicants for vacancies and acceptances.[20] The table below shows the number of MCS applicants and selections compared to the actual number of moves in the PeopleSoft data.

Table 20

MCS Applicants by Job Code[21] 1997-2002

Number of Applicants	**MCS Accepts**	**PeopleSoft Moves**	**Target Job**
41000	3707	4821	Store Manager[22]
0	0	4124	Co-Manager
641	113	24604	Assistant Manager
0	0	15043	Management Trainee

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[19] See deposition of Jeffrey Reeves, January 14, 2003, page 159, lines 22-23.

[20] From MCS tables job appnew, app offernew, job_slotnew, job openingnew and app acceptnew. These were used to link job_opening id to job_slot id to MCS jobcode. Promotion occurs if Accept indicator is "Y".

[21] The MCS system uses different codes to identify jobs than are used in the PeopleSoft data. Defendant provided a mapping of PeopleSoft to MCS job codes included in a June 24, 2002 email from defendant's counsel. That mapping was used for MCS summaries by job appearing in this report.

[22] PeopleSoft Store Manager moves in Tables 20 and 21 include lateral moves where employee prior job was store manager, but there was a change in store or a promotion was indicated in the job history data. Moves into Store Manager at Sam's are excluded.

46. The MCS system contains no information about how vacancies in Management Trainee and Co-Manager positions were filled. The information on Assistant Manager vacancies is negligible. For Store Manager, the total number of acceptances was 3,687 during 1998-2002. There were a total of 3,980 moves to Store Manager in the Wal-Mart data in PeopleSoft. Table 21 below provides a breakdown of MCS applicants for Store Manager by year.

Table 21

MCS Applicants For Store Manager and Assistant Manager by Year

		MCS		PeopleSoft
Job Title	Year	Bids	Accepts	Moves
Manager	1998	8807	755	803
Manager	1999	10121	910	993
Manager	2000	9088	933	1035
Manager	2001	10585	979	1054
Manager	2002	1832	110	95
Manager	Total	40433	3687	3980

47. The MCS system does not give a true measure of applicant flow for the positions of store Manager and above. To get a true measure of applicant flow, it would be necessary to have an open bidding system where employees would determine whether they wanted to come forward and bid for a vacancy, and the vacancy would be filled from these applicants. This is not the case with the MCS system, since "positions may be filled outside of the Management Career Selection process",[23] and individual

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[23] See Management Career Selection Guide, Bates WMHO 217239, bottom of page 2.

exceptions may be made to stated eligibility criteria.[24] Moreover, the system requires pre-screening of applicants before they can be considered for promotion.[25]

48. Due to the limitations of the Job Posting and MCS system described in the previous paragraphs, availability pools in the promotion analysis are determined from the incumbents in historical feeder jobs for the promotion.

49. The availability pool for a particular promotion is constructed to represent the group of employees who are similarly situated to the person promoted. In my analysis, I have specified employees as *similarly situated* if they worked in the same job and geographic area as the person promoted, as of the year-end prior to the promotion. Geographic area is taken to be district or store, depending on the target job. In order to determine the appropriate geographic area to be used in restricting the availability pool for a particular promotion, I relied on the historic pattern of changes in store, districts and regions for employees being promoted into each of the target jobs, which is described in a previous paragraph. This is a conservative approach that may mask some discrimination due to differential assignment of men and women to stores or jobs with greater earnings or promotion potential.

50. Wal-Mart policy is that all hourly employees are eligible for a Management Trainee position.

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[24] See Management Career Selection Guide, Bates WMHO 217238, middle of page 1. See also

[25] See deposition of Debra Kintzele, October 2, 2002, page 157 through top of page 159.

If this pool were used, instead of controlling for job, a much higher female availability percentage would result, and consequently the shortfall in female promotions discussed below would be greater. This also would be true if the availability pool were defined to include hourly supervisors such as Department Head, Customer Service Manager, and Support Manager, instead of controlling for historic feeder jobs.

51. By using prior job held by person promoted in determining the feeder pool for that promotion, any discrimination by Wal-Mart in selecting the job positions from which promotions are made would not be reflected in the promotion analysis. To illustrate this point, consider a hypothetical example where there were two jobs, one with all men and one with all women. Assume that employees in each of these jobs were equally qualified for promotion. If Wal-Mart always selected from the job with all men, then the availability pool would be 100% male, and there would be no disparities observed in the promotion analysis controlling for job.

52. The promotion analyses described in the following paragraphs give results for Wal-Mart and Sam's combined. The results for Sam's alone are discussed in a separate section below. Appendix 13e-h includes Sam's promotion summaries. All of the promotion analyses include promotions during 1997 through first quarter 2002. Promotions during 1996 are not included, because determining the availability pool would require knowing incumbents in 1995, and 1996 is the earliest year of complete data.

Promotions into Support Manager

53. Support Manager is the highest level hourly supervisory position below Management Trainee,

and many Support Managers are eventually promoted into Management Trainee and higher positions. Sales Associates and Department Managers are the largest feeder jobs into the Support Manager job. Women comprise about 70% of the Sales Associates and Department Managers, but only about 45% of the Support Managers. About 95% of employees promoted into Support Manager positions stay in the same store when promoted. Accordingly, in the analysis of promotion into Support Manager, I have used store as a geographic control, thus considering employees in the same job, and same store to be similarly situated for promotion.

54. The analysis of promotions into Support Manager shows that women received 2891 promotions fewer than would be expected from their representation in the availability pool, controlling for feeder job, store, and year of move. This disparity has a Z-value of -54.38 indicating a high degree of statistical significance, which is practically impossible to occur by random fluctuation.

Table 22

Analysis of Promotions Into Support Manager, Wal-Mart

	Promotions			%		
Year	Tot	Women		Women In Pool	Loss	Z-Value
1997	4316	2094	48.5	62.6	-608.2	-25.61
1998	4559	2161	47.4	61.4	-637.5	-26.59
1999	3939	1695	43.0	56.6	-535.6	-24.20
2000	4630	1941	41.9	54.2	-569.7	-23.59
2001	4153	1664	40.1	50.8	-446.1	-19.84
2002	791	294	37.2	49.1	-94.2	-9.02
Total	22388	9849	44.0	56.9	-2891.4	-54.38

Promotions into Management Trainee

55. The Management Trainee position is a transitional job leading directly into an Assistant Manager assignment, after the employee has completed a 4-5 month training program. Employees who were promoted into Management Trainee positions changed stores 62% of the time when being promoted. Thus, when Wal-Mart promotes an hourly employee into a Management Trainee position in a particular store, the company usually looks outside that store to select an employee to fill the vacancy, and sometimes it goes out of the district.

56. I have performed a promotion analysis comparing the percentage of women among those promoted into Management Trainee positions with the percentage of women in the available pool of hourly workers. The available pool of hourly workers for a particular promotion into a Management Trainee job consists of those employees who held the same job as the person promoted, and who worked in the same district, at the end of the year prior to the promotion. For example, if an employee was promoted into a Management Trainee position in 1998, had previously held a Sales Associate position (201) and was working in District 26, then the availability pool for that promotion would be the group of employees in the Associate position in District 26 at year-end 1997. In statistical terms, this definition of an availability pool for the promotions is referred to as "controlling for feeder job, district[26], and year of

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[26] In the promotion analyses that include a control for district, districts are defined separately for Sam's and non-Sam's. For example, Sam's employees with district=1 are considered to be in a separate district from non-Sam's employees with district=1.

move". Thus, employees in the same availability pool for a promotion are *similarly situated* in that they held the same job, in the same district, at the end of year prior to the promotion.

57. The next table below summarizes the results of the analysis of promotions into Management Trainee jobs. Women received 2952 promotions fewer than expected according to their representation in the availability pools, during 1997-2002. The Z-value corresponding to this disparity is —60.81, indicating a statistically significant shortfall that is virtually impossible to occur by chance, if promotions were selected at random from the availability pool.

Table 23

Analysis of Promotions Into Management Trainee, Wal-Mart

		Promotions		% Women		
Year	Tot	Women		in Pool	Loss	Z-Value
1997	1569	640	40.8	60.0	-302.0	-20.11
1998	2390	958	40.1	59.3	-460.3	-23.67
1999	2946	1142	38.8	59.4	-607.7	-28.34
2000	4003	1593	39.8	59.2	-777.6	-31.27
2001	3463	1407	40.6	59.9	-668.5	-28.25
2002	672	273	40.6	60.9	-136.3	-12.69
Total	15043	6013	40.0	59.6	-2952.5	-60.81

Promotions into Co-Manager

58. Larger stores have a Co-Manager position, which is above the Assistant Manager but below Manager within the store. Nearly all Co-Manager vacancies are filled by promotion of an Assistant Manager, and involve a change in store over 80% of the time. The analysis of promotions into Co-

Manager controls for district, job, and year of promotion.

59. Women received 346 promotions fewer than expected according to their representation in the availability pools, during 1997-2002.[27] The Z-value corresponding to this disparity is -13.81, indicating a statistically significant shortfall that is virtually impossible to occur by chance, if promotions were selected at random from the availability pool.

Table 24

Analysis of Promotions Into Co-Manager, Wal-Mart

	Promotions			% Women		
Year	Tot	Women		in Pool	Loss	Z-Value
1997	533	94	17.6	28.1	-55.8	-5.84
1998	652	118	18.1	29.5	-74.2	-6.96
1999	899	205	22.8	31.3	-76.4	-5.90
2000	1017	237	23.3	31.2	-80.4	-6.15
2001	868	209	24.1	30.2	-52.8	-4.46
2002	155	38	24.5	28.9	-6.8	-1.35
Total	4124	901	21.8	30.2	-364.4	-13.01

Promotions into Store Manager

60. Each store has a Store Manager who is the person most responsible for running the store. About 60% of Manager vacancies are filled by promotion of a Co-Manager, and the remainder mostly are filled by Assistant Managers. The promotion involves a change in store over 90% of the time. The analysis of promotions into Manager controls for district, job, and year of promotion.

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[27] Data for 2002 includes only the 1st quarter.

61. Women received 155 promotions fewer than expected according to their representation in the availability pools, during 1997-2002. The Z-value corresponding to this disparity is -7.72, indicating a statistically significant shortfall.

Table 25

Analysis of Promotions Into Store Manager

		Promotions		% Women		
Year	Tot	Women		in Pool	Loss	Z-Value
1997	607	126	20.8	24.3	-21.4	-2.53
1998	624	100	16.0	20.4	-27.3	-3.56
1999	706	103	14.6	19.9	-37.6	-4.74
2000	758	142	18.7	23.1	-32.9	-3.35
2001	809	153	18.9	23.2	-35.0	-3.38
2002	63	14	22.2	24.4	-1.4	-0.45
Total	3567	638	17.9	22.3	-155.7	-7.72

Promotions at Sam's

62. The above analysis looked at total Wal-Mart, including Sam's. I have also analyzed promotions into higher level hourly and store management positions at Sam's alone. The analyses include promotions into Store Manager. Co-Manager, Management Trainee, and Area Managers[28], in Sam's stores. There are statistically significant shortfalls for promotions into Area Manager, Management Trainee, and Store Manager at Sam's, but not for promotions

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[28] The position of Area Manager is only used in Sam's, and is similar to a Support Manager at non-Sam's stores, in that they are both the highest position below Management Trainee. The job codes for Sam's Area Managers are 043350, 043360, and 043550. The job code 043500, with title 'Area Mgr' is actually an Assistant Manager position at Wal-Mart.

into Co-Manager. However, the position of Co-Manager is much less frequently used at Sam's than at regular Wal-Mart stores. For example, the ratio of the number of Co-Managers to Store Managers at regular Wal-Mart stores is about 4:5, while at Sam's this ratio is less than 1:5. Moreover, there are relatively few promotions into Co-Manager at Sam's, compared to the number at Wal-Mart stores. The results of the analysis for Sam's alone are given in Appendices 13e-h.

Consistency of Promotion Disparities Across Regions

63. The pattern of under-promotion of women into Support Managers, Management Trainee, Co-Manager and Manager jobs is consistent in nearly every geographic region at Wal-Mart. The following table summarizes the number of regions that have a shortfall, or excess, of promotions of women.

Table 26

Count of Promotion Disparities Across Regions
Minus column gives number of regions where women received fewer promotions than expected

	All Regions			Regions Where Disparity Statistically Significant		
Target Position	Total	Plus	Minus	Total	Plus	Minus
Support Manager	40	2	38	35	0	35
Management Trainee	41	0	41	40	0	40
Co-Manager	40	3	37	22	0	22
Store Manager	40	6	34	13	0	13

For promotions into Support Manager, women received fewer promotions than expected in 95% of regions across the country. For promotions into Management Trainee, women received fewer promotions than expected in 100% of regions across the country, and in 40 out of 41 regions the female shortfall was statistically significant. For each target job, there was no region that showed a statistically significant excess of promotions of women.

E. ANALYSIS OF TOTAL EARNINGS AND HOURLY RATES

Methodology

64. Descriptive statistics of the Wal-Mart workforce indicate that women are paid less than men even within the same job[29]. These earnings differences could be due to extraneous factors such as how much seniority a person has, whether a person is a part time or full time employee, which store a person works in or how many weeks during the year the person worked. For example, if women generally have less seniority than men, this could explain why they earn less than men, or women might earn less because more of them are part time than men.

65. Total annual earnings[30] were analyzed to determine if women are paid less than men even after taking into account extraneous factors, using a statistical technique known as regression analysis. Regression analysis is widely used by statisticians to

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[29] See Appendix 6.

[30] Total annual earnings includes three types of earnings found in the yearend payroll data: regular, overtime and other earnings.

make comparisons between male and female earnings, while accounting for the effects of any extraneous factors. In a regression model, total earnings are assumed to be a function of the independent variables plus a random error.

The basic steps in this procedure are outlined as follows:

a. Use all the data to estimate the function of the independent variables, including gender.

b. Determine the 'gender coefficient' of the resulting regression function.

c. Determine if the gender coefficient is statistically significant.

66. A negative gender coefficient indicates that women are compensated less than similarly situated men. Negative coefficients may be expressed as a percentage difference. For example, if the coefficient as a percentage were 10%, this means that, all other factors being equal, a woman earns 10% less than a man. Statistical significance is determined by a t-value which measures the size of the gender coefficient in standard deviation units. For large sample sizes, t-values larger than 2.00 are considered statistically significant. If the gender coefficient is statistically significant, the disparity cannot be explained by chance variation and the coefficient measures a real difference between male and female earnings.

Total Annual Earnings Comparisons

67. The initial regression[31] of total annual earnings included variables which account for how

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[31] Referred to as model 1 in Appendix 15.

long an employee has worked for the company, how many weeks the employee worked during the year, whether the employee was hired or terminated during the year, whether the employee was full time or part time, which store the employee worked in, whether the employee was ever hired into an retail store management position, and whether the employee is a woman. Regressions were run for each year, 1996-2001, and were restricted to non-probationary employees in a retail store job who worked and had earnings[32]. The results of the initial regressions show that women are paid at least 9.3% less than similarly situated men in every year. These results are highly significant with t-values more extreme than -120.5 in every year. The initial regression shows that the earnings difference between men and women is significant even after taking into account factors such as seniority, weeks worked, part time status and store location.

68. The initial regression was also run separately for hourly and salaried employees[33]. The results for hourly employees show that women are paid at least 6.7% less than comparable men and are highly significant with t-values more extreme than -89.3 in every year. The results for salaried employees show that women are paid at least 12.6% less than similarly situated men in every year. These results are highly significant with t-values more extreme than -24.6 in every year. These models show that the

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[32] Technical descriptions of regression models are given in Appendix 14.

[33] Referred to model 1h for hourly and model 1s for salaried in Appendix 15.

earnings difference between men and women are more pronounced among salaried than hourly employees.

69. A second regression model was run, with job position added as a control factor in addition to those included in the initial model. This second model[34] measures differences in earnings within the same job position. As noted earlier in this report, women are under-represented in management jobs and have significant shortfalls in management promotions. Therefore, job positions held by women may be the result of discrimination and would be a tainted variable. Accordingly, regressions including job as a control factor will not reflect any discrimination due to failure to promote women. Nevertheless, the job that a person held was added as a variable to the initial model in order to explore whether earnings differences persist within jobs, notwithstanding the possible discrimination in job positions. The results show that women are paid at least 4.5% less than comparable men in every year, and are highly significant with t-values more extreme than -54.9 in every year. Thus, women still earn less than similarly situated men even after taking into account the job they held.[35]

70. The second model was also run separately for hourly and salaried employees[36]. The results for hourly employees show that women are still paid at

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[34] Referred to as model 2 in Appendix 15.

[35] The variable of "Store" may also be a tainted, because female managers may be assigned to stores with less earnings potential.

[36] Referred to as models 1h and 1s in Appendix 15.

least 4.5% less than similarly situated men in each year, and are highly significant with t-values more extreme than -53.84 in every year. The results for salaried employees show that women are paid least 5.8% less than similarly situated men, and are highly significant with t-values more extreme than -12.1 in every year. Thus, among hourly and salaried employees, women earn less than similarly situated men even after taking into account the job they held.

71. Job review ratings for hourly employees take on values 1, 3, 5, and 7, with 7 being the best rating. As mentioned earlier in this report, ratings of 3 and 5 comprise over 95% of the ratings given. To assess the effect of job review ratings on annual earnings, variables for the four rating values were added to the second model.[37] This third model[38] was run only for year 2001 when ratings data was most complete and excluded about 25% of hourly employees because they did not have a valid rating. The third model shows that women are paid 6.1% less than comparable men in 2001 with a highly significant t-value of -77.35. The 6.1% figure is higher than disparities when ratings were not taken into account, which is consistent with the earlier finding that women tend to have higher ratings than men.

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[37] Performance review data for management employees was not used in any regressions, because the data provided was incomplete until a few days prior to the completion of this report, and because performance ratings are not used for determining pay for Managers and Co-Managers.

[38] Referred to as model 3.

72. Table 27 below summarizes all regressions on total earnings. Details by year are attached as Appendix 15.

Table 27

Summary of Annual Earnings Regressions

Initial model controls for seniority, weeks worked, store, PT/FT status, whether hired or terminated during year, whether a management hire. All models exclude probationary employees and employees who did not work or had zero earnings.

Employees Included	Model	Range of Yearly Results, 1996-2001 Percent Difference	t-value
Hourly & Salary	1 Initial	9.37% to 10.52%	-120.59 to -147.87
Hourly only	1h Initial	6.75% to 8.14%	-89.36 to -115.64
Salary only	1s Initial	12.63% to 14.72%	-24.62 to -37.04
Hourly & Salary	2 Adds job	4.54% to 5.60%	-54.96 to -71.37
Hourly only	2h Adds job	4.54% to 5.58%	-53.84 to -69.56
Salary only	2s Adds job	5.46% to 7.07%	-12.17 to -20.05
Hourly only	3h Adds job and ratings	6.14%	-77.35*

* Year 2001 only, restricted to hourly employees with valid review rating.

Hourly Pay Rate Comparisons

73. In the preceding regressions for hourly employees, total annual earnings were significantly less for women than for men. Total earnings for hourly employees are affected by regular and overtime hours worked and by hourly pay rates. To investigate differences in pay rates, regressions on dollar per hour rates were run for non-probationary hourly retail store employees who were active at year-end. These first regressions on hourly rates[39] control for how long an employee has worked for the company, whether the employee was hired during the year, whether the employee was full time or part time, which store the employee worked in, whether the employee was ever hired into a retail store management position, what job the employee held, and whether the employee is a woman[40]. Gender coefficients for these regressions are expressed in dollars and represent the dollar difference in hourly rates between women and men. For example, if the gender coefficient is -0.30, then this means that hourly women earn $0.30 per hour less than similarly situated men.

74. The hourly rate regressions show that women are paid at least $0.18 per hour less than similarly situated men, and results are highly significant with t-values more extreme than -62.3 in every year[41]. Also, the disparities get steadily worse from 1997 to 2001 when women were paid $0.18 per

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[39] Referred to as model 4h.

[40] Details of the regression models are given in Appendix 14.

[41] Details of these regressions are given in Appendix 15.

hour less than men in 1997 to $0.34 less per hour in 2001. These regressions show that the hourly pay rate difference between men and women cannot be explained by factors such as seniority, part time status, store location and job held.

75. Job review ratings were added to the hourly rate regressions to investigate whether ratings could explain differences in hourly pay rates. This second model on hourly rates[42] was run only for year 2001 when ratings were most complete. The results show that women are paid $0.37 per hour less than comparable men in 2001, and are highly significant with a t-value of -102.65. Thus, women are paid at a lower hourly rate than similarly situated men even after taking into account both the job they held and their job review ratings, as well as the basic factors in the model. The $0.37 disparity is higher than the disparity when ratings are not taken into account, which is again consistent with the earlier finding that women tend to have higher ratings than men. Table 28 below summarizes the regressions on hourly pay rates, and details by year are given in Appendix 15.

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[42] Referred to as model 5h.

Table 28

Summary of Pay Rate Regressions on Hourly Employees

All models control for seniority, store, PT/FT status, whether hired during year, whether a management hire, job held. All models exclude probationary employees, those not active at year end, and those without a pay rate.

		Range of Yearly Results, 1996-2001	
Employees Included	Model	$/hour Difference	t-value
Hourly only	4h Has job	$0.18 to $0.34	-62.30 to -101.18
Hourly only	5h Has job and rating	$0.37	-102.65*

* Year 2001 only, restricted to hourly employees with valid review rating.

Consistency in Regressions Across Regions

76. In all regressions on total annual earnings and hourly pay rates, the gender coefficients are statistically highly significant because actual earnings and pay rates for women tend to be lower than what would be predicted for similarly situated men. To determine if women are paid less or at a lower rate consistently across regions, the average female difference between actual and predicted values was computed for every region in year 2001. For every regression model in this report, these averages were negative in 100% of all regions (41 out of 41), indicating that women are earning less and are paid at a lower hourly rate than similarly situated men in

every region. Details by region are given in Appendix 16.

F. CONCLUSION

77. Based on my analyses of Wal-Mart personnel and payroll data, and documents I have reviewed, I reach the following conclusions:

a) Women are disproportionately employed in lower paying hourly jobs. In each of the 41 regions at Wal-Mart, the percentage of women among hourly employees was approximately twice their percentage among salaried employees, at year-end 2001.

b) The total earnings paid to men is about $5000 more than earnings paid to women, among full-time employees working at least 45 weeks, on the average, in 2001. In each of the 41 regions across the country men earned at least $2200 more than women, and in 35 out of 41 regions men earned at least $4000 more than women, among full-time employees working at least 45 weeks, during 2001.

c) Women have lower hourly rates than men in hourly jobs, on the average. Women have lower hourly rates than men working in the same job in 2001, in 76% of the jobs with over 1000 employees, for employees who were employed for at least 1 year since date of hire.

d) Women have more years employed at Wal-Mart than men overall, in salary jobs, and in hourly jobs. Women have been working at Wal-Mart longer than men in the same job, for 97% of jobs with at least 1000 employees in 2001.

e) Women have higher performance ratings in hourly jobs than men, on the average in 2001. The average performance rating is higher for women than men in the same job, for 75% of hourly jobs with at least 1000 employees with ratings in 2001.

f) The hourly pay rate for men is $1.16 more than for women, on the average, at year-end 2001, among men and women hired in hourly positions in 1996, and Still employed in 2001. Among men and women hired into the same hourly job in 1996, and still employed in 2001, the average hourly pay rate for men is higher than the rate for women in 80% of the hourly jobs with over 1000 hires in 1996.

g) Over 95% of Store Managers and Co-Managers change stores at least once when entering those positions or later, and over 80% change district, and over 60% change region. Store Managers change stores 3.6 times on the average, when entering that position and subsequently.

h) Over 80% of Assistant Managers and Management Trainees change stores at least once when entering those positions or later, and over 60% change district at least once.

i) 80% of the promotions into Support Manager positions do not appear in the job posting data.

j) The Management Career Selection system (MCS) was not used for selecting promotions into Management Trainee or Co-Manager jobs.

k) The MCS system includes information on less than 1% of the promotions into Assistant Manager positions.

l) Women received 2891 fewer promotions into Support Manager than would be expected from their representation in the feeder pools.

m) Women received 2952 fewer promotions into Management Trainee than would be expected from their representation in the feeder pools.

n) Women received 346 fewer promotions into Co-Manager than would be expected from their representation in the feeder pools.

o) Women received 155 fewer promotions into Store Manager than would be expected from their representation in the feeder pools.

p) Total earnings paid to women ranged between 5% and 15% less than total earnings paid to similarly situated men in each year 1996-2001, even when accounting for factors such as seniority, status, and store.

q) In 2001 when performance ratings were available, the shortfall in earnings for female hourly employees was greater when including performance ratings as a possible explanatory factor for earnings differences than when it was not included.

r) Among hourly employees, women were paid between 18 and 34 cents per hour less than similarly situated men during 1996-2001, even when accounting for factors such as seniority, status, and store. The shortfall in female hourly pay rates became steadily worse from 1997 to 2001.

s) In 2001 when performance ratings were available, the shortfall in hourly rate paid to female hourly employees was greater when including performance ratings as a possible explanatory factor for earnings differences than when it was not included.

t) Women had lower total earnings, and lower hourly rates, than would be predicted for similarly situated men in every one of the 41 regions across the country.

78. Women employees at Wal-Mart are concentrated in the lower paying jobs, are paid less than men in the same job, and are less likely to advance to management positions than men. These gender patterns persist even though women have more seniority, have lower turnover rates, and have higher performance ratings in most jobs. The shortfall in female earnings, pay rates, and promotion rates have a high degree of statistical significance.

I declare under penalty of perjury of the laws of the United States and State of California that the foregoing is true and correct.

This Declaration was signed by me on April 23, 2003, at Berkeley, California.

/s/ Richard Drogin
Richard Drogin, Ph.D.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF WILLIAM T. BIELBY, Ph.D. IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, William T. Bielby, declare that:

1. I have been retained by Brad Seligman and Jocelyn Larkin of the Impact Fund and by the law firm of Cohen, Milstein, Hausfeld & Toll, counsel for plaintiffs in *Betty Dukes, et al. v. Wal-Mart Stores, Inc.* ("Wal-Mart"). I have been asked to review materials pertaining to personnel policies and practices of Wal-Mart and to address three issues. The first is whether key elements of the personnel system at Wal-Mart are uniform across the U.S. retail divisions. Second, I have been asked to determine whether uniform features of the Wal-Mart personnel system create barriers to women's career advancement in the company, especially with respect to promotion into management and compensation. The

third issue I have been asked to address is the adequacy of Wal-Mart's policies and practices in the areas of affirmative action, equal employment opportunity, and diversity for identifying, monitoring, and eliminating potential discriminatory barriers faced by women employed by the company.

2. I have testified as an expert witness in both California Superior Court and Federal Court on cases involving workplace discrimination. I have served as an expert in several other cases involving issues of gender discrimination in large, multi-establishment national and regional retail firms, including class action cases involving Lucky Stores, Publix, Sherwin-Williams, and Home Depot. A list of cases in which I have been identified as an expert or have given expert testimony since 1998 is attached as Exhibit A.

3. I have received a Ph.D. in Sociology from the University of Wisconsin–Madison in 1976. I also have a B.S. in Electrical Engineering and a M.A. in Social Sciences from the University of Illinois. I am currently Professor of Sociology at the University of California, Santa Barbara, where I chaired my department from 1992 to 1998. I am also affiliated with UCSB's Department of Statistics and Applied Probability. Among my former positions are Visiting Professor of Management at UCLA and Fellow at the Center for Advanced Study in the Behavioral Sciences at Stanford. I teach graduate and undergraduate courses on organizational behavior, research methods for the social sciences, labor markets, quantitative methods, and social inequality. I also specialize in research in each of these areas. Over the past twenty years, much of my research has focused on issues of workplace discrimination, and on organiza-

tional policies and practices more generally. My research on these topics has been supported by four grants from the National Science Foundation, and it has been published in leading peer-reviewed social science research journals. My Curriculum Vitae is attached as Exhibit B.

4. I have received national awards from three different professional associations for my research on gender, labor markets, social psychological aspects of work, and organizational personnel practices. I have served on numerous panels, advisory committees, and professional workshops on topics relating to workplace discrimination, organizational personnel policies and practices, and research methodology. I have served as an advisor, consultant, or reviewer for the following organizations and agencies: the U.S. Bureau of the Census, the U.S. Department of Justice, the U.S. Department of Labor, the National Science Foundation, the National Institute of Mental Health, the National Academy of Sciences, the University of Michigan's Institute for Social Research, Stanford University, and the Writers' Guild of America, West. I have also served on the editorial boards of leading social science journals, and I regularly review manuscripts for scientific journals on topics relating to organizational behavior, employment discrimination, gender and work, and research methodology. I have been elected to several offices in the American Sociological Association. I served for three years on the ASA Council, the organization's governing body, and I am currently President of the Association.

5. My consulting rate is $275 per hour, plus expenses. My rate for time spent in depositions $550 per hour, with a four-hour minimum per day.

6. I have reviewed the deposition testimony of Wal-Mart managers responsible for creating and implementing the company's personnel policies, as well as the testimony of managers who made decisions about compensation, hiring, promotion, job assignment, and related personnel matters. I have also reviewed the documents used as exhibits in the depositions of these individuals. Among others, in the human resources and diversity areas I have reviewed the testimony of Kevin Harper, Vice President of the People Division Wal-Mart Stores and Specialty Group; Coleman Peterson, Executive Vice President, People Division; Charlene Jarrells Porter, Senior Vice President, People Division; Jeffrey Reeves, former Sam's Club Vice President of People; and several People Directors and Regional Personnel Managers. At the senior executive and operations levels, I have reviewed the deposition testimony of Thomas Coughlin, President and Chief Executive Officer of Wal-Mart Stores Division; Don Harris, Executive Vice President of Merchandising and former Executive Vice President of Operations of Wal-Mart Stores; Jim Haworth, Executive Vice President of Operations and Chief Operating Officer of Wal-Mart Stores; and I have also reviewed the testimony of current and former Divisional Vice Presidents, Regional Vice Presidents, District Managers, and Store Managers. A complete list of the depositions I reviewed appears in Exhibit C.

7. The documents I reviewed included: organizational charts; correspondence, memos, reports, and presentations relating to personnel policy and practice, diversity, and equal employment opportunity issues, and documents describing the culture and history of the company. In addition to documents that are deposition exhibits, I was also provided with

the expert report of Dr. Marc Bendick and tables from the report of Dr. Richard Drogin.

8. In addition to the materials described above, I have also relied upon a large body of social research on organizational policy and practice and on workplace bias. Social research conducted across many decades has generated considerable knowledge about what generates and sustains workplace inequalities. That same research, either directly or by implication, points to the kinds of workplace policies and practices that are likely to minimize bias. The relevant research has applied multiple methodologies in a variety of contexts, including experiments in controlled laboratory settings; ethnographies and case studies in "real world" organizations both large and small, public and private, and in a range of industries; surveys done with representative samples of workers and employers; and historical studies based on archival materials from the United States and abroad. Thus, the scientific evidence about gender bias, stereotypes, and the structure and dynamics of gender inequality in organizations that I rely upon has substantial external validity and provides a sound basis for analyzing the policies and practices of Wal-Mart. My method is to look at distinctive features of the firm's policies and practices and to evaluate them against what social science research shows to be factors that create and sustain bias and those that minimize bias. In litigation contexts, this method of analysis is known as "social framework analysis."[1]

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[1] See J. Monahan and L. Walker, *Social Science in law: Cases and Materials*, Fourth Edition, Foundation Press, 1998, Chapter Five, "Social Science Used to Provide Context."

9. Below, I first summarize my overall conclusions about gender bias and the effectiveness of anti-discrimination policies and practices at Wal-Mart. Next, I address the issue of uniformity in personnel policy and practice at Wal-Mart. After that, I describe the firm-wide policies and practices at Wal-Mart that create and sustain barriers to women's career success and the effectiveness of the firm's efforts to identify and eliminate those barriers and guarantee equal employment opportunity.

10. Centralized coordination, reinforced by a strong organizational culture, creates and sustains uniformity in personnel policy and practice throughout the organizational units of Wal-Mart. Subjective and discretionary features of the company's personnel policy and practice make decisions about compensation and promotion vulnerable to gender bias. Finally, I have concluded that there are significant deficiencies in the company's policies and practices for identifying and eliminating barriers to equal employment opportunity at Wal-Mart. The basis for my conclusions is explained below.

11. Wal-Mart's People Division is responsible for corporate-wide human resource policy. Policies emanating from the Home Office in Bentonville are overseen by the Executive Vice President ("EVP") of the People Division, who described his duties as "overall responsibility for getting, keeping, and developing Wal-Mart talent worldwide."[2] The EVP re-

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[2] The Executive Vice President's responsibilities cover Wal-Mart Division 1, the Specialty Divisions, and Sam's Club and the rest of the company's human resources operations worldwide (Peterson depo., p.8).

ports to the company's President and Chief Executive Officer and sits on the corporate Executive Committee.[3] The senior human resources executives in each of the company's divisions report to the divisional top executives, with a "dotted line" reporting relationship to the EVP of the People Division. For example, in Wal-Mart Stores Division 1, the Senior Vice President of People reports directly to the division's President and CEO, and reports indirectly to the EVP of the People Division, and a similar reporting relationship exists in the Sam's Club division.[4] These senior human resources executives meet weekly with the EVP of the People Division, where people activities in the divisions would be discussed.[5]

12. A Primary Policy Committee with representatives from each of the company's operating divisions as well as the Home Office formulates and approves all new human resources policies. A Secondary Policy Committee that includes representatives from the People Divisions of each of the operating divisions and the home office also reviews the policies, and ultimately all policies are approved by Wal-Mart's Executive Committee and Executive Vice President of People before being disseminated throughout the company.[6]

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[3] Peterson depo., p. 11-12.

[4] Harper 30(b)(6) depo., p. 235-237; Jarrells Porter depo. 30-32; Peterson depo., p. 26-29.

[5] Peterson depo., p. 27-28.

[6] Hass depo., p. 24-30; Jarrells Porter depo., p. 28, 33-34; Reeves depo., p. 147-149.

13. The human resources function is organized hierarchically within divisions. For example, in Division 1, the company's approximately 2800 stores are organized by six divisional areas, with five or six regions within each area, and 80 to 85 stores within each region.[7] Each store has an hourly employee with the title of personnel manager who coordinates hourly recruiting and "CBL" and performs payroll functions.[8] Overseeing store-level human resources activities, including staffing and compliance with government regulations and company policies, are the Regional Personnel Managers ("RPM"), and most of them work out of the corporate Bentonville Home Office. RPMs are responsible for the management staffing of stores (e.g., participating in the recruitment and selection of Store Managers and Co-Managers), overseeing the Management Career Selection process, and evaluating store management teams. Each of the thirty-five Regional Personnel Managers in Div 1 reports to one of the three People Directors at the Home Office, who in turn report to the Vice President of the Wal-Mart Stores People Division.[9] People Directors meet weekly with RPMs,

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[7] Harper 30(b)6 depo., p. 188-190.

[8] Harper 30(b)6 depo., p. 117-120.

[9] Harper 30(b)6 depo., p. 188-192; Harper depo., p. 18-21; Ellison depo., p. 75-78, 81; Ruiz depo., p. 150-152; "RPM Responsibilities" (WMHO369676). The human resources function has a similar hierarchical organization in the Specialty Divisions. Each Specialty Division has Regional Personnel Managers for One-Hour Photo, Tire Lube Express, and Shoes and Jewelry report to the heads of their respective divisional operating units. People Directors that report to the Vice President of the Wal-Mart Stores People Division also have responsibilities for Specialty Divisions (Harper depo., p. 20-27).

provide them with training, direction, and support, and oversee training and orientation.[10] Mr. Harper, Vice President of the Wal-Mart Stores People Division, testified that among the responsibilities of his office are reviewing salary levels for district and regional managers, setting start rates for Assistant Manager, Co-Manager, and Store Manager positions, and the rate of salary adjustments for hourly employees.[11]

14. Sam's Club has a similar hierarchical organization to its human resources function, with Regional Personnel Managers reporting to a Vice President of People.[12] Former Vice President of People at Sam's Club Jeffrey Reeves testified that 99% of the human resources policies of Wal-Mart Stores and Sam's Club were identical.[13] Wal-Mart Stores CEO Thomas Coughlin also testified that the policies of two operating divisions were generally the same.[14]

15. Wal-Mart's computerized information system is a key element of the company's uniform personnel policies. The uniform policies and guidelines are available throughout the company via the Pipeline intranet on-line database, and information relied

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[10] Ruiz depo., p. 141-142; 151-152; "People Director Responsibilities" (WMHO369677).

[11] Harper depo., p. 41-47.

[12] Reeves 30(b)6 depo., p. 14-15.

[13] Reeves depo., p. 148. The only difference that Mr. Reeves could think of was in the attendance policy; also see Hottinger depo., p. 32-35.

[14] Coughlin depo., p. 42-43.

upon by managers is distributed centrally via the Manager's Workbench.[15]

16. Wal-Mart is well known for its innovations in using sophisticated information systems to maintain centralized decision-making and control in its business operations. Writing in the *Sloan Management Review*, Thomas W. Malone, one of the leading experts on this topic, described Wal-Mart's centralized system as follows:

> By centralizing pricing, buying, and promotional decisions on a national level, Wal-Mart was able to deliver better-quality products for lower prices than most of its competitors - with the result that small towns across the United States are now filled with the empty hulls of local retail stores, driven out of business by a Wal-Mart down the street. Other factors played a role, too, but a key factor that enabled Wal-Mart to centralize its decision-making was IT. With its famous state-of-the-art electronic ordering and inventory control systems, for instance, *Wal-Mart introduced a new level of connected, centralized decision making* into small-town retailing (emphasis added).[16]

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[15] Hass depo., p. 23-34, 43-44, 52, 65-67, 95; Teng depo., p. 86-87; Harper 30(b)6 depo., p. 44-45, 58-59, 69-72, 126, 131-132, 149-150; Harper depo., p. 102, 113-114, 191-192; Mireles depo., p. 108-109, 183-184.

[16] T. W. Malone, "Is Empowerment Just Fad? Control, Decision Making, and IT," *Sloan Management Review*, Vol. 38 (Winter), 1997, p. 23-35.

Deposition testimony is consistent with this account of centralized control in operations, and it demonstrates that the same system of control extends to the human resources area. For example, each store manager receives a computerized daily recap for the store that includes detailed information on both operational and merchandising factors such as sales by department, price changes, inventories, and invoices, and personnel factors like computer-based learning ("CBL") completions, payroll, attendance, full-time and part-time hours, and evaluations. District managers get a similar recap for each store in their district, and Regional Vice Presidents get a recap twice weekly aggregated to the regional level.[17] District managers rely on these reports to intervene with store managers to address any exceptions that are not in compliance with company policy and guidelines.[18] Each month, a "People P & L" report is generated by the Home Office for each store, reporting information on separations, turnover, and workforce demographics. Aggregated reports are produced at the level of district, region, and division.[19]

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[17] D. Carter depo., p. 138-139; Ellison depo., p. 225-228; Raps depo., p. 183-186; Butler depo., p. 112-113.

[18] See, for example, Raps depo., p. 186-187; D. Carter depo., p. 139-147; Ellison depo., p. 228; Butler depo., p. 111-112. District Manager Vincent Martinez testified that his primary job duties were to ensure "that all the company policies and culture and beliefs are communicated, taught, and enforced" (Martinez depo., p. 224-5.

[19] Harper 30(b)6 depo., p. 179-180, 242-246; R. Carter depo., p. 31; Harper depo., p. 274-275; Butler depo., p. 192.

17. In addition to acting upon information generated by reports rolled up from the store, district, regional, and divisional level, uniformity in human resources policy and practice is monitored via frequent store visits by District Managers and Regional Personnel Managers. District Managers are expected to visit each store in their District once every two weeks and submit reports about those visits to the Regional Vice President.[20] Each Regional Personnel Manager also travels weekly to visit stores in their region, and reports from those visits are submitted to the People Director responsible for the Region.[21]

18. An organizational culture is a shared set of values and beliefs about how things are done in the organization.[22] A strong and widely shared organizational culture promotes uniformity of practices throughout an organization. Wal-Mart is widely recognized by social scientists and management scholars as an organization with a strong culture, with practices and policies typical of such firms. These include the emphasis on the company's founder and its history, a mission statement defined by core values, frequent communication about the culture to employees, orientation and training about the culture for employees at all levels of the organization, pro-

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[20] Harper 30(b)6 depo., p. 166; D. Carter depo., p. 134-5; Ellison depo., p. 219-221.

[21] Ludwig depo., p. 128-137; Martinez depo., p. 170, 174.

[22] *See* T. E. Deal and A. A. Kennedy, *Corporate Cultures*. Addison-Wesley, 1982; E. H. Schein, *Organizational Culture and Leadership*, Second Edition, Jossey-Bass, 1992; and J. Kerr and J. W. Slocum, "Managing Corporate Culture Through Reward Systems," *Academy of Management Executive*, Vol. 1, 1987, p. 99-108.

moting managers from the ranks of hourly employees, and rotating managers among locations.[23]

19. Wal-Mart materials make frequent mention of Sam Walton's personal biography, the history of his founding of the company, and how his personal values (and those of others in his family) became core beliefs and values for the company.[24] Personal encounters with Sam are recounted as significant events in employees' lives, and stories about them are an important part of company lore.[25] The company's "Three Basic Beliefs" and other core elements of its mission and culture appear consistently in

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[23] Deal and Kennedy, *op cit.*; Schein, *op cit.*, W. Ouchi, "Markets, Bureaucracies, and Clans," *Administrative Science Quarterly*, Vol. 25, 1980, p. 129-141; C. D. Hansen and W. M. Kahnweiler, "Storytelling: An Instrument for Understanding the Dynamics of Corporate Relationships," *Human Relations*, Vol. 46, 1993, pp. 1391-1409; J. Martin, M. S. Feldman, M. J. Hatch, and S. B. Sitkin, "The Uniqueness Paradox in Organizational Stories," *Administrative Science Quarterly*, Vol. 28, 1983, pp. 438-453; T. Peters, "Symbols, Patterns, and Settings," *Organizational Dynamics*, Vol. 7, 1978, pp. 3-23; J. Pfeffer, "Management as Symbolic Action: The Creation and Maintenance of Organizational Paradigms," pp. 1-52 in *Research in Organizational Behavior*, Vol. 3, edited by L. L. Cummings and B. M. Staw, Jai Press, 1982; M .E. Boyce, "Organizational Story and Storytelling: A Critical Review," *Journal of Organizational Change Management*, Vol. 9 (No. 5), p. 5-26; W. Swap, D. Leonard, M. Shields, and L. Abrams, "Using Mentoring and Storytelling to Transfer Knowledge in the Workplace", *Journal of Management Information Systems*, Vol. 18 (Summer), 2001, p. 95-114.

[24] Muzingo dep., p. 97-106.

[25] Muzingo depo., p. 107-108; Scantlin depo., p. 55-57; Seaman depo., p. 71-72; D. Carter depo., p. 35-40; Sherman depo., p. 98-101; Oshier depo., p. 106-108; Wesbecher depo., p. 19-23.

written, on-line, and video training and orientation materials.[26] Corporate culture is also a topic covered frequently in Wal-Mart World, the company newsletter distributed to all employees of Wal-Mart Stores and Sam's Club.[27] Corporate culture is an important element of company-wide meetings, including the annual shareholders meeting and events for managers and associates held at the beginning and end of the year.[28]

20. New employees learn the Wal-Mart culture by viewing videos about the company's history, completing CBL modules about elements of the culture, and reading the Associate Handbook.[29] Employees in Wal-Mart stores attend a daily meeting held at shift changes, where managers discuss the company culture and employees do the Wal-Mart cheer.[30] Additional instruction and orientation on the Wal-Mart culture is included as part of the training given to new managers and ongoing training given to manag-

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[26] Muzingo depo., p. 114, 117-122, 125-128, 130-135.

[27] Muzingo depo., p. 133-134.

[28] Muzingo depo., p. 86-87; 147-148. Also see M. J. Schneider, "The Wall-Mart Annual Meeting: From Small-Town America to a Global Corporate Culture," *Human Organization*, Vol. 57, 1998, p. 292-299.

[29] Muzingo depo., p. 114-115; Seaman depo., p. 70-71.

[30] Muzingo depo., p. 86-87, 125; Hottinger depo. p. 83-84 and Oshier depo., p. 106-107 (on Sam's Club meetings and the Sam's Club cheer). The "Culture Topic Index" provided to store management states: "It is important for our Associates to understand how important culture is to their company. We have provided you with a culture topic for mandatory weekly discussions with all store Associates on each shift during store meetings." (BATES WMHO598668)

ers at all levels of the company.[31] Wal-Mart and Sam's Club managers at the Home Office attend weekly Saturday morning meetings, and the first meeting of the month is devoted to a culture topic.[32] According to Ms. Muzingo, the company's 30(b)6 deponent on corporate culture, the meetings are a deliberate effort to sustain the culture as the company grows:

> I think as a company we recognize, as we get larger that we are going to have to work hard to make sure that the culture stays intact. And so we look for lots of ways to do that. And one of them is that you have this large group of people that comes together on a weekly basis and so it's a good opportunity
>
> And certainly that audience of people are largely comprised of individuals that travel out to the stores on a weekly basis, and so that's a good way to make sure that they're being trained and exposed to the culture in the hopes that when they go to the stores they also will be training and developing people on the culture.[33]

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[31] Muzingo depo., p. 142-147.

[32] Muzingo depo., p. 135-142; Butler depo., p. 77-78; Ludwig depo., p. 112-113; Martinez depo., p. 166-168. Also see "Saturday Morning Fever: Wal-Mart's Weekly Meeting," *The Economist*, December 8, 2001.

[33] Muzingo depo., p. 141. Ms. Muzingo went on to explain that one reason experienced managers are included in the meeting is to teach the culture to those who are new to management (Muzingo depo., p. 142).

21. In sum, consistent with the organizational research on this topic, Wal-Mart's distinctive corporate culture is sustained by focused efforts of the firm through on-going training and socialization, communication specifically designed to reinforce its distinctive elements, promotion from within and relocating managers from store to store, and shared experiences among employees that build commitment to shared beliefs and values. As a result of these efforts, employees achieve a common understanding of the company's ways of conducting business.[34] This can be seen in the way various operational and personnel practices that might otherwise be coordinated solely by written rules enforced from above become part of the company's culture. Examples of these, which are fully understood by nearly all employees, are concepts such as SWAS ("store within a store"), CBWA ("coaching by walking around"), "Grass Roots," "Open Door," "Store of the Community," "Every Day Low Prices," "Ten Foot Rule," "Sun-Down Rule," and "Servant/Leadership."[35]

22. At Wal-Mart in 2001, women outnumbered men by nearly two to one in the hourly ranks (65.2% female for Wal-Mart and Sam's combined, Drogin Appendix Table 5a) and men outnumbered women by almost two to one in salaried management positions (33.2% female). At Wal-Mart Stores (Wal-Mart/Supercenter/Neighborhood Markets) in 2001,

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[34] Deal and Kennedy, *op cit.*; Ouchi, *op cit.*

[35] Muzingo depo., p. 84-92, 115, 131; Harper depo., p. 291-292; Jarrells-Porter depo., p. 115-116; Kintzele depo., p. 192-193; Dolan depo., p. 132-133; Goodwin depo., p. 48, 214; Wigger depo., p. 129-130, 138; D. Carter depo., p. 222; R. Carter, p. 155-156.

women's representation among hourly supervisors (78.5% of Team Leaders, job code 101) exceeded their representation among hourly salespersons (64.4% of Sales Associates, job code 501; see Exhibit D). Sales Associate is the largest job classification in the company, employing over 200,000 individuals, and there is substantial segregation within that job category. For example, in 2001 women comprised over 90% of those employed as Sales Associates in men's wear, infant/toddlers, health and beauty aids, domestic goods, and ladies sportswear, and less than 25% of those employed as Sales Associates in hardware and in Supercenter food departments such as dairy products, meat, frozen food, and produce (Exhibit D). Few men work in the front-end position of Cashier (job code 501, the second largest job category, with over 150,000 employees), which was 89.5% female in 2001. Not every department is sex segregated; for example, the gender mix is relatively balanced among Sales Associates in automotive (43.6% female), electronics (47.2% female), and candy, tobacco, and cookies (55.4% female).

23. In store level supervisory and salaried management positions, women's representation drops with each step up the job hierarchy. Although women outnumber men by nearly four to one among hourly supervisors, in 2001 they comprised only 45.1% of the Support Managers (job code 1050, "team lead"), the highest-level hourly supervisory position (Exhibit D). Moving into salaried management, in 2001 they comprised only 37.6% of Assistant Managers (job code 43000), 21.9% of Co-Managers (job code 41000), and 15.5% of Store Managers (job code 40000).

24. A similar pattern holds at Sam's Club, but at a somewhat lower level of segregation. In 2001, women comprised 54.1% of hourly employees but only 31.2% of salaried managers (Drogin Appendix Table 5b). Among the hourly ranks, in 2001 women were 71.8% of Cashiers (job code 501, the largest job category, employing over 16,000 individuals). Four of the six largest job categories are highly segregated, either done mostly by women (job code 320, "demo ptnr," 92.7% female in 2001) or mostly by men (job code 300, "shoe mngt," 19.1% female; job code 816, "tire tech," 1.1% female; and job code 530, "cart ptnr," 2.3% female).

25. The hourly supervisory position at Sam's Club is team lead (job code 910, 39.4% female in 2001). At Sam's Club, an Area Manager is a salaried position below the level of Assistant Manager.[36] The largest Area Manager positions are Front End (job code 43350, 64.8% female in 2001), Bakery (job code 49900, 58.2% female in 2001), Receiving (job code 43360, 34.0% female), and Meat (job code 49950, 8.5% female). Assistant Manager-level positions are Merchandising Manager 1 (job code 43370, 17.3% female in 2001), Merchandising Manager 2 (job code 43380, 16.0% female), and Business Manager (job code 43390, 36.6% female). Men outnumber women by almost four to one among Sam's Club Co-Managers (job code 41200, 22.0% female) and by about 10 to 1 among General Managers (job code 40000, 9.2% female).

26. Dr. Bendick's benchmarking analysis shows that there is a significant shortfall in women's repre-

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[36] Reeves 30(b)6 depo., p. 73-80, 83.

sentation in management at Wal-Mart relative to other companies in the large-chain retail industry. He also shows that the shortfall is consistent over time and across regions of the United States (Bendick Report, p. 16-30). Dr. Drogin's analysis demonstrates that contributing to the shortfall is a consistent gender disparity in rates of promotion into the Support Manager and Area Manager positions, into salaried management from the hourly ranks, and into the Co-Manager and Store Manager positions (Drogin Appendix Tables 14a to 14h). Dr. Drogin also shows significant compensation disparities by gender among similarly situated men and women (Drogin Appendix Tables 16). Below, I identify some of the personnel policies and practices that contribute to those disparities.

27. In this section of my section of my report I summarize the scientific literature upon which my opinions are based. In footnotes, I provide citations to sources in peer refereed journals, in important books and edited volumes in relevant fields of social science research, and, whenever possible, to review articles by leading experts who summarize the findings of social science research on gender bias in organizations, stereotypes, and related topics.

28. Depending on the job, organizational setting, and work environment, there are many reasons why men and women can have different career trajectories. For example, jobs may have job-related skill and experience requirements that differ, on average, between men and women. Gender disparities arising from such factors would not be considered discriminatory, so long as the employer is not responsible for differences in men's and women's qualifications (e.g., by not providing equal access to train-

ing). Conversely, employers create gender barriers when they make decisions about individuals' suitability for jobs, training, and support or their compensation based on beliefs about a person's gender rather than on his or her actual qualifications. Employers also create gender barriers when they ignore (or encourage) an organizational climate that is hostile towards women and inhibits them from performing to their full potential. Sometimes, practices that appear to be gender-neutral have the effect of denying to women the same opportunities that are available to men. For example, using employee referrals as a recruitment mechanism is likely to reinforce a workforce's existing gender composition.[37]

29. One way gender bias affects career outcomes is when stereotypes are allowed to affect personnel decisions. *Gender stereotypes* are beliefs about traits and behaviors that differ between men and women.[38] For example, men are believed to be com-

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[37] For a review of relevant research, see P. V. Marsden and E. Gorman, "Social Networks, Job Changes, and Recruitment," p. 467-502 in *Sourcebook on Labor Markets: Evolving Structures and Processes*, edited by I. Berg and A. L. Kalleberg, Plenum Publishing, 2001.

[38] K. Deaux and L. Lewis, "Components of Gender Stereotypes," *Psychological Documents*, Vol. 13, 1983, p. 25-34; K. Deaux and L. Lewis, "The Structure of Gender Stereotypes: Interrelationships Among Components and Gender Label," *Journal of Personality and Social Psychology*, Vol. 46, 1984, p. 991-1004; J. E. Williams and D. L. Best, "Sex Stereotypes and Intergroup Relations," p. 244-259 in *Psychology of Intergroup Relations*, edited by S. Worchel and W. G. Austin, Nelson Hall, 1986; S. T. Fiske, "Stereotyping, Prejudice, and Discrimination," p. 357-411 in *The Handbook of Social Psychology, Vol. 2 (Fourth Edition)*, edited by D. T. Gilbert, S. T. Fiske, and G. Landzey, McGraw-Hill, 1998.

petitive, aggressive, assertive, strong, and independent, while women are thought to be nurturing, cooperative, supportive, and understanding. Men are assumed to place a high priority on their careers, while women are assumed to be more strongly oriented towards family, even though research demonstrate that the commitments of men and women with similar job opportunities and family situations are virtually identical.[39]

30. These kinds of stereotypes are relevant to how men and women advance in careers with Wal-Mart. For example, if women are believed to be committed to and constrained by family circumstances, and men are not, women will not be given the same consideration as men for management positions that are believed to interfere with family obligations, especially if there is no reliable and systematic way to assess employees' interests in management positions.

31. When women perform successfully in male-dominated contexts, their accomplishments are more likely to be attributed to luck, help from others, or special circumstances rather than to their ability, whereas comparable performance by men is more likely to be attributed to their superior skills.[40]

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[39] For a review see D. D. Bielby, "Commitment to Work and Family," *Annual Review of Sociology*, Vol. 18, 1992, p. 281-302. Also see P. V. Marsden, A. L. Kalleberg, and C. R. Cook, "Gender Differences in Organizational Commitment: Influences of Work Positions and Family Roles," *Work and Occupations*, Vol. 20, 1993, p. 367-390.

[40] For a review of relevant research, see J. K. Swim and L. J. Sanna, "He's Skilled, She's Lucky: A Meta-Analysis of Observers' Attributes for Women's and Men's Successes and Failures,"

Moreover, stereotypical behaviors that are believed to be typical of men are often viewed as *inappropriate* for women. For example, it is less acceptable for a married woman with young children to place a high priority on her career than it is for a married man. Similarly, a woman who behaves in a competitive, assertive, and independent manner often elicits disapproval from those around her.[41]

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Personality and Social Psychology Bulletin, Vol. 22, 1996, p. 507-519. For studies of attribution bias in employment contexts, see J. H. Greenhaus and S. Parasuraman, "Job Performance Attributions and Career Advancement Prospects: An Examination of Gender and Race Effects," *Organizational Behavior and Human Decision Processes*, Vol. 55, 1991, p. 273-297; M. Igbaria and J. Baroudi, "The Impact of Job Performance Evaluations on Career Advancement Prospects: An Examination of Gender Differences in the IS Workplace, *Management Information Systems Quarterly*, Vol. 19, 1995, p. 107-123. Greenhaus and Parasuraman studied managers in three companies in the communications, banking and electronics industries, while Igbaria and Baroudi studied professionals in the field of information systems and data processing. For reviews of social psychological research on attribution biases, see Fiske and S. E. Taylor, *Social Cognition*, Second Edition, McGraw-Hill 1991, Chapter 3; M. Hewstone, "The 'Ultimate Attribution Error'? A Review of the Literature on Intergroup Causal Attribution," *European Journal of Social Psychology*, Vol. 20, 1990, p. 311-335.

[41] T. W. Smith, "Working Wives and Women's Rights: The Connection Between the Employment Status of Wives and the Feminist Attitudes of Husbands," *Sex Roles*, Vol. 12, 1985, p. 501-508; J. S. Bridges and A. M. Orza, "The Effects o Employment Role and Motive for Employment on the Perceptions of Mothers," *Sex Roles*, Vol. 27, 1992, p. 331-343; A. H. Eagly, M. G. Makhijani, and B. G. Klonsky, "Gender and the Evaluation of Leaders: A Meta-Analysis," *Psychological Bulletin*, Vol. 111, 1992, p. 3-22; M. J. Martinkio and W. L. Gardner, "A Methodo-

32. Because of gender stereotypes, individuals tend to ascribe "masculine" traits to men and "feminine" traits to women, and individuals tend to assume that the prevalence of "masculine" traits among women and "feminine" traits among men is rare. A large body of research demonstrates that the tendency to invoke gender stereotypes in making judgments about people is spontaneous and automatic.[42] As a result, people are often unaware of how stereotypes affect their perceptions and behavior, and individuals whose personal beliefs are relatively free of prejudice or bias are susceptible to stereotypes

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logical Review of Sex Related Access Discrimination Problems," *Sex Roles*, Vol. 9, 1983, p. 825-839; C. L. Copeland, J. E. Driskell, and E. Salas, "Gender and Reactions to Dominance," *Journal of Social Behavior and Personality*, Vol. 10, No. 6, 1995, p. 53-68; A. M. Konrad and K. Cannings, "The Effects of Gender Role Congruence and Statistical Discrimination on Managerial Advancement," *Human Relations*, Vol. 50, 1997, p. 1305-1328; A. H. Eagly, and S. J. Karau, "Role Congruity Theory of Prejudice Toward Female Leaders," *Psychological Review*, Vol. 109, 2002, p. 573-598.

[42] See, for example, M. A. Zarate and Eliot R. Smith, "Person Categorization and Stereotyping," *Social Cognition*, Vol. 8, 1990, p. 161-185; M. R. Banaji, C. D. Hardin, and A. J. Rothman, "Implicit Stereotyping in Person Judgment," *Journal of Personality and Social Psychology*, Vol. 65, 1993, p. 272-281; M. A. Zarate and P. Sandoval, "The Effects of Contextual Cues on Making Occupational and Gender Categorizations," *British Journal of Social Psychology*, Vol. 34, 1995, p. 353-362; M. R. Banaji and C. D. Hardin, "Automatic Stereotyping," *Psychological Science*, Vol. 7, 1996, p. 136-141. For a review, see J. A. Bargh and T. L. Chartrand, "The Unbearable Automaticity of Being," *American Psychologist*, Vol. 54, 1999, p. 462-479.

in the same ways as people who hold a personal animosity towards a social group.[43]

33. In the employment context, career barriers resulting from gender stereotypes and gender bias are likely to be consequential for women working in a traditionally male domains, such as the middle to upper managerial and professional ranks of large corporations, engineering division of firms, in the military, and in historically male-dominated industries such as skilled crafts and construction trades.[44]

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[43] S. T. Fiske and S. E. Taylor, *op cit.*, p. 271-294; R. Brown, *Prejudice*, Blackwell, 1995; G. V. Bodenhausen and C. N. Macrae, "The Self-Regulation of Intergroup Perception: Mechanisms and Consequences of Stereotype Suppression," p. 227-253 in *Stereotypes and Stereotyping*, edited by C. N. Macrae, C. Stangor, and M. Hewstone, Guilford Press, 1996; S. T. Fiske, "Stereotyping, Prejudice and Discrimination," p. 357-411 in *Handbook of Social Psychology*, edited by D. T. Gilbert, S.T. Fiske, and G. Lindzey, McGraw-Hill, 1998; G. V. Bodenhausen, C. N. Macrae, and J. Garst, "Stereotypes in Thought and Deed: Social Cognitive Origins of Intergroup Discrimination," p. 311-335 in *Intergroup Cognition and Intergroup Behaviors*, edited by C. Sedikides, J. Schopler, and C. A. Insko, Erlbaum, 1998.

[44] W. T. Bielby and J. N. Baron, "Men and Women at Work: Sex Segregation and Statistical Discrimination," *American Journal of Sociology* Vol. 91, 1986, p. 759-99; K. Deaux and J. C. Ullman, *Women of Steel: Female Blue Collar Workers in the Basic Steel Industry*, Praeger, 1983; R. M. Kanter, *Men and Women of the Corporation*, Basic Books, 1977; Eagly *et al.*, *op cit.*; M. J. Martinkio and W. L. Gardner, "A Methodological Review of Sex-Related Acces Discrimination Problems," *Sex Roles*, Vol. 9, 1983, p. 825-839; C. M. Jagacinski, "Engineering Careers: Women in a Male-Dominated Field," *Psychology of Women Quarterly*, Vol. 11, 1987, p. 97-110; P. Glick, C. Zion, and C. Nelson, "What Mediates Sex Discrimination in Hiring Decisions?" *Journal of Personality and Social Psychology*, Vol. 55, 1988, p. 178-186; I. Padavic, "The Re-Creation of Gender in

At Wal-Mart, women comprise a majority of employees overall and about two-thirds of those in hourly positions, but they comprise only about a third of

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a Male Workplace," *Symbolic Interaction*, Vol. 14, 1991, p. 279-294; J. S. McIlwee and J. Gregg Robinson, *Women in Engineering: Gender, Power, and Workplace Culture*, State University of New York Press, 1992; J. Mettrick and G. Cowan, "Gender Stereotypes and Predictions of Performance: Women in Air Combat," *Journal of Social Behavior and Personality*, Vol. 11, 1996, p. 105-120; J. H. Stiehm, *Arms and the Enlisted Woman*, Temple University Press, 1989; R. Hertz, "Guarding Against Women? Responses of Military Men and Their Wives to Gender Integration," *Journal of Contemporary Ethnography*, Vol. 25, 1996, p. 251-284. A job category is considered male-dominated when men comprise at least eighty to eighty-five percent of the incumbents. For additional research on the bias women face in such settings, conducted in a variety of contexts, see: E. Spangler, M. A. Gordon, and R. Pipkin, "Token Women: An Empirical Test of the Kanter Hypothesis," *American Journal of Sociology*, vol. 84, 1978, p. 160-170; M. E. Heilman, "The Impact of Situational Factors on Personnel Decisions Concerning Women: Varying the Sex Composition of the Applicant Pool," *Organizational Behavior and Human Performance*, Vol. 26, 1980, p. 386-395; J. Crocker and K. M. McGraw, "What's Good for the Goose is not Good for the Gander: Solo Status as an Obstacle to Occupational Achievement for Males and Females," *American Behavioral Scientist*, Vol. 27, 1982, p. 357-369; P. R. Sackett, C. L. DuBois, and A. W. Noe, "Tokenism in Performance Evaluations: The Effects of Work Group Representation on Male-Female and Black-White Differences in Performance Evaluations," *Journal of Applied Psychology*, Vol. 76, 1991, p. 263-267; J. Rosenberg, H. Perlstadt, and W. R. Phillips, "Now That We Are Here: Discrimination, Disparagement, and Harassment at Work and the Experiences of Women Lawyers," *Gender & Society*, Vol. 7, 1993, p. 415-433; and J. D. Yoder, "Looking Beyond Numbers: The Effects of Gender Status, Job Prestige, and Occupational Gender-Typing on Tokenism Processes," *Social Psychology Quarterly*, Vol. 57, 1994, p. 150-159.

those in salaried management positions, and most higher level management positions have a low representation of women.

34. A large body of social science research demonstrates that stereotypes are especially likely to influence personnel decisions when they are based on informal, arbitrary, and subjective factors.[45] In such settings, stereotypes can bias assessments of a woman's qualifications, contributions, and advancement potential, because perceptions are shaped by stereotypical beliefs about women generally, not by the actual skills and accomplishments of the person as an individual.[46] In decision-making contexts

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[45] For a review, see American Psychological Association, "In the Supreme Court of the United States: Price Waterhouse v. Ann B. Hopkins: Amicus Curiae Brief for The American Psychological Association," *American Psychologist*, Vol. 46, 1991, p. 1061-1070. Also see V. F. Nieva and B. A. Gutek, "Sex Effects on Evaluation," *Academy of Management Review*, Vol. 5, 1980, p. 267-275 (especially pages 270-274); D. N. Bersoff, "In the Supreme Court of the United States: Clara Watson v. Fort Worth Bank & Trust, Amicus Curiae Brief for the American Psychological Association" (reprinted in *American Psychologist*, Vol. 43, 1988, p. 1019-1028); Messick and Mackie, "Intergroup Relations," *Annual Review of Psychology*, Vol. 40, 1989, p. 49-50, Fiske and Taylor, *op cit.* (especially Chapter 9, "Social Inference"); L. H. Krieger, "The Contents of our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity," *Stanford Law Review*, Vol. 47, 1995, p. 1161-248, B. F. Reskin, *The Realities of Affirmative Action in Employment*, American Sociological Association, 1998; W. T. Bielby, "Minimizing Workplace Gender and Racial Bias," *Contemporary Sociology*, Vol. 29, 2000, p. 120-129.

[46] For review articles on gender bias in evaluation, see Nieva and Gutek, *op cit.* and R. Kalin and D. C. Hodgins, "Sex Bias and Occupational Suitability," *Canadian Journal of Behavioral Science*, Vol. 16, 1984, p. 311-325. Examples of studies of gender

characterized by arbitrary and subjective criteria and substantial decision-maker discretion, individuals tend to seek out and retain stereotyping-confirming information and ignore or minimize information that defies stereotypes.[47]

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bias in assessments of qualifications, performance and promotion potential include: G. L. Gerber, "The More Positive Evaluation of Men Than Women on the Gender-Stereotyped Traits," *Psychological Reports*, Vol. 65, 1989, p. 275-286; G. H. Dobbins, R. L. Cardy, and D. M. Truxillo, "The Effects of Purpose of Appraisal and Individual Difference's in Stereotypes of Women on Sex Differences in Performance Ratings: A Laboratory and Field Study," *Journal of Applied Psychology*, Vol. 71, 1988, p. 551-558; T. H. Shore, "Subtle Gender Bias in the Assessment of Managerial Potential," *Sex Roles*, Vol. 27, 1992, p. 499-515; M. Foschi, L. Lai, and K. Sigerson, "Gender and Double Standards in the Assessment of Job Applicants," *Social Psychology Quarterly*, Vol. 57, 1994, 326-339; J. Landau, "The Relationship of Race and Gender to Managers' Ratings of Promotion Potential," *Journal of Organizational Behavior*, Vol. 16, 1995, p. 391-400.

[47] This kind of biased information-processing has been examined and replicated in numerous experimental studies. See, for example, Banaji, Hardin, and Rothman, *op cit.*; Banaji and Hardin, *op cit.*; J. Crocker, D. B. Hannah, and R. Weber, "Person Memory and Causal Attributions," *Journal of Personality and Social Psychology*, Vol. 44, 1983, p. 55-66, S. M. Belmore, "Determinants of Attention During Impression Formation," *Journal of Experimental Psychology: Learning, Memory, and Cognition*, Vol. 13, 1987, p. 480-489; M. Schaller, "Social Categorization and the Formation of Group Stereotypes: Further Evidence for Biased Information Processing in the Perception of Group-Behavior Correlations," *European Journal of Social Psychology*, Vol. 21, 1991, p. 25-35; T. E. Ford and C. Stangor, "The Role of Diagnosticity in Stereotype Formation: Perceiving Group means and Variances," *Journal of Personality and Social Psychology*, Vol. 63, 1992, p. 356-367; C. N. Macrae, A. B. Milne, and G. V. Bodenhausen, "Stereotypes as Energy-Saving De-

35. Social research establishes clearly that the historical representation of women in a job has a substantial impact on compensation and other job rewards, mobility prospects, and workplace culture.[48] In retailing, management has historically been viewed as "men's work" while women were viewed as appropriate for cashier and clerk positions. Wal-Mart's founder, Sam Walton, described the traditional view of men's and women's roles in the industry as follows:

> In the old days, retailers felt the same way about women that they did about college boys, only more so. In addition to thinking women weren't free to move, they didn't think women could handle anything but the clerk jobs because the managers usually did so much of the physical labor – unloading

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vices: A Peek Inside the Cognitive Toolbox," *Journal of Personality and Social Psychology*, Vol. 66, 1994, p. 921-935; C. N. Macrae, C. Stangor, and A. B. Milne, "Activating Social Stereotypes: A Functional Analysis," *Journal of Experimental Social Psychology*, Vol. 23, 1994, p. 370-389; L. C. Johnston and C. N. Macrae, "Changing Social Stereotypes: The Case of the Information Seeker," *European Journal of Social Psychology*, Vol. 24, 1994, p. 356-367; M. Zuckerman, C. R. Knee, K. Miyake, and H. S. Hodgins, "Hypothesis Confirmation: The Joint Effect of Positive Test Strategy and Acquiescence Response Set," *Journal of Personality and Social Psychology*, Vol. 68, 1995, p. 52-60. For reviews, see Brown, *op cit.* and Fiske, *op cit.*

[48] P. England, *Comparable Worth: Theories and Evidence*, Aldine de Gruyter, 1992; B. F. Reskin, D. B. McBrier, and J. A. Kmec, "The Determinants and Consequences of Workplace Race and Sex Composition," *Annual Review of Sociology*, Vol. 25, 1999, p. 335-361.

> trucks and hauling merchandise out of the stockroom on a two-wheeler, mopping the floors and cleaning the windows if necessary.[49]

Experimental studies on stereotyping show that male and female job applicants with identical personal traits are matched according to their gender to jobs that are considered predominantly-male and predominantly-female.[50] And studies done in both experimental and natural settings demonstrate the impact of "sex role spillover," whereby gender-linked traits associated with male-dominated occupations can profoundly affect the working climate for women.[51]

36. A large body of research in industrial sociology, dating back to the 1950s, shows that individuals who find their opportunities for advancement

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[49] S. Walton with J. Huey, *Sam Walton: Made in America*, My Story, Bantam Books, 1992, p. 218. Mr. Walton continued: "Nowadays, the industry has waked up to the fact that women make great retailers. So we at Wal-Mart, along with everybody else, have to do everything we possibly can to recruit and attract women." As I show below, one of the innovations supported by Mr. Walton to recruit women into management, the Resident Assistant Manager program, has been largely ignored in the years since his death.

[50] Glick *et al., op cit.*

[51] Gutek and B. Morasch, "Sex Ratios, Sex-Role Spillover, and Sexual Harassment of Women at Work," *Journal of Social Issues*, Vol. 38, 1982, p. 55-74; B. Gutek, *Sex and the Workplace*, Jossey-Bass, 1985; D. Burgess and E. Borgida, "Sexual Harassment: An Experimental Test of Sex-Role Spillover Theory," *Personality and Social Psychology Bulletin*, Vol. 23, 1997, p. 63-75.

blocked respond by lowering their goals and aspirations, and by lowering their commitment to their work compared to others with more promising career prospects.[52]

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[52] R. Guest, "Work Careers and Aspiration of Automobile Workers," *American Sociological Review*, Vol. 19, 1954, p. 155-63; E. Chinoy, *Automobile Workers and The American Dream*, Doubleday 1955; T. V. Purcell, *Blue Collar Man: Patterns of Dual Allegiance in Industry*, Harvard University Press, 1960; R. Blauner, Alienation and Freedom, University of Chicago Press, 1964; O. Grusky, "Career Mobility and Organizational Commitment," *Administrative Science Quarterly*, Vol. 10, 1966, p. 489-502; Kanter, *op cit.*; J. A. Jacobs, *Revolving Doors: Sex Segregation and Women's Careers*, Stanford University Press, 1989; and K. Loscocco, "Reactions to Blue-Collar Work: A Comparison of Men and Women," *Work and Occupations*, Vol. 17, 1990, p. 152-177; L. M. Shore and S. J. Wayne, "Commitment and Employee Behavior: Comparison of Affective Commitment and Continuance Commitment with Perceived Organizational Support," *Journal of Applied Psychology*, Vol. 78, 1993, p. 774-780; J. E. Wallace, "Organizational and Professional Commitment in Professional and Nonprofessional Organizations," *Administrative Science Quarterly*, Vol. 40, 1995, p. 228-255; R. P. Settoon, N. Bennett, and R. C. Liden, "Social Exchange in Organizations: Perceived Organizational Support, Leader-Member Exchange, and Employee Reciprocity," *Journal of Applied Psychology*, Vol. 81, 1996, p. 219-227. For reviews, see W. T. Markham, S. L. Harlan, and E. J. Hackett, "Promotion Opportunity in organizations: Causes and Consequences," *Research in Personnel and Human Resource Management*, Vol. 5, 1987, p. 223-87 and D. D. Bielby, "Commitment to Work and Family," *Annual Review of Sociology*, Vol. 18, 1992, p. 281-302.

Discretionary and Subjective Procedures for Making Decisions that Affect Promotion and Compensation Managers Have Substantial Discretion on Criteria Used to Make Promotion and Compensation Decisions

37. Written guidelines for promotion are not absent in the Wal-Mart Personnel System. However, the materials I have reviewed indicate that: (1) written guidelines provide only minimum criteria for advancement, and managers can and do add additional criteria at their own discretion; (2) managers are able to modify or disregard written guidelines at their own discretion; and (3) there is little monitoring or oversight regarding how managers exercise their discretion in making promotion decisions.

38. Deponents ranging from store managers to top operations executives testified that there are no written criteria for selecting hourly associates for promotion into management or for promotions into Co-Manager or Store Manager positions, beyond the minimum requirements. They also testified that managers who make those selections have discretion to devise their own criteria, with no monitoring or oversight over how those criteria are devised or applied.[53]

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[53] See, for example the testimony of the following Division 1 managers: Harris (former Executive Vice President, Operations) depo., p. 82-84, 213, 223-233; Haworth (Executive Vice President, Operations), p. 90-92; Pharr (Divisional Sr. Vice President) depo., p. 174-175; Schwindt (Divisional Sr. Vice President) depo., p. 132-139, 195-196, Maines (Regional Vice President) depo., p. 206-208; Williams (Regional Vice President) depo., p. 168-172; Ludwig (District Manager) depo., p. 149-151; Kintzele (District Manager) depo., p. 46-47, Raps (Store Man-

39. Wal-Mart managers gave similar testimony about promotion to hourly supervisory positions such as Support Manager. Company guidelines specify minimum criteria based on discipline, tenure, and performance evaluations, however there is no other written policy or guideline specifying the criteria to be used to select among candidates who meet the minimum criteria. Store managers are allowed to consider other factors and apply other criteria, and it is left to their discretion to devise and apply them.[54] For example, Store Manager Arturo Mireles testified that he was aware of no written criteria to be used in making decisions about promotion to Department Manager or Support Manager. His practice was to rely on a range of unwritten criteria, including subjective factors such as teamwork, ethics, integrity, ability to get along with others, and willingness to volunteer to come in to assist in the store or at another store outside of regular work hours.[55] While factors like these might have common sense appeal and some might in fact be appropriate to consider in

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ager) depo., p. 125-128; Harper depo., p. 212-214. Store Manager Jesse James Brown testified that during his years in management at Wal-Mart, he has never been overruled by anyone in higher level management for any personnel decision (Brown depo., p. 299). Mr. Harper testified that there is no written policy governing exceptions to the guidelines, that there is no system in place or analysis conducted to assess whether the guidelines are followed, and that no exception report is generated for promotion decisions regarding selection into management trainee and high level management positions (Harper depo., p. 212-215, 224-225).

[54] Harper depo., p. 142-145; Harris depo., p. 210-213.

[55] Mireles depo., p. 155-159, 180-182.

making promotion decisions, assessments will be biased unless they are assessed in a systematic and valid manner, with clear criteria and careful attention to the integrity of the decision-making process.[56]

40. The same kind of discretion is allowed in decisions about compensation for hourly employees. For example, in Division 1, each job is categorized into one of five job classifications, each with its own hourly starting rate. However, according to company policy the Store Manager can pay up to two dollars an hour above the stated rate, based on his or her assessment of factors such as previous pay and experience. There is no company guideline and no training on when and how to adjust pay upwards, and while overall payroll is monitored, there is no monitoring of these individual adjustments.[57] In fact, at the Store Manager's discretion, a new employee can be paid more than two dollars above the specified start rate, and in such instances no exception report is generated.[58]

41. Annual pay increases in Division One are tied to performance evaluation ratings, with a percentage increase guideline specified by the Home Office. A Store Manager can give a raise larger than the specified amount at his or her own discretion. In

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[56] R. D. Gatewood and H. S. Field, *Human Resource Selection*, Third Edition, Dryden Press, 1994; and H. G. Heneman, III, R. L. Heneman, and T. A. Judge *Staffing Organizations*, Second Edition, Mendota House and Richard D. Irwin, 1997.

[57] Shatz depo., p. 66-72; Harper depo., p. 15-19. FYE 2003 Field Non-Exempt Associate Pay Guidelines, p. 5 (BATES WMHO366905).

[58] Shatz depo., p. 66-67.

addition, employees can be given merit increases for "exceptional performance." The company guideline is that a merit increase of four or five percent can be given no more than once per year, and it cannot be granted within 90 days of an annual performance increase or raise due to a promotion.[59] However, there is no guideline for assessing "exceptional performance" and no monitoring of the number of people who receive increases and how frequently they are given to any specific employee.[60] Managers can and do give merit raises more than once per year.[61]

Availability and Interest in Advancement is Not Assessed Systematically for Promotion into Management

42. Consistent and systematic job posting is an effective way to determine who is interested in and available for promotion to higher-level positions. An

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[59] Harper depo., p. 51; FYE 2003 Field Non-Exempt Associate Pay Guidelines, p. 10 (BATES WMHO366910); Scanlin depo., p. 91.

[60] Arnold depo., p. 149-150; Harper depo., p. 51-55; Seaman depo., p. 253; Shatz depo., p. 82, 86-89. Company guidelines also specify a shift differential of fifty cents, with District Manager approval required for any differential over that amount (Pay Guidelines, p. 9). However, Mr. Shatz, who pays a one dollar differential in his store, testified that he did so without District Manager Approval and that he has never sought approval from a District Manager for any pay adjustment he has given (Shatz depo., p. 84-85).

[61] Shatz depo., p. 105-106; Ellison depo., p. 266-267; Raps depo., p. 256-250. District Manager Bernard Seaman was not aware of any guidelines about how to make decisions about merit raises or when merit raises should be given (Seaman depo., p. 253, 258-259).

effective system also communicates clear and accurate information to employees about the training and experience required to become eligible for a job, about job conditions, and about how the job fits into a career path in the organization.[62] Wal-Mart People Division Vice President Harper agreed that the company benefits from posting, by allowing people to show interest in a position. He added: "I think anytime you get the right candidate into the right job, the success of that person would certainly reflect in the performance of their area of responsibility." He agreed that posting benefits employees by giving them "an opportunity for promotion or an opportunity for diversifying their career by being able to work in different parts of the store."[63] Coleman Peterson, the Executive Vice President of the company's People Division, gave similar testimony: "Job posting ensures the company that it is able to attract and identify as many talented people as possible for jobs that are needed and for the individuals it provides an opportunity to apply for positions in the company that can allow them to move forward in their careers."[64] Mr. Peterson, who has been an advocate for the adoption of posting policies at the company, has also testified about their impact on workplace fairness. He testified that posting reduces litigation expenses because it affects "the fairness of how people get picked for jobs." According to Mr. Coleman: "People understand where the jobs are and they understand what it is you need to do to qualify for the jobs."[65] The testimony of these two executives from the company's People Division is consistent with the professional literature on human resources policy. Unfortunately, Wal-Mart's posting systems do not meet the criteria of effective and fair policy and practice. Wal-Mart has separate posting systems for hourly and management positions, and each has identifiable deficiencies that make them vulnerable to bias.

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[62] Heneman, Heneman, and Judge *op cit.*; L. S. Kleiman and K. J. Clark, "An Effective Job Posting System," *Personnel Journal*, Vol. 63 (February), 1984, p. 20-25; J. Z. Levine, "Job Posting Practices," *Personnel*, Vol. 61 (November/December), 1994, p. 48-52; W. Markham, S. Harlan, and E. Hackett, "Promotional Opportunity in Organizations: Causes and Consequences," p. 223-287 in *Research in Personnel and Human Resources Management*, edited by K. Rowland and G. Ferris, Jai Press, 1987; J.P. Rudin and J. W. Boudreau, "Information Acquisition in Promotion Decisions," *Human Relations*, Vol. 49, 1996, p. 313-325.

[63] Harper depo., p. 116-117. Also see Harper depo., p. 153-154. Similarly, former People Division Vice President Andrew Wilson testified that posting of hourly positions was done so that employees in stores that might have as many as six hundred employees could become aware of which positions were available. He testified that it was the company's view that "it would encourage our associates to be able to know the jobs that were open and be able to apply for those jobs" (Wilson depo., p. 133-134).

43. Current company policy specifies that openings for hourly supervisory positions are to be posted within the store where the opening occurs. Online, computerized posting began in the late 1990s; prior

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[64] Peterson depo. p. 162.

[65] Peterson depo., p. 166-167. Similarly, People Director Bob Monfils testified that posting of open District Manager and Store Manager positions helps ensure that the most qualified individuals apply for and are selected for these positions and allows all employees to feel they have a fair chance to apply (Monfils depo., p. 141-142).

to that there was paper posting of some positions.[66] However, under current policy, Store Managers have the authority to choose not to post a position. There are no written guidelines regarding when to depart from the posting policy, and there is no monitoring or review of exceptions to posting of hourly positions.[67] Store managers also have authority to waive minimum requirements regarding time in current position and coachings, and there are no guidelines specifying when this is appropriate.[68] In addition, there is no requirement to post openings that are filled by lateral moves, so, for example, a manager can choose not to post an open supervisory position and instead informally approach an existing supervisor and ask that person if he or she would like the position.[69]

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[66] Wilson depo., p. 133-134, Peterson depo., p. 157-158, Weaver depo., p. 52-55 (paper posting of department manager lead and office supervisor positions in stores where she worked). Posting of hourly positions at Sam's Club began in approximately 1999 (Haworth depo., p. 50-51). Prior to the posting policy, one way openings were filled was for a manager to approach an employee considered to be a good performer and ask that person if he or she wanted the position (Weaver depo., p. 56-57).

[67] Harper depo., p. 118-119, Haworth depo., p. 88, Hams depo., p. 174-175. Mr. Harper was not aware of any analysis by the company on the frequency with which Store Managers depart form the posting policy. He testified that he was aware that complaints about lack of posting is one of the allegations in this litigation, and to his knowledge no effort has been made to find out if it is true (Harper depo., p. 119-120).

[68] Harper depo., p. 122-124.

[69] Weaver depo, p. 91-92. Under the policy, the position vacated by that supervisor would be posted (Weaver depo., p. 112).

44. Prior to 1998, management positions in Division 1 were not posted. Since then, posting of Store Manager, District Manager, and some other positions has been done via the computerized Management Career Selection ("MCS") system, although an employee needs the approval of his or her District Manager before applying via the MCS system.[70] Co-Manager, Assistant Store Manager, and Management Trainee positions are generally not posted.[71] As with hourly promotions, the Regional Personnel Managers have discretion to depart from the policy on posting management positions, although there is no written policy on when that is appropriate.[72] An exception report shows whether or not a position was posted and how long it took to fill a position, but no record is made of reasons for exceptions to the posting policy, and no statistical summary is complied

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[70] Kintzele depo., p. 40; Peterson depo., p. 157-158; Management Career Selection Guide (BATES WMHO2 17238-217240). A limited test posting program for management trainees was tried for one week in January 2003 (Haworth depo., p. 49-50).

[71] Harper depo., p. 160-163; Kintzele depo., p. 41-42; Peterson depo., p. 160-161; Monfils depo., p. 145-146; Mitchell depo., p. 161-163, 169-170; Butler depo., p. 171; Martinez depo., p. 157-158; Scantlin depo., p. 141, 145; Seaman depo., p. 148. According to the July 2000 version of the MCS Training Manual, Co-Manager and Assistant Manager positions in Division 1 "may be posted on an exception only basis" with prior approval from the RPM's People Director (BATES WMHO349584; Monfils depo., p. 150-152). Mr. Harper testified that he did not know why Store Manager and hourly promotions were posted, but management trainee positions were not. He was not aware of any discussions in the company about why this is the case, outside of discussions with attorneys (Harper depo., p. 180-181).

[72] Harper depo., p. 151-153, 155-157.

regarding exceptions with the posting policy.[73] At Sam's Club, management positions are not posted, and on line posting of management trainee positions began just recently, in early January of 2003.[74]

45. The company's practice of requiring relocation across stores in order to move into salaried management positions makes the promotion process especially vulnerable to gender stereotyping. While it may indeed be the case that, on average, more women than men face family constraints that limit their ability to relocate for a management position, stereotypes lead people to act on an assumptions that overstate the extent to which that is true. The absence of a systematic mechanism for determining which employees are available for and interested in promotion from the hourly ranks into management is especially problematic in this context. In the absence of systematic, reliable, and timely information on the interests and availability of individual men and women, stereotypes about women's and men's family commitments and constraints will lead decision-makers to overlook or discount the availability of qualified women who want to advance into the salaried ranks. Similarly, District Managers who must give there approval before a salaried employee responds to a posting under the MCS system are likely to be influenced by stereotypes in the same way.

46. Lack of clarity in the relocation requirements associated with promotion to salaried management positions is likely to discourage some

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[73] Harper depo., . 157-160, Mitchell depo., p. 153-159.

[74] Grimm depo., p. 232-233, Haworth depo., p. 56-57; Reeves depo., p. 159-160, Spragg depo., p. 182-183.

women from seeking promotions. Managers consistently testify that hourly employees usually move to a different store when they become management trainees and are promoted to Assistant Store Manager positions, and promotion to Co-Manager and Store Manager almost always involves relocation as well.[75] Less consistent is testimony about whether an employee must be able and willing to relocate their place of residence in order to be considered for a management position. For example, in District Manager Daniel Carter's district in Northern California, employees applying for the Management Training program have been asked to certify in writing that they are willing to transfer "to any location within the Wal-Mart trading area" to receive training and again at the completion of training.[76] Former Regional Vice President John Butler required Co-Managers to be willing to relocate "whenever and wherever we need them."[77] Similarly, Store Manager Bernard Seaman emphasizes the relocation requirements of the Management Training program when speaking to hourly employees who express interest:

> Q. What do you tell that employee about the scope of that relocation requirement?
>
> A. I say, you realize you could be relocated, and it could mean from - in my case now, Seattle, I always use the example you could be in Texas, you could go to Maine, or, in my

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[75] Mains depo., p. 196-197; Reeves depo., p. 156-157; Drogin Report, Table 16

[76] D. Carter depo., p. 260-264.

[77] Butler depo., p. 155-156.

> case, you get a call one day from Los Angeles and three weeks later you're in Seattle. So I kind of use my own experience. I throw that at them (Seaman depo., p. 349-350)

In contrast, other managers testify that ability and willingness to relocate one's place of residence is not an absolute requirement for promotion, although moving from one store to another usually is required.[78] As recently as June 2002, People Division Vice President Harper determined that it was important to remind Regional Personnel Managers that ability to relocate was not a mandatory requirement for promotion.[79] It is likely that hourly department heads considering a career in salaried management or Assistant Managers considering higher-level salaried positions may well be receiving mixed messages about whether they are required to indicate a willingness to relocate to any area of Wal-Mart's operations in order to be given serious consideration for a promotion. An individual who is not able to make that commitment is likely to be discouraged by the apparent emphasis on relocation, even when a move to a new store within a district or region would be possible.

47. Wal-Mart's founder, Sam Walton, recognized that the emphasis on relocation could work to the disadvantage of talented women who are qualified for management positions and that the business case for the emphasis on relocation might be overstated. In his autobiography, he discussed the original management philosophy, that one had to be

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[78] Harris depo., p. 233-236; Harper depo., p. 233-234, 238-242.

[79] Harper depo., p. 247-249.

ready to relocate on a moment's notice to move into management, and his views of the shortcomings of that approach:

48. Maybe that was necessary back in the old days, and maybe it was more rigid than it needed to be. Now, though, it's not really appropriate anymore for several reasons. First, as the company grows bigger, we need to find more ways to stay in touch with the communities where we operate, and one of the best ways to do that is by hiring locally, developing managers locally, and letting them have a career in their home community–if they perform. Second, the old way really put good, smart women at a disadvantage in our company because at the time they weren't as free to pick up and move as many men were. Now I've seen the light on the opportunities we missed out on with women.[80]

To open more opportunities for women in management, Mr. Walton was a strong supporter of the Resident Assistant Manager program. In the late 1980s, Wal-Mart implemented and later formalized a policy creating the position of Resident Assistant Manager for individuals who were eligible to be Assistant Managers but not able to relocate.[81] Resident Assistant Managers were eligible to move into a Co-Manager position without relocating.[82] According to Executive Vice President of Operations Jim Haworth, the program was phased out, although some Assistant Managers have been "grandfathered" into the program, and it is being "tested" in some areas currently. Mr. Harper testified that the program still exists, but with little participation and only on an "as requested" basis.[83] Former Regional Vice President John Butler said that he was "vaguely" aware of the program, Store Manager Bernard Seaman testified that he just recently learned of the program, and Store Manager Jesse James Brown had heard of the program but did not know if it applied to his store.[84] Don Harris and Jim Haworth, the former and current Executive Vice Presidents of Operations, each testified that they were unaware of any plans to expand the program.[85] And while Resident Assistant Managers are eligible for promotion, Wal-Mart Stores Chief Executive Officer Thomas Coughlin testified that he was not aware of anyone being promoted from that position.[86] In sum, this program, originally implemented in part to create more management opportunities for women, appears to have little effect anymore as a route to management for employees who have personal or family commitments that tie them to a specific community geographic region.

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[80] Walton op cit., p. 217-218.

[81] Haworth depo., p. 97-98; Curran depo., p. 24-25, 27.

[82] Curran depo., p. 25-26.

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[83] Harper depo., p. 242-243.

[84] Butler depo., p. ; Seaman depo., p. 354-355; Brown depo., p. 226-228.

[85] Harris depo., p. 238-239; Haworth depo., p. 100; also see Jarrells Porter depo., p. 246.

[86] Coughlin depo., p. 157-158.

Wal-mart's diversity efforts are inadequate for eliminating barriers to women's career advancement

48. Organizational policies and practices that create barriers to career advancement for women and minorities, once in place, become institutionalized and rarely change in the absence of any substantial change in a firm's business, technical, or legal environment.[87] This is especially true of personnel practices and policies that are reinforced by the

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[87] L. Stinchcombe, "Social Structure and Organizations," p. 142-93 in *Handbook of Organizations*, edited by J. G. March, Rand McNally, 1965; M. T. Hannan and J. H. Freeman, "Structural Inertia and Organizational Change," *American Sociological Review*, Vol. 43, 1984, p. 143-164; J. N. Baron, "Organizational Evidence of Ascription in Labor Markets," in *New Approaches to Economic and Social Analyses of Discrimination*, edited by R. Cornwall and P. Wunnava, Praeger, 1991. The concept of organizational inertia has been applied in scientific studies conducted in a wide range of industrial settings. See, for example, J. Roggema and M. H. Smith, "Organizational Change in the Shipping Industry: Issues in the Transformation of Basic Assumptions," *Human Relations*, Vol. 36, 1983, p. 765-790; E. Abrahamson and C. J. Fombrun, "Macrocultures: Determinants and Consequences," *Academy of Management Review*, Vol. 19, 1994, p. 728-755; L. Gardenswartz and A. Rowe, "Diversity Management: Practical Application in a Health Care Organization," *Frontiers of Health Services Management*, Vol. 11, 1994, p. 36-40; G. T. Fairhurst, S. Green, and J. Courtright, "Inertial Forces and the Implementation of a Socio-technical Systems Approach: A Communication Study," *Organization Science*, Vol. 6, 1995, p. 168-185; C. Doucouliagos, "Conformity, Replication of Design and Business Niches," *Journal of Economic Behavior & Organization*, Vol. 30, 1996, p. 45-62; and M.. Ruef, "Assessing Organizational Fitness on a Dynamic Landscape: An Empirical Test of the Relative Inertia Thesis," *Strategic Management Journal*, Vol. 18, 1997, p. 837-853.

firm's culture.[88] However, gender bias in the workplace is by no means inevitable, and social science research shows what kinds of policies and practices effectively minimize bias.

49. Through deliberate efforts, the effects of stereotypes can be controlled.[89] Research studies show that the effects of stereotypes and out-group bias on evaluative judgments such as those involved in recruitment, hiring, job assignment, promotion, and assessments of skills and qualifications can be minimized when decision-makers know that they will be held accountable for the criteria used to make decisions, for the accuracy of the information upon which the decisions are based, and for the consequences their actions have for equal employment opportunity.[90] However, as I described above, at Wal-

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[88] P. Doeringer and M. Piore, *Internal Labor Markets and Manpower Analysis*, D. C. Heath, 1971

[89] P. G. Devine, "Stereotypes and Prejudice: Their Automatic and Controlled Components," *Journal of Personality and Social Psychology*, Vol. 56, 1989; S. T. Fiske, M. Lin, and S. L. Neuberg, "The Continuum Model: Ten Years Later," p. 231-54 in *Dual Process Theories in Social Psychology*, edited by S. Chaiken and Y. Trope, Guilford Press, 1999.

[90] T. E. Nelson, M. Acker and M. Manis, "Irrepressible Stereotypes," *Journal of Experimental Social Psychology*, Vol. 32, 1996, p. 13-38; J. L. Eberhardt and S. T. Fiske, "Motivating Individuals to Change: What Is a Target to Do?" p. 369-415 in *Stereotypes and Stereotyping*, edited by C. N. Macrae, C. Stangor, and M. Hewstone, Guilford Press, 1996; A. M. Konrad and F. Linnehan, "Formalized HRM Structures: Coordinating Equal Employment Opportunity or Concealing Organizational Practices?" *Academy of Management Journal*, Vol. 38, 1995, p. 787-829; T. F. Pettigrew and J. Martin, "Shaping the Organizational Context for Black American Inclusion," *Journal of Social Issues*, Vol. 43, 1987, p. 41-78; G. R. Salancik and J. Pfeffer, "Uncer-

Mart, personnel decisions regarding promotion and hourly compensation rely significantly on discretionary and subjective criteria, with little monitoring and oversight.

50. Formal written policies alone are not sufficient to minimize bias in personnel decisions. A written equal employment opportunity ("EEO") policy that is simply reactive and lacks effective accountability is vulnerable to bias against women and minorities. Often, such a system constitutes what social scientists call symbolic compliance: an exercise in "going through the motions," with little substantive impact on creating a work environment that is free of

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tainty, Secrecy, and the Choice of Similar Others," *Social Psychology*, Vol. 41, 1978, p. 246-55; C. T. Schreiber, K. F. Price, and A. Morrison, "Workforce Diversity and the Glass Ceiling: Practices, Barriers, Possibilities," *Human Resource Planning*, Vol. 16, 1993, p. 51-69; P. E. Tetlock, "Accountability: The Neglected Social Context of Judgment and Choice," p. 297-332 in *Research in Organizational Behavior*, Vol. 7, edited by L. L. Cummings and B. M. Staw, Jai Press, 1985; P. E. Tetlock and J. I. Kim, "Accountability and Judgment Processes in a Personality Prediction Task," *Journal of Personality and Social Psychology*, Vol. 52, 1987, p. 700-709; P. E. Tetlock, "The Impact of Accountability on Judgment and Choice: Toward a Social Contingency Model," *Advances in Experimental Social Psychology*, Vol. 25, 1992, p. 331-376; Reskin, *op cit.*; P. M. Tetlock and M. Lerner, "The Social Contingency Model: Identifying Empirical and Normative Boundary Conditions on the Error-and-Bias Portrait of Human Nature," p. 571-585 in *Dual Process Theories in Social Psychology*, edited by S. Chaiken and Y. Trope, Guilford Press, 1999, W. Bielby, 2000, *op cit.* To see how human resource professionals apply these principles in the design of personnel systems, Gatewood and Field, *op cit.*; and Heneman, Heneman, and Judge *op cit.*

bias.[91] True "EEO accountability" has three key elements: (1) monitoring and analysis of disparities in career trajectories; (2) systematic evaluation of managers on their contributions to the firms' goals regarding diversity and equal employment opportunity; and (3) monitoring and analysis of employees' perceptions of discriminatory barriers and career opportunities.[92] Below, I assess the effectiveness of Wal-Mart's policies and practices on each of these dimensions.

Monitoring of Gender Disparities

51. Effective EEO policy includes the regular monitoring and analysis of patterns of segregation and differences by gender and race in pay and career

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[91] L. B. Edelman, "Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law," *American Journal of Sociology*, Vol. 97, 1992, p. 1531-1576; L. B. Edelman, S. Patterson, E. Chambliss, and H. S. Erlanger, "Legal Ambiguity and the Politics of Compliance: Affirmative Action Officers' Dilemma," Law and Policy, Vol. 13, 1991, p. 73-97; L. B. Edelman, H. S. Erlanger, and J. Lande, "Employers' Handling of Discrimination Complaints: The Transformation of Rights in the Workplace," *Law & Society Review*, Vol. 27, 1993, p. 497-534; L. B. Edelman, Lauren B. and S. Petterson, "Symbols and Substance in Organizational Response to Civil Rights Law," in *Research in Social Stratification and Mobility*, 1999; M. E. Heilman, " Sex Stereotypes and their Effects in the Workplace: What We Know and What we Don't Know," *Journal of Social Behavior and Personality*, Vol. 10, 1995, p. 3-26; J. S. Leonard, "Women and Affirmative Action," *Journal of Economic Perspectives*, Vol. 3 (No. 1), 1989, p. 61-75. Also see J. S. Leonard, *Use of Enforcement Techniques in Eliminating Glass Ceiling Barriers*, Report prepared for the U. S. Department of Labor, Glass Ceiling Commission, April 1994.

[92] W. Bielby, 2000, *op cit.*

advancement as a routine part of an organization's personnel system. Such monitoring is used to assess whether disparities are greater than what plausibly might be expected based on differences in job-related knowledge, skills, abilities, interests, availability and other job-related factors that influence an employee's contributions to the organization.

52. Gender composition in Wal-Mart jobs is tracked in several reports. Kevin Harper, Vice President of the People Division reviews the monthly People P & L report and a quarterly People Update reporting the gender composition of Wal-Mart's hourly workforce and salaried management. A quarterly Diversity Report Card compiles regional People P & L statistics in a single report.[93] However, statistics on gender composition are not analyzed to assess factors that could account for the disparity in women's representation among salaried management positions compared to the representation in the hourly workforce and in hourly department head positions. Managers testified consistently that they did not believe that women were less qualified than men for management positions in the company, and Wal-Mart has taken a similar position in its responses to plaintiffs' interrogatories.[94] Yet there have been no attempts to explain, for example, why it is that women in Division 1 represent more than three quarters of

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[93] Harper depo., p. 273-280; Ruiz depo., p. 170.

[94] For example, see Haworth depo., p. 109-110; Bosler depo., p. 120; Butler depo., p. 200-201; Curan depo., p. 100; Harris depo., p. 85; Kintzele depo., p. 188; Ludwig depo., p. 237-237; Martinez depo., p. 265-266; Perkins depo., p. 84; Schaffner depo., p. 157; Defendant's Supplemental Objections and Answers to Plaintiffs' First and Second Sets of Interrogatories, p. 7.

all hourly department heads but only 38% of Assistant Managers.[95] Nor is there any regular monitoring of gender disparities in compensation among hourly or managerial employees.[96] In addition, there have been no studies of whether women are less interested than men in management positions.[97] In sum, Wal-Mart's policies and practices regarding equal employment opportunity include no systematic assessment of disparities by gender in pay, promotion, and other career outcomes designed to identify possible discriminatory barriers and remedy them.

Evaluation of Managers on Contributions to Company EEO and Diversity Objectives

53. THE second component of EEO accountability is explicit evaluation of managers and supervisors on their contributions to an organization's EEO objectives. Nearly all medium- to large-scale organizations have a written antidiscrimination policy. Many have a written policy stating that implementing the objectives of the Affirmative Action Plan is the responsibility of every employee, a statement often repeated by top executives. However, such policies are merely symbolic unless they also delineate explicit duties and responsibilities relating to equal employment opportunity in each manager's or supervisor's

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[95] Harper depo., p. 304-305; Jarrells Porter depo., p. 242-249; Haworth depo., p. 113; Harris depo., p. 95.

[96] Coughlin depo., p. 121-123; Harris depo., p. 175-178; Harper depo., p. 37, 88-93 (on one study of gender differences in base pay among managers), 100; Haworth depo., p. 177-178; Schwindt depo., p. 265; Shatz depo., p. 115.

[97] Curran depo., p. 89; Harper depo., p. 128, 185; Haworth depo., p. 54-55, 108-109; Monfils depo., p. 94-95.

job description, which can then be related to specific evaluative dimensions in the performance reviews of those employees.

54. One way of evaluating managers' contributions is to establish numerical goals and assess managers on progress towards achieving those goals. At Wal-Mart, goals have been established for women's representation in management, and diversity has been added to the "people" dimension of managers' performance evaluation. However, the numerical goals themselves are not based on any assessment of women's representation among those qualified and available for salaried management positions and the rate at which women would be expected to move into those positions absent any barriers to equal employment opportunity. Instead, Wal-Mart's goals for women's representation are based on the principle that they should reflect the "community" (i.e. roughly 50%), without any regard to gender composition of the relevant applicant pools.[98] In fact, the goals themselves are established in an ad hoc manner, without any guidelines. For example, in Division 1 since 2000, District Managers have devised their own goals, which are compiled and aggregated by Regional Personnel Managers into goals for each region, which are in turn compiled and aggregated by People Directors and forwarded to the People Division Vice President.[99] District Managers, RPMs, and Regional Vice Presidents are not given any instruction on how to determine their goals other than

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[98] Harper depo., p. 291-293, 302-303.

[99] Harper depo., p. 293-294, 296-297, 299-300; Jarrells Porter depo., p. 118-120; Ellison depo., p. 179-184.

to increase representation, and there is no written document describing the goal-setting process.[100] Managers at the level of District Manager and higher are evaluated on progress towards those goals.[101] A similar process has been used for setting goals at Sam's Club.[102] Not surprisingly, Wal-Mart managers set modest goals that are slightly higher the current representation. For example, RVP Butler testified, "we look at where we are, and we select what we think — what we consider is a reasonable improvement from one year to the next."[103] Sandy Ellison testified that when she was a RPM, she would compile District Manager goals into a spreadsheet and examine whether they "made sense" and "weren't worse than the year before or something like that." District Manager Daniel Carter testified that Ms. Ellison, when she was his RPM, would review with him associate demographics reported on the People P &L, but he was never given any goals regarding women's representation in management.[104] Mr. Carter testified that the one time he was asked to develop a goal for his district, he did not want to write anything down that was "unrealistic or I knew wouldn't happen immediately."[105] Similarly, District Manager Ludwig Marcus testified that he was not aware of any company goals about promoting women into management, and that when he was a RPM the goals he set with District Managers were not any sort of target, other than an indication of a need to improve.[106] Sam's RPM Ben Dolan testified that he was looking for goals that were "realistic or achievable" from his Directors of Operations ("DO"), and that he did not know how they set their goals. He chose purposely not to give DOs guidance because he "wanted to see what they submitted back."[107] Wal-Mart Store Manager Jesse James Brown testified that he has not had any discussions with his District Manager or other Wal-Mart officials about goals and objectives for his store regarding female managers.[108] Similarly, Store Manager Arturo Mireles testified that he was not aware of any goals for promotion of women into management, and Store Manager Marvin Raps gave similar testimony.[109] At Sam's Club, Director of Operations Mark Bosler and General Manager Alan Oshier each testified that they were not aware of any goals for increasing women's representation in management.[110]

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[100] Harper depo., p. 297-299, Butler depo., p. 203, Ellison depo., p. 184-186.

[101] Harper depo., p. 310-311.

[102] Dolan depo., p. 71-73, 240-243.

[103] Butler depo., p. 203.

[104] D. Carter depo., p. 215-219.

[105] D. Carter depo., p. 219-220.

55. In the absence of guidelines, managers who are aware that they are evaluated relative to diversity goals have an incentive to establish modest

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[106] Ludwig depo., p. 234-235.

[107] Dolan depo., p. 243-244. Mr. Dolan testified that after assuming his position as RPM in 2001 it took him about six months to get a feel for what kinds of goals were "reasonable numbers."

[108] Brown depo., p. 207-208; also see p. 159, 161.

[109] Mireles depo., p. 219; Raps depo., p. 222-225.

[110] Bosler depo., p. 85; Oshier depo., p. 69-70.

goals, and there is little incentive to work aggressively to meet them, since evidence of improvement, rather than meeting the goal, is viewed as satisfactory performance.[111] Overall, contribution towards diversity goals is at best only weakly tied to the compensation of managers. For Store Managers and Co-Managers, performance evaluation is not a factor for either base salary or incentive pay, so evaluation on contributions to diversity goals has no impact on their compensation.[112] For others, diversity is one component of one dimension of the performance evaluation, and it is the overall aggregate score that is tied to managers' percentage raises.[113] For example, Jeff Reeves, former Vice President of People at Sam's Club, testified that managers received a "very subjective" rating of diversity contributions on a 1 to 5 scale. That rating was one component of four, which together had a weight of just 5% in the overall evaluation score for General Managers and Co-Managers. Of course, evaluation of diversity contributions has no effect at all on motivating managers' behavior if they are not aware that they are being evaluated, and there is deposition testimony suggesting that is the case for some managers. For example, District Manager John Scantlin could not recall whether meeting demographic goals had ever been discussed with him as part of his evaluations, and John Butler, formerly a Regional Vice President at Wal-Mart, did not know whether any portion of the performance evaluation score was tied to diversity.[114]

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[111] Harper depo., p. 311-312.

[112] Arnold depo., p. 178-192.

[113] Jarrells Porter, p. 149-150. For Division 1, see Ellison depo., p. 192-194. For Sam's Club, see Grimm depo., p. 117-118.

56. The absence of a significant relationship between diversity contributions and compensation was viewed as a major weakness of the company's diversity efforts by former Sam's Club People Vice President Jeff Reeves. In his view, diversity efforts will remain "lip service" unless diversity contributions are tied in a significant way to incentive pay.[115] In the assessment of Mr. Reeves, efforts to increase the diversity of the company's management ranks will remain limited until executives and managers fully embrace diversity efforts as an integral part of the operations side of the business.[116]

57. The materials I have reviewed are consistent with Mr. Reeves' assessment. It is clear that there has been an increased emphasis on diversity issues by high level human resources executives at Wal-Mart since the late 1990s, but that commitment has had little impact on actual personnel policy and practice as it relates to compensation among hourly employees and promotion into field management. The company's diversity efforts have been weak in assessing and addressing vulnerabilities to bias created by discretionary and subjective aspects of the personnel system. The process for setting diversity goals and evaluating contributions to diversity objectives is not linked in any meaningful way to identify-

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[114] Scantlin depo., p. 72.

[115] Reeves depo., p. 21-24, 26, 34-35, 38-40, 282.

[116] Reeves depo., p. 15-16, 34-35, 263-264.

ing and eliminating barriers to equal employment opportunity.

58. Although Wal-Mart Stores Chief Executive Officer Thomas Coughlin has testified that responsibility for diversity is shared equally by all management employees,[117] awareness of diversity goals is limited both among top operations executives and store-level managers. While operational aspects of Wal-Mart's business are run with centralized coordination and oversight, Mr. Coughlin rejects having the same kind of oversight and accountability in the area of diversity.[118] Absent this kind of accountability, true integration of diversity policy into the personnel practices in the operating divisions and genuine commitment to diversity efforts by managers and executives who oversee and make decisions about pay and career advancement is unlikely to take place. In addition, other proactive efforts that have the potential to contribute to enhanced diversity in the management ranks, such as recent efforts to identify and develop highly qualified women and minority employees,[119] are likely to have limited success.

Monitoring Employees' Perceptions of Discriminatory Barriers

59. The Third component of EEO accountability is systematic analysis of feedback from employees about perceptions of barriers to and opportunities for

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[117] Coughlin depo., p. 199-204.

[118] Coughlin depo., p. 200-201.

[119] See, for example, Ellison depo., p. 207; Jarrells Porter depo., p. 281-282.

career advancement. Systematic monitoring of trends in employees' perceptions of barriers to career advancement and of top management's commitment to EEO can be used to identify subtle forms of bias and related problems not immediately apparent from analyses of more objective workforce data.

60. Wal-Mart surveys its employees annually as part of its Grass Roots survey program. The survey is designed to assess employees' perceptions on work-related issues. Results are tabulated by store, and the top three concerns are posted at each store. Store Managers are expected to meet with their employees to discuss those concerns and to develop specific action plans for addressing them.[120] Responses to the survey are also used to compute an Unresolved People Index ("UPI," formerly called Union Potential Index), which is used to identify stores at risk of union organizing activity. Stores scoring high on the index are targeted for intervention by company management and are subsequently re-surveyed to assess whether there is any improvement in employee morale following intervention.[121]

61. The Grass Roots Survey, which has been conducted annually since 1994, would seem to be an efficient mechanism for assessing employees' perceptions about barriers to equal opportunity associated with gender. However, the survey has never been used to assess employees' perceptions on issues such as whether they have been treated unfairly due to

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[120] Albrecht depo., p. 56-57, 140; Coughlin depo., p. 187-188; Peterson depo., p. 68, 189-190.

[121] Albrecht depo, p. 107-109, 142-143; Hobbs depo., p. 185; Sims depo., p. 177-178.

gender (or race) or the firm's commitment to diversity. Nor have the results of Grass Roots Surveys ever been analyzed by gender or race in order to assess perceived discriminatory barriers.[122] Indeed, according to Kristi Lem Albrecht, the company's 30(b)6 deponent on surveys, there have been no employee surveys of any kind addressing diversity issues or the treatment of women employees.[123]

62. In sum, Wal-Mart has a range of diversity and equal opportunity policies and initiatives, many of them implemented in the past few years. Unfortunately, they have identifiable weaknesses that limit their effectiveness for identifying and eliminating discriminatory barriers. The process for setting goals is not linked to a systematic assessment of the policies and practices that influence the rate at which men and women advance through their careers at Wal-Mart. Evaluation of managers on contributions to the company's diversity and equal employment opportunity objectives is too weak to have any significant effect, and the company fails to use the tools available to it to systematically assess employees' perceptions of discriminatory barriers related to gender. In contrast to the centralized coordination and control that characterizes the operations side of Wal-Mart's operations, its human re-

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[122] Albrecht depo., p. 70-72; Jarrells Porter depo., p. 147; Peterson depo., p. 189-193. Although the surveys had been conducted annually since 1994, Ms. Albrecht testified that the first and only time she was asked to do a tabulation by gender was in 2001, and at that time she discovered that the system being used for the survey at that time was not capable of producing results separately by gender (Albrecht depo., p. 70-71).

[123] Albrecht depo., p. 55-56.

sources practices regarding equal employment opportunities are too diffuse to establish meaningful oversight and accountability.

63. I have concluded that an elaborate and sophisticated system of centralized coordination, reinforced by a strong organizational culture, creates and sustains uniformity in personnel policy and practice throughout Wal-Mart's organizational units. I have also concluded that subjective and discretionary features of the company's personnel policy and practice make decisions about compensation and promotion vulnerable to gender bias. In addition, I have concluded that there are significant deficiencies in the way the company monitors its personnel policies and practices, establishes diversity goals, and evaluates managers' contributions to equal opportunity objectives. Personnel policy and practice at Wal-Mart as implemented in the field has features known to be vulnerable to gender bias. Discretionary and subjective elements of Wal-Mart's personnel system and inadequate oversight and ineffective anti-discrimination efforts contribute to disparities between men and women in their compensation and career trajectories at the company.

I declare under penalty of perjury of the laws of the United States and State of California that the foregoing is true and correct.

This Declaration was signed by me on April 21st, 2003, at Santa Barbara, California

/s/ William T. Bielby

William T. Bielby, Ph.D.

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JAN 20 2011
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No. 10-277

IN THE

Supreme Court of the United States

WAL-MART STORES, INC.,

Petitioner,

v.

BETTY DUKES, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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Volume 2 of 3
(Pages 578a-1157a)

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The following documents have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the petition for a writ of certiorari:

Opinion of the United States Court of Appeals for the Ninth Circuit 1a

Order of the United States District Court for the Northern District of California Granting in Part and Denying in Part Motion for Class Certification 162a

Order of the United States Court of Appeals for the Ninth Circuit Granting Rehearing En Banc 284a

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF SHEILA ACREE IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Sheila Acree, declare:

1. I am a female former employee of Wal-Mart. I reside in Missouri.

2. Prior to my employment at Wal-Mart, I had more than 15 years' experience working in retail stores, including eight years as an assistant manager.

3. I worked at a Wal-Mart store in Chillicothe, Missouri from September 1994 to February 2000 as a Sales Associate and from May 2000 to April 2001 as a Cashier. I was interested in and qualified for management positions, but I could never find any written information about the Management Training

Program or other promotional opportunities. Many hourly supervisor positions in the Chillicothe store were not posted, which prevented me from expressing my interest in those jobs. I was never mentored or encouraged toward my goal of becoming a Wal-Mart manager.

4. As a Sales Associate in the Ladies' Wear, Men's Wear, Lingerie, and Infants Departments, I gained a lot of experience in the job responsibilities of a clothing department manager. In approximately 1997, I performed all Department Manager duties for about a month while the Lingerie Department Manager (Lisa Lenhoff) was on vacation. Also in approximately 1997, Assistant Manager Linda Donath and Management Trainee Bart Gabert selected me to help train employees in the clothing departments of a new Wal-Mart that was opening in Kansas City, Missouri. In approximately 1998, Assistant Manager Karen Thomas assigned me to train new employees in the clothing departments at the Chillicothe store.

5. My qualifications and experience are reflected in several of my performance evaluations. In 1997, my evaluation was "above standard," and it states, "[Sheila] is able to step in when department manager is gone and take care of the department." (True and correct copy attached hereto as Acree Exhibit A.) In 1998, my evaluation was "above standard," and it states, "[Sheila] is a fast productive worker. . . . She does a good job in accomplishing her goals and meeting deadlines. . . . Sheila is able to take care of [the Lingerie Department] when the dept. mgr. is gone." (True and correct copy attached hereto as Acree Exhibit B.) My 1999 evaluation was "exceeds expectations." (True and correct copy at-

tached hereto as Acree Exhibit C.) Store Manager Frank Chaney signed these three evaluations.

6. At the Chillicothe store, open hourly supervisor positions were not always posted, which meant that I could not always express my interest in open positions. I monitored job postings, and applied for some posted hourly supervisor positions, which I saw as a way to learn about management at Wal-Mart in the absence of written information. However, I often saw that management selected employees for promotion without first posting the job and allowing me a chance to even express interest in the position. For example, I recall that the Fabrics Department Manager position was not posted and was filled before I could apply. Despite my qualifications, I was never interviewed for any promotional opportunity, and I was never promoted to an hourly supervisor position.

7. To my recollection, Support Manager positions were never posted in the Chillicothe store. I never saw any written information in the store or on the internal computer system about required qualifications or the application process for Support Manager jobs. During the course of the seven years I worked at Wal-Mart, I remember only two women who held the position of Support Manager.

8. There was never an opportunity to express interest in the Management Training Program. There was no application process or procedure to sign up for interviews.

9. After each instance in which I was denied a promotion, I used the Open Door to meet with Store Manager Frank Chaney to ask why I had not been selected. Each time, Mr. Chaney told me he did not know why I was not selected. Mr. Chaney never told me that I had performance problems that would pre-

vent my promotion. Mr. Chaney never gave me verbal or written information about the necessary qualifications for Department Manager, Support Manager, or the Management Training Program. He provided no mentoring to help me become a Wal-Mart manager.

10. In approximately 2000, after Store Manager Chaney again failed to give a meaningful response to my request for information about why I did not get a posted promotion, I used the Open Door to talk with the District Manager about being passed over for promotions. When I called the District Manager, he was unavailable to speak with me, so I left a message with his assistant. I never received a return phone call from the District Manager or his assistant, despite Wal-Mart's "Sundown Rule," which requires managers to respond on the same day to an employee or customer complaint. This confirmed my belief that Wal-Mart had no interest in promoting me.

11. During the period of 1997 to 1999, I had to take several medical leaves of absence to care for my husband, who had five heart attacks during those two years. Even during those two years, my evaluation ratings were "above standard" and 'exceeds expectations." (See Acree Exhibits A, B, C.) I received one verbal coaching for attendance issues. I was never told that my medical leaves of absence would prevent me from obtaining a promotion to Department Manager or other management positions.

12. In February 2000, I left Wal-Mart in frustration with being passed over for promotion and the lack of information about promotional opportunities, but I returned after about two months. Even though I had more than six years of experience as a Sales Associate, and even though I specifically requested a

position on the sales floor, Store Manager Chaney assigned me to work as a Cashier, which was a less desirable position. I believe that Mr. Chaney assigned me to a Cashier position in retaliation for using the Open Door with the District Manager regarding promotional opportunities. I know that sales floor positions were available because I saw other newly hired employees assigned to the sales floor. I also saw Cashiers who were hired after me get transfers to the sales floor.

13. I left Wal-Mart again in April 2001 because Store Manager Chaney refused to give me a position other than Cashier. Since about August 2002, I have been working as a sales associate at Stage Department Store.

14. I love working in retail. I would consider going back to work at Wal-Mart if I knew that I would be considered fairly for promotion.

15. I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Missouri that the foregoing is true and correct.

This Declaration was signed by me on 4-11 (month and day), 2003, at Chillicothe, MO (city, state).

/s/ Sheila Acree

Sheila Acree

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES,
PATRICIA SURGESON,
CLEO PAGE,
CHRISTINE KWAPNOSKI,
DEBORAH GUNTER,
KAREN WILLIAMSON
AND EDITH ARANA, on behalf of themselves and all others similarly situated,

Plaintiff,

vs.

WAL-MART STORES, INC.,

Defendant

Case No. C-01-2252 MJJ

DECLARATION OF DONNA ADAIR IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I, Donna Adair, declare:

1. I make this statement on the basis of my personal knowledge, and, if called as a witness, could and would testify competently to the facts herein.

2. I am a female former employee of Wal-Mart, and reside in Tennessee. I am currently a store manager at Parent-Teacher Store in Franklin, Tennessee. I have been in that position since September 2001. In my position, I have responsibility for supervising employees.

3. I was employed by Wal-Mart from November 1993 to approximately April 2001. I worked in three Wal-Mart stores: in Clear Lake, California in

Sacramento, California and in Franklin, Tennessee. Throughout my employment, I received above standard ratings and was commended for my ability to manage and supervise associates. I was never disciplined in any way while an employee of Wal-Mart. Despite my excellent management and supervisory skills, I was denied promotional opportunities offered to less qualified men. Also, I was paid less than men with whom I worked.

4. Prior to joining Wal-Mart, I had worked in retail at J.C. Penney and a family-owned business, Circle F Western Shop. I applied at a new Wal-Mart Store in Clear Lake, California with little knowledge of the employment opportunities within the company. Initially, I was hired to help set up the store, which had not yet opened. After the store opened, I worked as a service desk clerk. for a short time and was then promoted to Customer Service Manager ("CSM") within three months after I was hired. A month later, I was promoted to Head CSM. Both my supervisors and the associates I supervised recognized my excellent supervisory skills and how the front-end ran smoothly during my shifts while I worked in the positions.

5. I realized after joining Wal-Mart that there were opportunities to advance within the company and informed the Store Manager Randy Ward sometime in 1994 that I was interested in a promotion to Support Manager. I specifically expressed interest in a Support Manager position that was given to a male associate Simon Williams despite my qualifications. Subsequently, I expressed interest in another Support Manager to Store Manager Ward position a number of months later and was promoted to the position in October 1994.

6. While I was Support Manager, I continued to be interested in promotional opportunities and expressed this interest to Store Manager Randy Ward. In November 1995, I was promoted to the Assistant Manager in Training Program. I was in the program for approximately 16-20 weeks in the Clear Lake store and was then promoted to the position of Assistant Manager in the Clear Lake store. Each evaluation I received as an Assistant Manager rated me as "exceeding expectations".

7. I fully expected to move up within the company and be promoted to Store Manager. However, experiences I had with former Divisional Vice President Kendall Schwindt and Regional Vice President J.R. Reed made it clear to me that because I am a woman I would not be promoted to Store Manager.

8. The day after Easter in 1995 another female assistant manager, B.J. Black, and I reported to work at 4:00 a.m. to prepare for a visit from Kendall Schwindt. Randy Ward was on vacation and it was our responsibility to make sure that the store complied with company guidelines. Mr. Schwindt visited our store at approximately 9:00 a.m. that morning and toured the store with Ms. Black and me. During the tour, Mr. Schwindt ridiculed and talked down to both of us in front of associates we supervised. He told us that we were very poor examples of managers for the "fine young men" who were Assistant Manager Trainees and who were standing with us. In my experience as an employee of Wal-Mart, I had never observed anyone from Home Office speak to a manager in a store in the way Mr. Schwindt spoke to us. I had never heard Mr. Schwindt speak to male assistant managers with such contempt. I was very embarrassed by the com-

ments Mr. Schwindt made. Ms. Black and I made an anonymous call to Mr. Maxie Carpenter, Vice-President of Personnel, in the Home Office, Bentonville, Arkansas to tell him about what had happened during the tour. I am not aware of any investigation that occurred as a result of our use of the Open Door. I did not tell any of my supervisors about what happened because I feared that I would be retaliated against for doing so.

9. Despite this experience, I continued to work hard and my performance continued to exceed expectations. In June or July of 1996, I transferred to a Wal-Mart store near Sacramento, California after my husband's job relocated him to the area. I remained at the store near Sacramento until December 1996. The store manager was Randy Ward who had been at the Wal-Mart store in Clear Lake. My responsibilities increased at the store because it was a much larger store than the one in Clear Lake.

10. In December 1996, I transferred to a store in Franklin, Tennessee after my husband accepted a new position in Tennessee. The practices and procedures I had learned in the two California stores were the same practices and policies used at the Tennessee store. The personnel policies were the same in Tennessee as in California. I did not receive any additional training in order to assume the duties of assistant manager in Tennessee. Britt Wood (male) was the store manager when I started in the Franklin store. Following Mr. Wood, the store managers were Cheryl Doyle and Keith Rinehart.

11. In approximately April of 1998, I stepped down from the position of Assistant Manager because of an incident that I felt was the last straw involving acting-Regional Vice-President J.R. Lee. Mr.

Lee made an unexpected visit to the Franklin, Tennessee store on a day when Store Manager Doyle was off. I was assistant manager over soft lines at the time and I walked over to the department where Mr. Lee was located. As I walked over, I noticed that he was tearing something up and dropping it on the floor. I walked up to him and he told me "[w]ell you have a backer that's outdated and I ripped it up. And now, you need to clean it up" referring to the paper I had watched him drop on the floor. I had never seen a regional manager treat a manager in the store in that way and I was very upset. I did not see Mr. Lee treat any of the other male assistant managers who were in the store the way that he treated me even though it was not uncommon for departments to have expired backers.

12. I immediately drafted a letter of resignation because of the treatment I received from Mr. Lee following the similar treatment from Mr. Schwindt. The two incidents convinced me that I had no future with the company as these superiors clearly did not view female managers as worthy of respect. I decided that the best thing for me to do was to leave. I agreed to stay only after Store Manager Doyle told me that I was too valuable to lose and offered me a position in the cash office. I worked in the cash office from approximately April 1998 until November 1999.

13. I went through management training again beginning in November 1999 although I performed the actual duties of an assistant manager. My duties were essentially the same as those I had performed before I had stepped down to work in the cash office. I did not post for the position and entered into the program after Store Manager Rinehart encouraged me to do so. As part of my job responsibilities, I han-

dled the payroll and had access to salary information for the associates in the store. I discovered that Rich Hailey, another trainee who had previously worked at Wal-Mart and left for several years, was earning approximately $4000 a year more than I. I spoke to the store manager Keith Rinehart, who did not deny the pay disparity. He offered no legitimate explanation for it, and told me that it was out of his hands. He promised to take care of me in my next evaluation. However, the pay disparity was never corrected.

14. In handling payroll, I noticed that men frequently earned more money than women associates despite the fact that women were in higher positions and had worked for the company longer. For example, I observed that a newly hired male sales associate, James Ray, was paid approximately $15.00 an hour. None of the female hourly associates, including a department manager, Annie Garner, who had worked for the company for twenty years, earned $15.00 an hour at the time.

15. Throughout the time that I worked as an Assistant Manager, I worked primarily in Soft lines. I noticed that the areas that most frequently led to promotion to store manager were the Garden Center and Sporting Goods. It was my understanding that Assistant Managers were to rotate and work in all areas of the store. However, in my experience I was not given the opportunity.

16. In April 2000, I went out on medical leave after I broke my knee and did not return to work. I learned I was terminated sometime in 2001 when I received papers from the company concerning profit sharing.

17. I observed throughout my employment with Wal-Mart that associates were often selected to fill open positions within stores without job posting. In the few instances in which I recall jobs were posted, management had already decided who would fill the positions.

I declare under penalty of perjury of the laws of the United States and State of Tennessee that the foregoing is true and correct.

This Declaration was signed by me on April 4, 2003, at ____________________.

/s/ Donna Adair
Donna Adair

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF GRETCHEN ADAMS IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Gretchen Adams, declare:

1. I am female and reside in Florida. I was a managerial employee at Wal-Mart Supercenters from 1993 until December 2001. My husband is totally and permanently disabled and has been disabled throughout my employment with Wal-Mart. My teen-aged son also lives with me and is an amateur golfer with aspirations of turning professional soon.

2. During my years with Wal-Mart, I relocated my family eight times at the request of the company. Despite my very strong performance as Deli Manager, Assistant Manager, and Co-Manager, I never was promoted to Store Manager. I was aware that

men doing the same job were paid more, and that I was even paid less than men I was training. I experienced retaliation for using the Open Door. Managers made comments reflecting derogatory stereotyping of women. Although I observed men being mentored by other men, I never was mentored and never met a female District Manager.

3. Prior to my employment with Wal-Mart, I was a teacher and Director of Education for a trade and technical school. I also had spent several years in the restaurant and retail industries, and had managed a restaurant. I had operated a family-owned oilfield and I had lived abroad when my husband was in the service.

4. I applied for an hourly position at the Wal-Mart Supercenter in Stillwater, Oklahoma in April 1993. I was hired in a support position in the Service Deli. The Service Deli prepares and sells hot food and bakes items from scratch. Brett Donnelly, the male Manager of the Deli, hired only women to work in that department and often made inappropriate, sexually-charged comments to the Deli employees. After a month of this conduct, Mr. Donnelly escalated his harassment and began calling one female employee at home. He also made physical moves towards her at the workplace, which I, among several others, observed. Finally, as a result of that female employee coming forward with her charge of sexual harassment, he took a two-week vacation, was demoted to a Department Manager position, and transferred to another store instead of being fired as required by Wal-Mart policy.

5. With the departure of Mr. Donnelly, I was approached by Store Manager Larry Wilcoxsen and District Manager Ed Robertson and offered the posi-

tion of Deli Manager. The position had not been posted, and I had not applied for it, although I had indicated at my 90-day review that I was interested in a managerial career at Wal-Mart. I did not accept the promotion at first, as I did not think the salary was adequate. Mr. Wilcoxsen and Mr. Robertson assured me that everyone started within the same salary range for this position. They told me that the salary range was $23,500.00 to $26,500.00 and they offered to start me at what they claimed was the maximum, $26,500.00. Based on that representation, I accepted the position of Deli Manager. I later learned men were started at a higher salary, as detailed below.

6. I spent the next five years as a Deli Manager, moving my family four times as I traveled to help set up new Supercenters. I managed the Deli in Stillwater, Oklahoma for almost a year before being asked to go to Florida to help open new Supercenters there. Florida was considered to be a haven of new opportunity for advancement as many new Supercenters were to open there. I was assigned to set-up and open the Deli in Cape Coral, Florida. While waiting for the Cape Coral assignment, I moved my family for approximately 3 months to Jasper, Alabama where I was assigned to clean up a Deli Department that the local authorities were threatening to close down. I then moved to Cape Coral. After a few months in Cape Coral, I was asked to move to Titusville, Florida to help set-up and open another new Supercenter. Again, I moved my family and residence.

7. I stayed in Titusville, Florida for two and a half years as I wanted a promotion and thought it would be beneficial if a District Manager had a

chance to get to know me well, see what I was capable of doing, and therefore support me in my promotional efforts. I was very successful in my efforts in the Titusville Supercenter Deli. My Deli was the number one in the district, number one in the region, and number three in the entire company.

8. I asked for my well-earned promotion to Assistant Manager from everyone that I thought could facilitate it. I repeatedly and frequently approached my District Manager, Powell Wallace, and asked for a promotion. I spoke with Joe Tapper, Regional Food Vice President from the Home Office in Bentonville, Arkansas, and Mark Schwartz, Vice President of Supercenters from the Home Office. They told me it would be simple to get a promotion; I only had to speak with my Store Manager and my District Manager. I continued to speak several times with District Manager Wallace about my wish for a promotion to Assistant Manager, but he just continued to put me off. I spoke with Cathy McWherter, Regional Personnel Manager, about my career and she offered me a promotion to Assistant Manager in Dallas, Georgia. However, after she spoke with Mr. Wallace, she retracted the offer without an explanation. Finally, Store Manager Jim Roulette confided in me that District Manager Wallace was not in favor of women being in upper management and that if I wanted a promotion I should first transfer to another district. Now, instead of continuing to ask Mr. Wallace for a promotion, I began to ask him for a transfer to another district. Mr. Wallace told me he would talk about the promotion after my move to Kissimmee, Florida to open yet another Supercenter in his District. He told me that only the best employees were going to Kissimmee. I felt I had already proven

myself, no longer trusted Mr. Wallace, and did not think this was fair to delay my promotion this way.

9. As my future aspirations were blocked by Mr. Wallace, I decided to use the Open Door, as I had little to lose. My understanding of the Open Door Policy was 'open door, shut the door, out the door' and I felt I was taking a risk of suffering retaliation by going above Mr. Powell in seeking a promotion. Nevertheless, my position was intolerable, and so I contacted Steve Wycoff, in Training and Development, and asked for his help. Mr. Wycoff suggested I contact Larry Patrick, Director of Personnel for Supercenters, if Mr. Wallace continued to refuse my request for a promotion or transfer. When I called Mr. Patrick, he was very protective of Mr. Wallace, defending and attempting to justify Mr. Wallace's actions. Mr. Patrick promised to look into the problem and get back to me. I never heard from Mr. Patrick again.

10. I then began a lengthy process of finding an open position in another district in which to transfer. I made countless telephone calls to Store Managers and Regional Personnel Managers to discover what openings they anticipated. Finally, in May 1997, I was able to transfer to Winston-Salem, North Carolina. I was still a Deli Manager.

11. I applied for a Meat/Deli Merchandiser position in June 1997, as I decided to try another avenue of promotion. I was not interviewed for the position even though I was told I would be by David Norman, Regional Vice President. Ken Sanford, a man I had trained as a Deli Manager in Cape Coral, was given the position. I pointed out to Ramona Truax, the Regional Personnel Manager, that a man I had trained had received this promotion. Her only

response was to raise her eyebrows and say that she would see what she could do. There was no further follow-up.

12. New merchandiser positions were available in late 1997. Again, I applied and followed up with many telephone calls. David Norman, Regional Vice President, told me that I was on the "recommended" list. I expressed my strong desire for the promotion, and my willingness to relocate anywhere. Again I was passed over. A man with only three months experience with Wal-Mart was chosen for one of the openings. When I tried to discover who the other successful applicants were, and the gender of the new Merchandisers, I was told by Mary Smith, Regional Personnel Director, that it was none of my business, and that it did not matter, the damage was done. I requested an explanation for the refusal to promote me. Fred Bunch, District Manager and Mary Smith both told me they were unable to give me a good reason. One of the merchandisers, Ken Sanford, said that he knew that I should have received one of the positions but it was based on "whom you knew, not what you knew". No one told me what I should do, if anything, to receive a promotion to Merchandiser.

13. From the fall of 1997 until July 1998, I was sent to approximately ten different stores in several states to help with various problems. Throughout this period, Fred Bunch, District Manager, continued to promise to put me into the Management Training Program so that I could be promoted to Assistant Manager.

14. Finally, in July 1998, I was promoted to Assistant Manager. I did not join the Management Training Program, but instead was promoted directly

to Assistant Manager. Regional Personnel Assistant Heather [last name unknown] told me that I would not receive the training because I earned too much. As Assistant Manager trainees are paid hourly, and receive overtime pay, Heather said that Mary Smith, Regional Personnel Manager, had told her to tell me that my hourly pay would be too high, and that Wal-Mart did not want to pay it. Instead, I was handed a manual and told by Debbie Plumadore, Store Manager, that I would learn on the job.

15. In November 1999, I was promoted to the position of Co-Manager by Ron Cook, after two men, Christopher Pierce and Shawn Stanley, turned down the position. I again relocated my family. I was never to receive another promotion.

16. As Co-Manager, I continued to relocate my family at the request of Wal-Mart. I was a Co-Manager in North Carolina, Nevada, and Florida, moving my family each time.

17. After I was Co-Manager in North Carolina for a few months, I learned that Supercenters were opening in Las Vegas, Nevada. I had lived previously in Las Vegas, and I knew that this was an area of expansion for Wal-Mart. I thought that a transfer to an area of growth would be beneficial for my career and my goal of becoming a Store Manager. I sought a transfer to Nevada. In April 2000, I became a Co-Manager at a Supercenter in Las Vegas. Within a few weeks of commencing my employment in Las Vegas, I learned that at least two male Co-Managers started at a higher pay rate than I did, as detailed below.

18. On or about October 23, 2000, the District Manager in Las Vegas, Chuck Salby, expressed his contempt for female managers within the first few

weeks of my tenure in Las Vegas. I was in a car with Mr. Salby, Store Manager Jay Mossell, and Co-Manager Jim Eble, driving to a meeting in Utah. Mr. Salby responded to something I had said by exclaiming "Gretchen, I just want to tell you how refreshing it is to finally have a female with your intelligence and knowledge in my district." None of the, other male managers responded to this statement.

19. On or about October 23, 2000, there was a bomb threat at the Las Vegas Supercenter and the store was evacuated for several hours. When we were allowed back in, the store was in terrible shape, with full shopping carts abandoned throughout the store and pallets of merchandise that should have been unloaded left out. The following morning, the Supercenter had another bomb threat and a drive-by shooting threat. Meanwhile, even more carts were left to be re-stocked. The store was in a very chaotic state. That morning, Don Harris, Vice President of Operations from, the Home Office in Bentonville, Arkansas, and Kendall Schwindt, Divisional Director, arrived at the Supercenter for a store tour. Mr. Harris was extremely angry at the condition of the store. He got even angrier when he learned that the Store Manager, Jay Mossell, and the District Manager, Chuck Salby, were both on vacation at the same time and a crisis had happened.

20. When this happened, I had been in the process of completing my final interview plans for a position in Training and Development. I had already been through three interviews including the preparation of a videotape. I received a call from Teri Ross, Training and Development, and was told that they could not consider me now that I was on probation. She told me that the Regional Manager, Jim Wilhem,

had told her that all members of management in our store were on probation for a year and that no one would be transferred or promoted. I told her we knew nothing about it. I asked Jay Mossell, Store Manager, and Chuck Salby, District Manager, if they knew anything about it and they did not. I felt that this was very unfair of upper management and decided to use the Open Door policy. I sent a letter to Jim Wilhem, Regional Director, Kendall Schwindt, Divisional Director, Lee Scott, CEO of Wal-Mart, Inc, Larry Ezell, Regional Personnel Manager and Andy Wilson, Director of Supercenter Personnel. A true and correct copy of this letter is attached hereto as Adams Exhibit A. I told these executives that respect for the individual, one of the basic beliefs at Wal-Mart, was not being followed in the way the Las Vegas store was being handled.

21. On November 10, 2000, the day after I faxed these letters to these executives, District Manager Chuck Salby came to talk with me. He said he knew about my letters and that the recipients were not happy. He told me that if I decided to send another letter, I should show it to him first. Mr. Salby said he would have advised me not to send this letter and that it was not a very "smart" move. I told Mr. Salby that we would find out if the company really supports the Open Door policy, that I had just told the truth in my letter, and that it was time for someone to stand up. Mr. Salby did not address the issues in my letter or tell me when I could expect a response.

22. On November 13, 2000 Jim Wilhem, Regional Director, came into the store. He was very angry but did not address the issues in my letter. Mr. Salby told me that Lee Scott, Wal-Mart CEO,

would be in to see all of the members of management.

23. On November 24, 2000, Mr. Scott did come to the store. He did not address the particular issues of my letter but told me I was doing a good job. Mr. Scott returned on November 27, 2000 and addressed the management team. Mr. Scott said that either Mr. Schwindt or Mr. Wilhem would be back in the store within two weeks to address the issue of my ability to apply for a promotion.

24. Before there was any follow-up to my Open Door letter, District Manager Salby called me into his office on December 13, 2000. He was very abusive in his language, and called me a "worthless broad." He gave me a choice of termination or immediate transfer from his district. Mr. Salby told me that I was not going to get the position I was applying for in Training and Development, and that I needed to decide that minute where I wanted to transfer to. I asked if I could speak with my husband about such an important decision and he told me he wanted my answer right then. I asked if it was my letter to the executives that had caused this, and he refused to answer. He gave me no explanation as to why he was acting this way, or what, if anything, I had done to deserve such treatment. Mr. Salby told me that Mr. Schwindt and Mr. Wilhem were aware of what he was doing to me. I told Mr. Salby that I would return to Florida, and he collected my keys and my walkie-talkie. He sent me home to wait.

25. I became Co-Manager in Greenacres, Florida, moving my family again. Mr. Salby's efforts to retaliate for my use of the Open Door continued, even though I had moved out of his district. He sent

to my new District Manager a poor evaluation of me and a written coaching which he had told me had been torn up.

26. I renewed my efforts to be promoted to a position in Training and Development. I contacted Teri Ross, Director of Training and Development, and she told me that it would just be a matter of formality, but someone would call for a final interview. However, I was required to interview two more times. I was told by Irvin Young that I had done very well. In September 2001, the prerequisites for this position changed without notice. I was told by Irvin Young that I was suddenly ineligible for the position because experience as Store Manager was now required and, as a Store Manager, one had to be on the "promotable" list. I had never been offered a Store Manager position.

27. I quit in December 2001.

28. In at least three of the stores where I worked, I learned that men were paid more than I was even though I had equal or more responsibility. In Jasper, Alabama in June and July 1994, I trained James O'Neil how to run a Deli. He was new to the company, and had no deli or retail experience. He had only worked in fast food. One week, he was sent out of town to help in a grand opening of another store, and he asked me to deposit his paycheck. When I took Mr. O'Neil's deposit slip to the bank in Jasper on July 15, 1994, I saw that he was being paid $30,000.00, approximately $3,500.00 more than I was receiving, even though I was an experienced Deli Manager and I was training him. I was concerned and spoke with the Regional Personnel Manager, Brian Hardin, the next week. Mr. Hardin explained that this was just a "fluke," and that there

was nothing he could do about it. I accepted this at the time.

29. This practice of paying a male trainee more than me was repeated at the next store. When I moved to Cape Coral, Florida in 1994, I trained Ken Sanford as a Deli Manager. Again, Mr. Sanford was new to Wal-Mart and his experience was limited to bakery work. Mr. Sanford told me that he was earning $30,000.00 per year. I was being paid only $28,089, having received a yearly review with an above-standard rating. Mr. Sanford received the promotion to Merchandiser that I sought, as detailed above.

30. That this was a pattern of gender discrimination and not a series of flukes became very clear when I learned for a third time that men were being paid more than I was receiving. When I was a Co-Manager in Las Vegas, Nevada, in 2000, I learned that male Co-Managers Scott Jolley and Jim Eble were paid approximately $47,000. I was paid only $43,500.00. I had been told by District Manager Ron Cook and Regional Personnel Manager Mary Smith that all new Co-Managers were paid the same base pay. Upon learning that these two male Co-Managers, with no more experience than me, were being paid more, I spoke with Regional Personnel Manager Larry Ezell and with District Manager Chuck Salby. I asked Mr. Ezell why I had been told that all Co-Managers began at the same salary if this were not true. I received no meaningful response. Mr. Ezell and Mr. Salby agreed to give me an immediate raise to $47,000. The raise was not made retroactive to compensate me for the period when I was underpaid. I was given no explanation as to why two men, doing the same job I did, were paid more. I was

given no assurance that there would be any review conducted to ensure other women were not being similarly underpaid. My request to look into past discrepancies was ignored.

31. I learned about this litigation when, as a Co-Manager, I received "talking points" from the Home Office in Bentonville, Arkansas that were to be used when Managers discussed the class action with employees. When this case was filed, I realized that my experience of gender discrimination was not unique, and that other female employees were taking action. I quit Wal-Mart six months after this case was filed, and became an organizer for the United Food and Commercial Workers International Union. I was never involved in a union activity before, but felt something had to be done.

32. I have personal knowledge of all of the foregoing and, if asked, could and would testify competently to all of these facts.

I declare under penalty of perjury of the laws of the United States and the State of Florida that the foregoing is true and correct.

This declaration was signed by me on April 14, 2003 at Milton, Florida (City and State).

/s/ Gretchen Adams

Gretchen Adams

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF WANDA AKLEY IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Wanda Akley, declare:

1. I make this statement on the basis of my personal knowledge and, if called as a witness, could and would testify competently to the facts herein.

2. I worked at the Wal-Mart Supercenter in Calhoun, Georgia from November 2000 to July 2001 as a grocery stocker making $8.32 an hour working full-time. I was not allowed to take any weekends off. After seven months with no weekends off, I complained to both Grocery Manager Steve Walwaven and Store Manager Megan Hammer but they were both unresponsive. Shortly thereafter, a male grocery stocker [name unknown] was hired and allowed to take all of his weekends off. Because I was not al-

lowed to take any weekend time off. I left in July 2001. I was not asked to fill out an Exit Interview.

3. In December 2001, I began working at the same Wal-Mart as a full-time overnight grocery stocker. My schedule required me to routinely work the graveyard shift. Despite my prior experience in this position, I began with an hourly rate of only $8.00, which was less than what I had previously been making. After I started, I discovered that one of my male co-workers, Russell Logan, had started at $10.00 an hour in the same position. I spoke with Grocery Managers Hank Delatorre and Doug [last name unknown] and asked why Mr. Logan was paid more than I was for the same position. They both told me that Mr. Logan was paid more because he had experience and, with experience, one could earn up to $9.00. When I told them that Mr. Logan was making $10.00 an hour and that I also had previous experience in this same position, they were completely unresponsive. I then spoke with the Grocery Department Manager Georgiana Bearden about the discrepancy in pay. I was with her when she spoke with Grocery Manager Doug [Last Name Unknown] about why Mr. Logan was paid so much more than I was. Doug then told us that pay rates were "none of [our] business." Finally, I spoke with Store Manager Megan Hammer who agreed to raise my salary to $8.72, still under the amount of Mr. Logan's hourly rate. By that point, I had spoken to a number of members of management, and I had always been told that I could be fired for discussing pay rates, so I feared pursuing the issue any further.

4. In 2002, I expressed an interest to Grocery Manager Doug, Assistant Manager Jeff [last name unknown], and Grocery Department Manager

Bearden about moving from overnights to first shift. Ms. Bearden told me I would have to have experience unloading trucks. Shortly thereafter, male Grocery Stocker Brandon [last name unknown] was transferred from overnights to first shift even though he had no experience unloading trucks. Later that year, I asked Grocer Manager Doug if I could transfer to an opening in the Shoe Department but he told me that they needed everyone to remain in Stocking. Approximately one month later, male Stocker Tommy [last name unknown] was allowed to transfer out of Stocking to another store.

5. My evaluations have always been rated "Meets Expectations" or "Exceeds Expectations."

6. As of January 2003, I am on family medical leave to care for my ill father.

I declare under penalty of perjury of the laws of the United States and State of Georgia that the foregoing is true and correct.

This Declaration was signed by me on April 2, 2003, at Calhoun, Georgia.

/s/ Wanda Akley

Wanda Akley

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF EDITH ARANA IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, EDITH ARANA, declare:

1. I have personal knowledge of each and every fact set forth in this Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

2. I was employed by Wal-Mart, Inc. from September 5, 1995 through October 19, 2001 in Duarte, California. I am female. I am the mother of five children and had more than ten years' experience working in retail and grocery stores, including supervisory and management experience, prior to beginning my Wal-Mart career. During the six years I worked at Wal-Mart, I never rose above a Support Manager position despite my consistent "above aver-

age" or "exceeds expectations" performance evaluations and constant requests for advancement opportunities.

3. I decided to become a named plaintiff in this action because I was unfairly denied promotional opportunities, training, and equal pay throughout the time I worked at Wal-Mart. My main concern is to end all those employment practices at Wal-Mart that have prevented women from obtaining management positions and to ensure equal pay for comparable work and equal access to the training and mentoring necessary to advance in the Company. I understand the responsibilities of a named plaintiff. I am prepared to fulfill my duties to the women in the class so that they achieve fair and equitable treatment

4. I first learned that a new Wal-Mart store was opening in my area in the summer of 1995. At the time, I was voluntarily unemployed but ready to re-enter the workforce. When I saw the ad in the newspaper, I knew Wal-Mart would be able to provide me a career in the field that best suits me: retail. I have always been really great with people and I love merchandising as well.

5. The new store was going to be located in Duarte, California. I applied and was hired as the Personnel Manager, an hourly position. I was surprised that my pay rate was only $7.00 an hour, given my past experience and the fact that Wal-Mart was a larger company than I had worked for in the past. I trained for the Personnel Manager position by traveling with Assistant Manager Lori Whitehead to other Wal-Mart stores and working with her and other Personnel Managers for approximately three months. I learned that each of these stores, located

in Upland, Rancho, Fontana, Pomona, Corona and Colton, California operated similarly and that the personnel policies and practices were consistent from store to store.

6. The Duarte store did not officially open until January 1996. During the period from September to January, I reported to a temporary location in Monrovia, California where I was responsible for creating the personnel files for prospective employees for the new Duarte store. I also helped the Assistant Managers any way I could and was often called out on the floor to assist in the various departments. Although my scheduled shift was from 7 a.m. through 4 p.m., many days I was required to work 10 to 12 hour shifts to get all my work done.

7. In January 1996, I received an "above average" rating on my initial 90-day evaluation and a $0.40 raise. I thought I should have received an "outstanding" evaluation and asked Co-Manager Greg Boynton why he had not given me the higher ranking. His response was "payroll can't handle it."

8. As the Duarte store reached full employment, the Assistant Managers began delegating more responsibilities to me. This interfered with the time I had available to do the paper work associated with personnel and payroll so I asked Store Manager Bernie Seaman if he could provide me with an assistant. He never did this so in March 1996, I told Mr. Seaman that I did not want to continue as the Personnel Manager because I was overworked and underpaid. Store Manager Seaman apologized for not having given me additional help and assigned me to train as a Test Scanner without any change in pay.

9. My duties as a Test Scanner included checking merchandise for the correct price and en-

suring that the store's inventory was correct. This was a new position for Wal-Mart and required the use of special equipment, the Telzon machine. This hand held computer allowed pricing and inventory information from each Wal-Mart store to be communicated directly to corporate headquarters in Bentonville, Arkansas. The Telzon data was available to the Store Manager through the daily Store Manager Recap Reports as well as through the STAR reports. When I finished my Telzon training, I was the only Test Scanner in the Duarte store and I continued to work as a scanner concurrently with my other positions throughout my employment with Wal-Mart.

10. In August 1996, I received my annual evaluation with a "standard" ranking and a $0.30 raise. I had been evaluated by Assistant Manager Vanessa Rico who was new to the store and who did not know my work. I told Assistant Manager Lori Whitehead and Store Manager Seaman that I did not do "standard" work. They agreed and several months later, I received a merit raise.

11. On my 1996 annual evaluation, I wrote under the "Associate Comments/Goal Setting" category: "I would like to be able to do any thing in the store—invoicing, UPC, price changes, courtesy desk, lay-away and support. The way I'm going to do that is to train and ask questions." (Attached hereto as Arana Exhibit A is a true and accurate copy of my August 1996 performance evaluation.)

12. In approximately July 1997, I overheard a co-worker talking about an open support manager position. I went to Store Manager Seaman and told him that I was interested in the position. I was not interviewed and I do not recall filling out an applica-

tion for the job. Mr. Seaman told me that I had the job.

13. A Support Manager is just below the Assistant Manager and has many of the same job duties, such as handling rude customers, checking voids off the cash registers, approving checks above a certain limit, keeping keys to the registers and the back office. As Support Manager, I still had to work my regular test scanning job but would then serve as Support Manager either on Friday evening and over the weekend or by returning several weekday evenings after having completed my regular shift. For these additional responsibilities and hours, I received a mere $0.40 an hour raise. My pay rate was then $8.50 an hour.

14. On my 1997 annual evaluation, I received an "above standard" ranking and a $0.45 raise. I also received two merit raises that year, one for $0.41 and the other for $0.56. The second Associate Commendation Form read: "Edith is doing an excellent job as Support. Goes beyond what is expected. She will receive a 6% increase for merit raise." (Attached hereto as Arana Exhibit B is a true and accurate copy of an Associate Commendation Form dated December 11, 1997.) Even with excellent performance evaluations and numerous merit raises, my pay rate was then only $10.00 an hour.

15. In approximately December 1997, I told Store Manager Seaman that I wanted to apply for the Assistant Manger Training Program. Information about this training program is not posted anywhere in the store and is not included in the employee handbook. There is no formal application process. I learned about the program by hearing other associates talk about the program. I under-

stood that the only way to be considered for the program was by asking your Store Manager to recommend you. Store Manager Seaman told me that he would recommend me to the District Manager for the training program.

16. In early 1998 I was out on sick leave due to injuries I suffered in a car accident in late December. When I returned to work, I still had not heard anything from Mr. Seaman regarding when I would start the Assistant Manager Training Program. When I asked him why, he said he did not think I was still interested since the car accident. I reassured him that I was still interested in management training and he said that he would recommend me the next time the District Manager asked for candidates for the Assistant Manager Training Program. During this same time period, I also discussed my interest in the Assistant Manager Training Program with Assistant Manager Lori Whitehead.

17. Despite having expressed interest in management training to both Store Manager Seaman and Assistant Manager Whitehead, I was not recommended for the Management Training Program at that time.

18. I worked as a Support Manager for about one year before I voluntarily stepped down from the position in July 1998. I stepped down because management repeatedly promised, but failed, to provide additional help when I worked on Friday nights and Sundays, the two busiest days at Wal-Mart. I did not mind working these days so long as I had adequate help. When management failed to provide additional support on these days, I asked to be taken off either Friday night or Sunday as I did not think it was fair that I had both of the two busiest days most

of the time. Although Store Manager Seaman, and then the new male Store Manager Darren Rastad, repeatedly reassured me that I would not have to work both Friday night and Sunday, neither changed my schedule so I asked to step down. I was not being paid enough money or provided sufficient support to sacrifice my weekend time with my family.

19. In August 1998, I received another "above standard" evaluation and a $0.54 raise. I also applied for another Support Manager position when I saw one posted on Wal-Mart's computerized job posting system. I was not interviewed for the position. The promotion went to a male, Jerry Serrano.

20. Over the next two months, I worked in a number of different capacities, including the back-up UPC clerk , the UPC clerk, and as a sales associate in the Men's Wear Department. The UPC clerk and back-up clerk were responsible for implementing price changes by ensuring that merchandise was correctly priced. I received a merit raise of $0.52 cents in November 1998.

21. During 1999, I worked mostly on the sales floor in both the Women's and Men's Wear Departments and then with the Seasonal Products Department. I was still interested in management and began applying for Department Manager positions on the computer, including Manager of the Household Paper Goods Department in approximately June 1999. I was not interviewed for this position. Instead, I was passed over in favor of a male co-worker whose name I no longer remember. I was also denied Department Manager positions in the Ladies wear and Stationary Departments. In the Spring of 1999, John Kocharian replaced Bernie Seaman as the Store Manager.

22. In late July 1999, my doctor ordered me to take a stress-related leave of absence. After I returned from that leave, my husband fell gravely ill and died in September 1999. This required me to take a two month leave of absence. Upon my return, I received an "exceeds expectations" performance evaluation and a $0.57 raise from Lori Whitehead Schmidt who had been promoted to Co-Manager.

23. Early in 2000, Store Manager Kocharian asked me to return to the position of Test Scanner rather than working the floor. The store was getting ready for inventory and test scanning is very important to the inventory process. I agreed to this change and began not only test scanning but implementing the price changes in various departments whenever the department managers were unable to get this task done.

24. On January 22, 2000, Co-Manager Lori Schmidt gave me a merit raise of $0.58 an hour. On the Commendation Form, Ms. Schmidt wrote: "Edith is being given a merit increase due to going above and beyond her job performance. Edith has covered most of my departments for extended periods of time during their absences, not having any one in dept. She does an outstanding job feeling (sic) in where she is needed—anywhere, anytime." (Attached hereto as Arana Exhibit C is a true and accurate copy of the January 2000 Commendation Form.)

25. In approximately February 2000, the Department Manager position in the Paper Goods and Chemical Department became open again when the current male Department Manager moved to a different department. I was still interested in this promotion and applied again through the computerized posting system. Again I was not even interviewed.

Instead, Store Manager Kocharian informed me that he was giving the position to a male from another Wal-Mart store who had worked in that department. Later a male, Steve [last name unknown] transferred into the position from the Glendora store.

26. After the death of my husband, my interest in entering the Assistant Manager Training Program was even greater because I was now the sole support for my family. Although I do not recall the date, I told Store Manager Kocharian sometime after being denied the department manager position in the Paper Goods and Chemical Department that I wanted to apply for the Assistant Management Training Program. I told him that I had been with the store for five years and that I wanted a new challenge. Mr. Kocharian did not reply to me. He simply shrugged his shoulders and walked away from me.

27. I raised the Assistant Manager Training Program with Store Manager Kocharian again during the inventory of the store. Mr. Kocharian told me that if we had a good inventory, I would get a raise and he would recommend me for management training. I worked very hard and had excellent results. About a week after inventory was over, I went back to Store Manager Kocharian and reminded him that he had said he would recommend me for the Assistant Manager Training Program if inventory went well. He did not respond and brushed me off. I waited a few more days and went back to Mr. Kocharian. I told him very forcefully that he had promised me management training if inventory went well. He told me that he did not recall our conversation. This response really frustrated me. Although I continued to work as hard as I could, I felt that no matter how well I performed, Store Manager Kocharian

was denying me the opportunity to advance with the Company because I was a woman.

28. During the months after I told Store Manager Kocharian that I wanted to apply for management training, I also told various Assistant Managers that I was interested in management opportunities, including John Moore, Jim Nolan, Nofoao Dorsey, and Dwight [last name unknown]. Each of these managers was supportive of me. One encouraged me to keep trying; another was skeptical, however, and told me that it probably would not happen in the Duarte store.

29. In August 2000, my doctor again ordered me to take a medical leave of absence due to high blood pressure and stress.

30. When I returned from leave in October 2000, Co-Manager Lori Schmidt gave me my annual performance evaluation. I received an "exceeds expectations" ranking and a $0.60 raise, which brought my pay rate to $12.85 an hour. I wrote under the Comments/Goal Settings section, "I would like more mgt. [management] duties so that I can get in mgt. training." (Attached hereto as Arana Exhibit D is a true and accurate copy of my evaluation for 2000.) At some point, I wrote a letter to Co-Manager Schmidt expressing my interest in joining the Assistant Manager Training Program. In response, she suggested that I write such a letter directly to the District Manager.

31. In October 2000, I also saw another Support Manager position posted on the computer and applied for it. Again, I was not interviewed for this position. As best I recall, this job ended up being given to several different associates, including a male, none of who held the position very long.

32. In or about December 2000, I wrote to District Manager Judy Evans informing her that I wanted to apply for the Assistant Manager Training Program. Ms. Evans wrote back to me, explaining that she was no longer District Manager but that she would forward my letter to the new District Manager, a male, Dave Riggs. I never heard anything from District Manager Riggs regarding management training.

33. In December 2000, Store Manager Kocharian personally recognized me by awarding me a merit raise of $0.65 an hour. This brought my pay rate to $13.50 an hour. On the Commendation Form, he wrote, "Edith has done a commendable job in helping store scan for inventory." (Attached hereto as Arana Exhibit E is a true and accurate copy of the Commendation Form signed by Mr. Kocharian and dated December 16, 2000.) While I certainly felt that I could use the small amount of extra money to support my family, I was frustrated because my goal was a position in management, which would really make a difference for my children's future.

34. In approximately January 2001, I called the 1-800 Wal-Mart number to complain about Store Manager Kocharian's unfair treatment of women, including his refusal to interview women candidates for department manager positions in certain departments. As far as I know, my complaint was never investigated.

35. In approximately February 2001, I spoke to District Assistant Wanda Stoke in the District Office. I asked her when the new District Manager would be hiring for the Assistant Manager Training Program. She informed me that I should apply directly to the Store Manager. I told her that my Store Manager,

John Kocharian, was not going to allow a woman into the Assistant Manager Training Program. She then told me to apply directly to the District Manager. I decided against this because Mr. Kocharian had represented to us, during the District Manager's store visits that he was a close friend with District Manager Riggs and I was afraid Mr. Kocharian would retaliate against me. Because I was the sole support of my children, I could not risk losing my job or having my hours cut.

36. In approximately February 2001, Assistant Manager John Moore asked me to travel to the Covina store to assist with the test scanning necessary for its upcoming inventory. I was told this would be a one-day assignment. While I was at the Covina store, I learned that the man in charge of my work, one of the District Loss Prevention Managers named Rico [last name unknown], was expecting me to continue working as part of a traveling inventory/test scanning team six months out of the year. I complained to Assistant Manager Moore that I did not want to do this work or be part of an inventory team. I would have complained to Store Manager Kocharian but he was not in the office. Mr. Moore told me that he thought the work was for only one day. However, he kept sending me out to be part of this "team."

37. When Store Manager Kocharian returned, I told him that I did not want to be on a test scanning crew. He responded that each store needed to provide one team member and that I did not have a choice in the matter. When I asked him why the associate who had been on the team previously could not return to that position, Mr. Kocharian informed me that she was now over a department and did not

want to leave. This explanation did not make sense to me. Instead, I believed Mr. Kocharian made me continue this work because I had complained about him on the 1-800 number.

38. I was not satisfied with the traveling scanning team assignment. Even though Mr. Kocharian had denied me management training in the past, I still wanted to enter management training and I felt I would not be able to enter the Assistant Management Training Program if I was out of sight, on an inventory team going from store to store.

39. While on the traveling scanning team, I was not required to punch in and out of a time clock. Instead, I would record my hours on a form that a manager would initial after we had finished the test scanning required by that particular store. I would record my hours from the time I left my home to the time I returned home. I would then either call my time into the Duarte store or complete a time adjustment sheet for the Duarte store.

40. In May 2001, a new Co-Manager, Barbara Martin, called me into the office to explain changes that were being implemented in associate time keeping. I understood from this meeting that any deviation from a posted schedule would show up as a tardy or an absence. In other words, if I was scheduled to work from 7a.m. to 4 p.m. but an Assistant Manager told me not to come in until 9 a.m. the next day, my time the following day would reflect me being two hours late for work. I was still working on the inventory team, however, so I was not punching a time clock and did not fully understand how this new system would affect me. At some point Ms. Martin showed me a form entitled "Verbal Coaching" and told me that I had a number of unexcused ab-

sences and tardiest. To my knowledge I was not having any problems with my work schedule, attendance, punctuality, or tardiness. I asked her how the time clock could be reporting me as absent or tardy when I did not punch in to any time clock. Ms. Martin told me that Store Manager Kocharian had asked her to meet with me to discuss the new time-keeping policy and that was what she was doing.

41. After I had been working on the traveling scanning team for a few months, a male Support Manager, Randy Powers, talked to me individually about another change in Wal-Mart's time-keeping procedures for associates who traveled from store to store. Mr. Powers explained that from that point forward, I was not to record the time I spent traveling to and from my home. Instead, I was only to record the time I spent in a store. He told me that he had already explained this policy to the other traveling test scanners and the associates in his store during a meeting occurred on a day I was not working. This change in policy significantly affected my weekly pay since several of the stores I traveled to were quite a distance from my home in Pasadena, Los Angeles County. For instance, the Brea store was about a 45 mile one-way commute from my home while another store in Orange County was between a 1 1/2 to 2 hour one-way commute from my home.

42. In June 2001, this lawsuit was filed. I was not a named plaintiff at the time.

43. At about this same time, we were preparing for inventory at my home store in Duarte. When I test scanned at the Duarte store, I generally worked the 7 a.m. to 4 p.m. shift and I did punch in and out on the time clock. Immediately prior to inventory,

the pace at the Duarte store was frantic. Store Manager Kocharian wanted the back room impeccable and the floor scanned as accurately as possible. He walked the floor constantly and during our daily store meetings, he routinely stated, "if the inventory goes badly, we're going to blame Edith." Although he tried to make his remarks sound comical, I very much felt he was threatening me. During this period, I am certain I worked my full shift, and many extra hours as well.

44. Sometime in September 2001, Co-Manager Martin called me while I was working at another store and asked me to bring in a record of my hours to the Duarte store. I brought my documentation to her and asked her why she needed it. (Attached hereto as Arana Exhibit H is a true and accurate copy of the time record submitted to Co-Manager Martin in September 2001.) She responded that there was a question about my hours. Aside from the May 5 meeting I had had with Ms. Martin and the September 14 meeting with Assistant Manager Rodriguez, none of my supervisors had questioned me about my hours or otherwise raised with me any concern about my attendance or punctuality.

45. On or about September14, 2001, Assistant Manager Ben Rodriguez called me into the office and handed me a "Coaching For Improvement Point." The document states, "Edith has an attendance problem. She has nineteen unapproved absences since 3-14-01 till now 9-14-01. This is unacceptable to Wal*Mart standards which is three unapproved absences in a six month rolling period. She also has twenty four tardies, five left early's." (Attached hereto as Arana Exhibit F is a true and accurate copy of this coaching form.) I asked Assistant Man-

ager Rodriguez how could this be since I did not punch a time clock while I was on the road. I also asked him if he knew that Co-Manager Martin had already talked to me about this matter. Mr. Rodriguez informed me that Co-Manager Martin had instructed him to give me this form.

46. At about this same time, Wal-Mart began reducing my hours.

47. About two weeks later, on or about September 28, Assistant Manager Rodriguez called me back into the office again and handed me a "Verbal Coaching" form that stated, "Associate took only a 15 minute lunch on 9/25/01, which is in violation of Company policy and State Law. Associate needs to take at least a 1/2 hour lunch daily. Any further violations will result in a written type of coaching." (Attached hereto as Arana Exhibit G is a true and accurate copy of this coaching form.) I asked Mr. Rodriguez if he was kidding about this coaching. Mr. Rodriguez informed me that Wal-Mart was getting strict about how lunches and breaks were being taken so that associates could not later sue the Company because they did not get a lunch break. I explained to Mr. Rodriguez that I was the only person working the department on that particular shift and that while I was clocked out for lunch, a customer came onto the floor. I clocked back in to assist the customer and, because the store was very busy that night, it never occurred to me to return to lunch; that the night was over before I knew it. Mr. Rodriguez appeared quite uncomfortable and sheepish during this conversation, which led me to believe, he did not agree with the coaching.

48. Several days later when I was working in the Duarte store, Co-Manager Martin paged me to

the back office and advised me that she had documents showing that I had been paid for hours that I had not worked at a particular store. I asked which hours and stores was she talking about and she asked about particular stores and hours. I stated that I had worked the hours recorded on the document I had given her. She next asked who had initialed my document and I replied that it was an Assistant Manager at whatever store I had worked. I did not know their names. Ms. Martin reviewed each set of initials with me but this did help me remember their names because I never knew their names. I knew they were Assistant Managers based on their badges. Co-Manager Martin then told me to return to the floor.

49. I returned to the sales floor troubled, as, by now, it was clear that Wal-Mart was trying to get rid of me. About an hour or two later, Co-Manager Martin paged me to the back office a second time. This time she told me she had documents that said I did not work the hours on my paper and indicated that if I could not provide additional information, it would be a problem. I told her that everything I had was on the paper I had given her. At some point during this discussion, someone knocked on the door and handed Ms. Martin something. I sat there for some time while she reviewed the document and took care of other things. Then she told me that she had what she needed and that I could go. My last questions to her were whether she had everything she needed, and whether she had verified what she needed to verify. She said something to the effect that she was finished, that she would communicate with Store Manager Kocharian, and that I could leave.

50. Over the next few weeks, the Company continued cutting my hours significantly. At some point, I went to the unemployment office to file a claim because I was not making enough to support my family.

51. On or about October 19, 2001, I called Assistant Manager Ben Rodriguez to complain that I had only been given one hour of work on the schedule that had been posted the day before. Mr. Rodriguez told me that he thought he had more hours for me and asked me to come to the store.

52. When I arrived at the store, I looked for Assistant Manager Rodriguez. He took me to Co-Manager Martin who informed me that I was being fired for being paid for hours I did not work. I was surprised and asked Co-Manager Martin why she had not fired me when we last met if she had evidence that I had been paid for hours I did not work. The only comment that I recall her making was that they had documents that proved I did not work the hours I was paid for. She did not show me these documents. Instead she asked for my badge, keys, and other Wal-Mart equipment. I was so furious that I refused to sign the exit interview form.

53. On or about December 14, 2001, I filed a Charge of Discrimination against Wal-Mart, Inc. alleging that the Company had discriminated against me on the basis of my gender in promotion and training opportunities. My attorneys received a Right to Sue Notice on my behalf of August 19, 2002.

I declare under penalty of perjury of the laws of the United States and State of California that the foregoing is true and correct.

This Declaration was signed by me on April 21, 2003, at Pasadena, California.

/s/ Edith Arana

Edith Arana, Declarant

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, KAREN WILLIAMSON, on behalf of themselves and all others similarly situated, Plaintiffs, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF LORI ARHANGELSKY IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Lori Arhangelsky, declare:

1. I am a 33 year old female who currently lives in Rogers, Arkansas. I worked for Wal-Mart on two separate occasions. Between November 1996 and August 1997 I worked at the Cherry Lane Wal-Mart store, in the Fort Worth, Texas area. From approximately January 11, 1999 until April 23, 1999 I worked at the Wal-Mart store in Hulen, Texas. During my employment at Wal-Mart, I experienced sexual harassment and discovered the Open Door did not work. I was also denied promotional opportunities and saw a less experienced male awarded a promotion. I was discouraged from pursuing a management position.

2. In November 1996 I was hired at the Cherry Lane store as a sales associate in the Health and Beauty Department. In January 1997, Assistant Manager Mike Fuller told me that because of my hard work and my attention to detail he was promoting me to Sales Associate in the Electronics Department. Although Mr. Fuller termed the move as a promotion, I did not receive a corresponding raise when I accepted the new position.

3. While working at the Cherry Lane Wal-Mart store, I suffered severe sexual harassment. Support Manager Gilbert Hill, my direct supervisor, repeatedly harassed me with comments and questions such as, "when are we going to have sex?" One day in the summer of 1997, he pushed me against some pallets and put his hands up the front of my shirt. I was so scared and distraught I left work immediately. Assistant Manager Mike Fuller later called me into the office to discuss the incident. When I arrived, Support Manager Hill was in the office. Mr. Fuller asked me to explain what was going on with Mr. Hill right there in the room. I was very intimidated by this. While we were in the office, Mr. Hill admitted to the verbal portion of the assaults. However, I never observed or was made aware of any discipline Wal-Mart took against Mr. Hill for the sexual harassment.

4. In late July or early August of 1997, I approached Store Manager Jim Brown and told him that I was uncomfortable working with Support Manager Hill after his repeated sexual harassment. I requested a transfer to the Hulen or Lakeworth stores, two other Wal-Marts in the area. Store Manager Brown told me neither store had any openings. The Store Manager told me I had two options, I could

quit or just deal with it. Therefore, I gave my two weeks notice and quit.

5. With over a year break from working at a Wal-Mart store, in January 1999, I decided I would attempt once more to have a career at Wal-Mart I applied at store the Hulen, Texas Wal-Mart store because I did not want to return to the Cherry Lane store due to my damaging experience there.

6. I was hired as an Electronics Associate at the Hulen, Texas store in mid-January 1999. Within weeks of starting at the Hulen store, I talked to Assistant Manager David White and Store Manager John Jurca about becoming part of the Wal-Mart management team. When I told them I was interested in the Management Training Program, Mr. Jurca asked me if I had a college degree. I said no. He informed me that he tends to hire people with a college degree in business management for the Management Training Program. As I did not have a college degree, I understood from Mr. Jurca that I was not qualified to be a manager at Wal-Mart.

7. Because Mr. Jurca led me to believe that he would not choose me for the Management Training Program because I lacked a college degree in business management, I set my goals on a Support Manager position. Support Manager is the level of management just below Assistant Manager at Wal-Mart. I talked to Mr. White and Mr. Jurca repeatedly about being promoted to Support Manager during my time at the Hulen Wal-Mart. Neither of them would respond to me about my interest. Typically, Mr. White and Mr. Jurca changed the subject or brushed me off. Neither of them told me what I needed to do in order to become a Support Manager.

8. By the end of January 1999, Assistant Manager David White approached me and asked me to apply for a Customer Service Manager position. This is an hourly position. Almost all if not all the Customer Service Managers I observed at both the Cherry Lane and the Hulen Wal-Marts were women. I was upset because I felt Mr. White was trying to steer me toward a front end position when I had clearly let him know I was interested in a Support Manager position. He told me that because I am a woman I was better suited for the front end at that time. I asked why he thought it was alright for a woman to take care of the money at the front end but not alright for a woman to be a Support Manager over other areas of the store. Mr. White responded by saying it would be best for me to start at the front end and work my way up into a support manager position.

9. Based on Mr. White's recommendation I decided to accept the Customer Service Manager position, because I believed it would lead to a promotion to a Support Manager position. Mr. White informed me I would receive a .50 cent raise with the promotion. However my pay did not increase when I took over the position.

10. In approximately March 1999, a Support Manager opening was posted in the break room. I told Mr. White and Mr. Jurca that I wanted to be considered for the position. Neither of them would give me the code necessary to take the CBL (computer based learning) knowledge tests required by Wal-Mart for the position. Instead they ordered me back to the front end podium, my work station.

11. Toward the end of March 1999, I was asked to train Walter Cagle, an associate from the Elec-

tronics Department, in Customer Service Manager duties. I believed at this time that Mr. Jurca must have been considering me for the support manager position and that Mr. Cagle was going to take over my current position as Customer Service Manager.

12. After three weeks of CBLs and other training, Mr. Cagle had not learned the position. In my experience, I had never seen an employee take longer than three or four days to learn the position. When I participated in the Wal-Mart Customer Service Manager training, I learned the position in two days. After three weeks I felt that Mr. Cagle was incapable of learning the position. Mr. Cagle could not grasp basic tasks that were essential to the customer service manager job, such as learning the override reason codes, closing out a shift properly and maintaining customer flow through the front end. I engaged in a daily battle of helping Mr. Cagle grasp these core tasks. Finally, I approached Assistant Manager Steven Thompson and told him that Mr. Cagle was not learning the position satisfactorily and the oversight he required was so extensive that I was being prevented from completing my daily Customer Service Manager duties. Mr. Thompson informed me that I had to keep helping Mr. Cagle because Mr. Cagle needed to know the Customer Service Manager duties since he was the new Support Manager. Wal-Mart filled the Support Manager opening with Mr. Cagle, instead of me. I had not even been interviewed for the position.

13. Mr. Cagle had been hired one month before me at the Hulen Texas Wal-Mart store and unlike me, he had no prior Wal-Mart experience. He spent his five months with Wal-Mart entirely in the sales associate position in the Electronics Department be-

fore Wal-Mart promoted him. Unlike me, he had never held a supervisory or management position in the store.

14. I was devastated when I learned that Wal-Mart chose not to promote me and not even to interview me for the position before placing a male with demonstrably lesser skills and ability than me, and no Wal-Mart management experience, in the support manager position.

15. I protested to Store Manager Mr. Jurca and Assistant Manager Mr. White. I told them it was unfair that Wal-Mart did not consider me for the Support Manager position when they both knew I wanted the promotion and that it was unfair that they then expected me to train Mr. Cagle. Mr. Jurca and Mr. White did not act concerned by my frustration. Mr. White just expressed that I should be happy with what I had, a Customer Service Manager position. Again, neither Mr. Jurca nor Mr. White told me what I needed to do in order to be promoted. They offered no explanation to justify their selection of a less qualified, less experienced man for the position.

16. After Mr. Cagle was promoted instead of me, I decided to leave Wal-Mart as I felt my hard work was not recognized and that promotional opportunities were denied me because of my gender. I wrote a letter of resignation explaining that I needed to seek a job that gave me more opportunity to use my skills and earn a living than Wal-Mart was providing.

17. From the time I was placed in the Customer Service Manager position at the end of January 1999, through the end of March 1999 I approached Mr. White repeatedly about my promotion raise. Mr.

White repeatedly told me to wait until the next pay period to see if the raise would be reflected on my check. The raise did not take affect until April 3, 2003, and I never received any back pay.

I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Arkansas that the foregoing is true and correct.

This Declaration was signed by me on April 1, 2003, at 9:09 p.m.

/s/ Lori Arhangelsky

Lori Arhangelsky

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiffs, vs. WAL-MART STORES, INC., Defendant.	Case No. C-01-2252 MJJ **DECLARATION OF PATRICIA BEBEE IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, PATRCIA BEBEE, declare that:

1. I have personal knowledge of each and every fact set forth in this Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

2. I was employed by Wal-Mart, Inc. at Store No. 0234 in Liberty, Missouri from September 6, 1990 through June 26, 2001. I quit because of the lack of promotional opportunities. I am female.

3. Prior to joining Wal-Mart, I was employed by Pizza Hut where, during my fourteen year history, I worked my way up from waitress to shift manager to assistant manager to store manager.

4. Despite my management experience, Wal-Mart offered me a job as a sales associate in the Softlines Department at $4.50 an hour. At the time,

I was supporting two school-aged children. On my application I had indicated that I was seeking a supervisory position and that I had seven years of management experience so I was disappointed not to be offered a management position. (True and accurate copy attached as Bebee Exhibit A.) However, I had worked my way up through the ranks at Pizza Hut and I was confident that I could do so again at Wal-Mart.

5. On my 90 day evaluation, I was ranked "above standard" in every category. My reward was a mere 25 cent raise, which I felt was very low and only brought my pay rate up to $4.75 an hour. Under the "career goals" section of this evaluation, I wrote, "Still would like to foresee possibility for assistant manager program." (True and accurate copy attached as Bebee Exhibit B.)

6. Several months later, Store Manager Leroy Marvel asked me if I wanted to learn the Service Desk position. I said yes because I wanted to learn all aspects of the Company so that I could get promoted. This job was not posted and I only knew it was available after Store Manager Marvel offered it to me.

could get promoted. This job was not posted and I only knew it was available after Store Manager Marvel offered it to me.

7. In February 1991, I received an "above standard" mid-year evaluation. Despite this good rating, I did not receive any rate increase with this evaluation. In the "associate's comments" section, I wrote, "Would still like to know more about Wal-Mart as a company. Would like to eventually train for CSM [Customer Service Manager]; and up to MG

[management] in due time." (True and accurate copy attached as Bebee Exhibit C.)

8. In July 1991, I received my first annual performance evaluation and again, I was ranked "above standard." This time I was given a 30 cent raise for my high achievement, but I was still only earning $5.05 an hour.

9. Since I was having trouble supporting my family on this low wage, I began working a second job at ASAP convenience store. At the time, I planned to work this second job only until I was promoted into management, which I still believed would happen even though none of my managers had acknowledged my written requests for management opportunities.

10. During the time, I worked the Service Desk, I learned the job requirements of Customer Service Manager (CSM) and began performing those duties as well. The CSM oversees the front end of the store, including scheduling and supervising the cashiers and checking out merchandise.

11. On my yearly evaluations in 1992 and 1993, I was ranked 4.1 and 3.8, respectively, as a Customer Service Manager. A "4" indicates a ranking of "exceeds expectations." Both years I received only a 30 cent raise.

12. On my 1992 evaluation, I wrote, "I am still interested in pursuing a higher level in this Company. Do not want to be stagnant!!" (True and accurate copy attached as Bebee Exhibit D.) In 1993, I was frustrated with my lack of progress and low rate of pay and wrote: "I am very pleased with my overall evaluation. My only feedback is if you do a pretty descent [sic] job at your area, why there isn't a merit

increase along with your annual?" (True and accurate copy attached as Bebee Exhibit E.) After three years with the Company, I was still earning only $5.65 an hour. In August 1993, I was promoted to the position of Head Service Desk and received another 30 cent raise. But, I was still earning less than $6 an hour: $5.95. In the Head Service Desk position, I was responsible for overseeing customer service, including handling exchanges and refunds for customers, and doing the charges for organizations and churches.

13. In May 1994, I helped stop a theft in the front end of the store. For this, I received a merit raise of 20 cents an hour.

14. In July 1994, I earned another "above standard" evaluation. This time my increase was 40 cents an hour, which brought my pay rate to $6.55 an hour. In the comments section, I wrote: "Still want to learn other areas thru the store so I can better myself and possibly go to another area in the future. I believe in learning what you can about all aspects of a job so you both benefit yourself and the company. I believe I do a fantastic job on the front end even when the stress level has reached its peak. Would like to learn another area! Nite receiving and day stocker." (True and accurate copy attached as Bebee Exhibit F).

15. In approximately March 1995, Store Manager Marvel asked me if I wanted to move to the Cash Office. This job was not posted and the only way I learned about it was when Store Manager Marvel offered it to me. During the approximately one and a half years I worked in this position, my hours were varied, including weekday shifts from 11 a.m. to 7 p.m. and 2 p.m. to closing, and a Saturday

shift from 5 a.m. to 2 p.m. I received a merit increase of 50 cents an hour when I first took the position. That July, I received another "above standard" evaluation. In the comments section, I again stated that I did not want to stagnate but to learn all I could and to move to the next level. (True and accurate copy attached as Bebee Exhibit G.)

16. In 1996, Store Manager Marvel allowed me to move to a Stocker position. When I first expressed interest in this position, Store Manager Marvel told me he did not want me to move from the Cash Office because I was too valuable in that position. I worked on the stocking crew for about two years. I received "above standard" annual evaluations both years and raises of 40 cent and 50 cents, respectively. After eight years at Wal-Mart, I was still only making $8.50 an hour. On my 1996 evaluation, I wrote, "I am still interested in learning all I can for this Company. I don't want to be stagnant in one position. I have ideas about the mgt. Program in the future. People need to develop and be able to grow to benefit the Company." (True and accurate copy attached as Bebee Exhibit H.)

17. Although I had consistently stated my interest in moving up in the Company on each of my evaluations through 1996, I only recall two managers talking to me about a management career at Wal-Mart. The first, a male Assistant Manager whose name I no longer remember, told me that I needed to have a college degree. I told him that neither the Store Manager, Leroy Marvel, nor the District Manager, Jerome Schieder, had a college degree. I also remember talking to Assistant Manager Ben Abbott about my interest in management but I do not recall him giving me any encouragement or instructions

regarding how to find out about or apply for management opportunities.

18. In 1998, I quit my second job at ASAP convenience store. About this time, Wal-Mart started using a computerized job posting system for some of the positions open at my store. I made a number of applications for department manager positions through this system, including the Paper Goods and Chemicals Department and Electronics Department. At one point, I was interviewed by an Assistant Manager for a department manager position. The only thing I recall about this interview was informing the Assistant Manager that I did not want to be placed in the Cosmetics Department. The Cosmetics Department was a "high shrink" area: high volume with lots of theft. It was also a department comprised exclusively of female associates and I did not view it as a stepping stone to management as I did some of the other departments, such as Electronics and Paper Goods and Chemicals, that were run mostly by male associates and male department managers.

19. I learned that I had been promoted to Department Manager when the new Store Manager, Cynthia Olah, congratulated me. At first, I was thrilled because I believed I was being promoted to the Paper Goods and Chemicals Department. Then she told me it was the Cosmetics Department and I was tremendously disappointed. In addition to considering this a dead end department, I had learned from the former Department Manager that Cosmetics was chronically understaffed. I learned later that a male, Mark Richardson, was promoted to Department Manager over Paper Goods and Chemicals.

20. During the approximately two and one-half years I was Department Manager in Cosmetics, I

continued to apply for the department manager position in the Paper Goods and Chemical Department as well as other departments. I was never interviewed again. And even though I kept receiving "above average" or "meets expectations" rankings on my performance evaluations, none of the Assistant Managers or the Store Manager ever talked to me about Wal-Mart's management training program. There was no information about this program posted anywhere in the store and I did not learn about its existence until very late in my career at Wal-Mart. The management training program was not discussed at the daily store meetings I attended.

21. During this same two and one-half year period, I watched Mark Richardson and other male associates move from position to position within the Company while I stagnated as the Cosmetics Department Manager. In particular, Mr. Richardson moved from department head to department head, including in the Household Paper Goods, Electronics, and Men's Wear Departments. Another male associate, Paul Owings, who appeared to be barely out of high school and who was hired several months after I became Department Manager in Cosmetics, was promoted from a sales associate to Department Manager over the Paper Goods and Chemicals Department to Support Manager.

22. In June 2001, I quit my employment with Wal-Mart because of the lack of promotional opportunities. During my exit interview, I informed Wal-Mart that I was leaving because I was dissatisfied with the hours, working conditions, career opportunities and my supervisor. (True and accurate copy attached as Bebee Exhibit 1.) No member of management made any attempt to dissuade me from

leaving or told me of any promotional opportunities that would be available.

I declare under penalty of perjury of the laws of the United States and State of Missouri that the foregoing is true and correct.

This Declaration was signed by me on 4-14-, 2003, at 12:10 p.m.

/s/ Patricia Bebee

Patricia Bebee, Declarant

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF GEANETTE BELL IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Geanette Bell, declare:

1. I am a 34 year African-American female from Pontotoc, Mississippi. I believe that Wal-Mart has not given me an opportunity to rise within the company equal to the opportunity given to its male employees. I also feel that Wal-Mart has given male employees more support to successfully perform their job duties than it has given me and other female employees.

2. I work at the Wal-Mart store in Pontotoc, Mississippi. I have worked at Wal-Mart since October, 1989, in a variety of positions. For the past 5 years I have been a Department Manager.

3. Throughout my career at Wal-Mart, I have always received a "meets expectations" rating or higher on my performance appraisals. For four out of

the past six years, I have received an "exceeds expectations" rating on my performance.

4. In 1990, I approached Jim Legge, the Store Manager, and asked him how I could get into the Management Training Program. He laughed. He told me that I would have to relocate to be in the program. Then he told me that I "wouldn't want to be in the program," ending the conversation. I was discouraged by his response, which clearly indicated that he did not consider my candidacy for the program. Therefore, I did not bother him about it again. I knew of no other way to obtain information about management training. There was nothing in writing available to me that explained the program.

5. From March of 1998 to December of 2000 I was Department Manager of chemicals and paper goods. Wal-Mart did not provide me with the full-time help necessary for the busy department. I asked Assistant Manager David LeSueur for full-time help in the department, but my request was denied. When I transferred to the infants department in December 2000, Adam Worthham, a male employee, took over as Department Manager of chemicals and paper goods. Wal-Mart scheduled a full-time associate to work in Mr. Worthham's department. In August 1998, Mr. Worthham left the department and Shauna Adams, a female employee, became Department Manager of chemical and paper goods. Wal-Mart stopped scheduling full-time help in the department when Ms. Adams took over the position, leaving her, like me, understaffed in the department.

6. For more than the last two years, I have been on Wal-Mart's hiring committee at the Pontotoc store. Wal-Mart's hiring committee is responsible for screening applicants for new hourly positions. Dur-

ing my tenure on the hiring committee, Personnel Manager Rena Harden sometimes has directed the committee to filter candidates into certain positions based on their gender. Commonly, Ms. Harden has instructed me to find women for cashier positions. Also commonly, Ms. Harden has instructed me to find males for cart pusher and carry-out positions.

7. In the fall of 2002, District Manager Sammy Sappington announced at a meeting that he had asked Coy Tutor to enter the Management Training Program. Mr. Tutor was a Department Manager, like me. He did not have as many years experience with Wal-Mart as I did. Additionally, I had received an "exceeds expectations" rating on my 2001 and 2002 performance evaluations. I did not think it was fair that Mr. Tutor, a male Department Manager, had been approached to enter the Management Training Program instead of me, a female Department Manager with more Wal-Mart experience.

8. I realized that I had never seen Wal-Mart announce that a female was selected for a Management Trainee position. I knew of other males who were selected by Wal-Mart. In addition to Mr. Tutor, Bill Finley was selected for the Management Training Program in 1999, at a time when he had only three years experience with Wal-Mart and no Department Manager experience. Also, Adam Worthham was put in the Management Training Program in 2002, after less than two years of experience with the company.

9. In the fall 2002, after I saw this third male, Coy Tutor, invited to the Management Training Program, I approached Store Manager Bryan Timmons to again ask how I could get into the program. Mr. Timmons told me I would not want to enter the pro-

gram because I would not want to relocate my children. He would not give me any direction or information regarding what I could do to be selected for Wal-Mart's Management Training Program.

10. In my 13 years at Wal-Mart, Wal-Mart's relocation policy, which was frequently mentioned in conjunction with the Management Training Program, discouraged me at times from attempting to enter the program. However, of the males I recall entering the program, none of them were required to move from their homes in order to enter the program or become Assistant Managers. For example, Billy Finley and Adam Worthham, two males from my store who have entered the program in the past few years, were assigned to stores within commuting distance from Pontotoc.

11. A few months after expressing my interest in the Management Training Program was rejected by Store Manager Timmons, Wal-Mart posted a notice about the Management Training Program. The notice invited employees to express their interest in entering the Management Training Program. This was the first time in my 13 years at Wal-Mart that such an invitation had been posted. According to the January 2003 announcement, employees had about one week to apply for a Management Trainee position. Selected employees would then be interviewed.

12. I did not feel comfortable applying for the position because, after watching Wal-Mart hand pick its candidates for the Management Training Program for 13 years, I questioned Wal-Mart's sincerity. I was suspicious that Wal-Mart's action was solely in response to the lawsuit. I might be interested in a future opportunity to enter the Management Train-

ing Program if I was confident that I was being judged on merit, not by my gender.

I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Mississippi that the foregoing is true and correct.

This Declaration was signed by me on April 1, 2003, at Pontotoc, Mississippi.

/s/ Geanette Bell

Geanette Bell

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF SANDRA BERKOWITZ IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, SANDRA BERKOWITZ, declare that:

1. I make this statement on the basis of my personal knowledge, and, if called as a witness, could and would testify competently to the facts herein.

2. Before I began working at Wal-Mart, I held office manager positions with Ohio Car Care and Rust Proofing, a real estate attorney, and Computer Air. For five years I was an office manager for Detailing USA. In each of these positions I supervised approximately five people at a time.

3. I was employed by Wal-Mart, Inc. in Boca Raton, Florida from June 6, 2001 through June 12, 2002. I am female.

4. I was initially hired as a cashier making $6.50 an hour. In August 2001, I received a merit raise of $.25 an hour. In September 2001, my per-

formance evaluation rated my performance level "exceeds expectations" and I received a $.35 an hour raise. (Attached hereto is a true and accurate copy of 2001 Performance Appraisal as Berkowitz Exhibit A.) In November 2001, I was promoted to Customer Service Representative and given a 5% raise. This brought my pay rate from $7.10 to $7.46 per hour. I am single and I care for two grandchildren. On this salary I could barely support my family.

5. I did not work the same shift everyday. Some days I was scheduled for an opening shift and other days I was scheduled to close. Head Customer Service Manager Lazina Hernandez would call me when someone went on vacation or called in sick and I would work that shift. Some days I was forced to use my lunch period to pick up my 8-year-old granddaughter from school. My schedule varied because I wanted to show Wal-Mart that I could work any hours required. I hoped that this commitment would increase my chances of promotion.

6. In approximately August 2001, I saw an opening for a Personnel Manager at a Wal-Mart store in Pompano Beach, Florida posted on the board in my store and on the CBL. The Assistant Managers told us at evening meetings that if we wanted to apply for a position on the CBL we would need to let them know so they could give us a code. The Computer Based Learning system or "CBL" is the computer system in Wal-Mart stores that allows associates to apply for positions online. I asked Assistant Manager Illene Jacobs if she would help me apply for this position on the computer and she never did. I then called the store myself and the Store Manager, Mitch Brick, told me to come in for an interview. After the interview he said that he would get in touch

with my Store Manager Charles Ayala and Assistant Manager Jacobs. I was sitting in the break room a few days later when I heard Store Manager Ayala and Assistant Manager Jacobs discussing the position. I learned from this conversation that they were not going to recommend me for it. I did not get the position. I received no explanation from Store Manager Ayala or Assistant Manager Jacobs for their refusal to recommend me for the position. Neither of these managers provided to me any guidance or instruction as to what, if anything, I needed to do in order to be promoted.

7. In approximately September 2001, I expressed interest in an assistant manager position in Boca Raton, Florida to Head Customer Service Manager Lazina Hernandez and Assistant Manager Illene Jacobs. Head Customer Service Manager Hernandez said that I should apply for the position. When I asked Assistant Manager Jacobs for her approval and for the code I needed for the computer, she told me that I was good at what I was doing. She attempted to dissuade me from applying for this position. I told her that I wanted to become an assistant manager and Assistant Manager Jacobs replied, "why bother, most of the Assistants are men unless you are an exceptional woman." This statement led me to believe that Assistant Manager Jacobs did not think I had an equal chance of becoming an assistant manager because I am a woman. Assistant Manager Jacobs never assisted me with applying for this position and therefore, I was never able to interview for it.

8. In approximately October 2001, Assistant Manager Bob Hall supervised the Domestics and Housewares Departments. He told me that the de-

partment manager positions for those departments were open. I was interested in applying for those positions. Assistant Manager Hall told me that to apply I would have to ask the Assistant Manager I reported to for clearance, who was Illene Jacobs. I told Assistant Manager Jacobs that I was interested in those positions and she told me she would get back to me. She never did.

9. In approximately January 2002, I saw a posting on a billboard in the back of our store for an Assistant Manager Trainee position. I told Assistant Manager Jacobs that I would like to apply for the position and needed her help to gain access though the computer. She again stated that I was good at what I did, but if I were really interested, that she would help me apply for the position when she had time. I would have asked another assistant manager but we were told that we were supposed to apply for positions with the assistance of our supervising assistant manager. I asked repeatedly for a few weeks for Assistant Manager Jacobs to help me apply. She repeatedly claimed that she never had time to help me. I eventually stopped asking Assistant Manager Jacobs to help me apply for the Assistant Manager Trainee position because a notice was posted stating that the position was closed. Later, I heard Assistant Manager Jacobs say that a man was selected for that position. This further convinced me that Wal-Mart was not interested in promoting women into management.

10. I felt that I was being overlooked for the positions that I expressed interest in because I am a woman. I felt discouraged from applying for other positions. I never rose any higher at Wal-Mart than the Customer Service Manager position.

I declare under penalty of perjury of the laws of the United States and of the State of Florida, that the foregoing is true and correct.

This Declaration was signed by me on Sandra Berkowitz, 2003 at Boca Raton, Florida.

/s/ Sandra Berkowitz

Sandra Berkowitz, Declarant

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF JOAN BERRY IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Joan Berry, declare:

1. I make this statement on the basis of my personal knowledge, and, if called as a witness, could and would testify competently to the facts herein.

2. I am a female and a former employee of Wal-Mart, Inc. I reside in Georgetown, Delaware.

3. I began working as a member of the set up crew for the Newport News, Virginia Wal-Mart in 1997, and then later in October of the same year, became a stocker at the same store. I was promoted to Department Manager of Domestics in 1999 and worked in that position until I resigned in August of 2001. I was never disciplined while working at Wal-Mart, and I received "above standard" or "exceeds expectations" marks in every performance evaluation that I was given. In all but one of my evaluations, I

specifically indicated in writing my desire to move up into store management. (Attached hereto as Berry Exhibits A, B, and C are, respectively, true and correct copies of my 1997 (90-day) Associate Evaluation, my 1998 Associate Evaluation, and my 2000 Performance Appraisal).

4. In 1999, I was approached by my store manager, Wayne Radcliff, and asked whether I would "take over" the Housewares Department, effective immediately. This was two days before I was scheduled and pre-approved to take time off to assist my pregnant daughter, who was about to have a baby. I did not want to be transferred to the Housewares Department with only two days before I had to leave, since in my experience, that would have surely led to a disaster in the department. When I communicated this to Mr. Radcliff, he responded by saying "I knew you would bitch about it," and then just walked away. I never heard Store Manager Radcliff speak to a male employee with such disrespect.

5. Sometime in 2000, I was approached by Assistant Manager Maria Robinson who told me that she was "on a mission from Wayne" (Mr. Radcliff, our Store Manager), and that I was selected to go into management training. Later, in April of that year, when I was set to start the training, Ms. Robinson told me that she and Mr. Radcliff had decided, since my son had died a year earlier, that it would not be a good time for me to go into training because of the anniversary of my son's death. I responded by saying that I was putting my "heart and soul" into working hard and that only I could decide whether I was ready for training after my son's death. I felt completely belittled and could not believe that management would use my son's death as an excuse for not

promoting me. Two men were selected for training and thereafter were promoted to Assistant Manager positions, including Leo Kudel, who was the Department Manager over Pets & Supplies.

6. Later in 2000, I was approached by a new Assistant Manager, Jason Overton. He asked me whether I would manage the Health & Beauty Aids department instead of the Domestics Department. I told him that I did not think I was getting enough support from store management for Domestics and not enough staff were assigned to my department to help me, so I declined. He responded by saying "The majority of Assistant Manager Trainees are male, right? How many are coming from Domestics?" I responded by saying that his statement was unfair. Mr. Overton then just walked away without saying anything else. I took Mr. Overton's comments to mean that either I could not get promoted because I was a woman, or that I had to transfer out of the Domestics Department in order to get promoted. I observed several male Assistant Managers who had only worked in one department in my store and who were promoted directly to management training and assistant manager positions. Mr. Overton himself was one such person, having been promoted to Assistant Manager after several years of working in security. Another example is Leo Kudel, who had only worked in the Pet & Supplies Department before being trained and becoming an Assistant Manager at another store. I am unaware of any female Department Managers who were promoted to Assistant Manager after working only in Domestics or Health & Beauty Aids.

7. In my two years as Department Manager of Domestics, I observed that virtually all of the em-

ployees in my department were women. Other departments, such as grocery, were almost all men.

I declare under penalty of perjury of the laws of the United States and of the State of Delaware that the foregoing is true and correct. I signed this Declaration on April 11, 2003 in Georgetown, Delaware.

/s/ Joan Berry

Joan Berry

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF PAULA BIRD IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Paula Bird, declare:

1. I make this statement on the basis of my personal knowledge and, if called as a witness, could and would testify competently to the facts herein.

2. I have a GED and a technical degree in medical office management. Prior to my work with Wal-Mart, I had been a manager at a senior center in Missouri. I currently work as a shift manager at a KFC restaurant and am also self-employed as a house cleaner. I am also responsible for raising four children between the ages of nine and sixteen along with my husband, who is on active duty with the United States Air Force.

3. I began working for a Wal-Mart Supercenter in Sedalia, Missouri in 1998 as an overnight unloader/stocker making $6.40 an hour. Between

1999 and 2000, I also worked at a Wal-Mart Supercenter in Marshall, Missouri and at a Hypermart in Kansas City, Missouri. When I left in 2000, I was making $8.73 an hour. I always worked full-time. I frequently worked night shifts and was regularly required to work weekends.

4. When I began my employment with Wal-Mart in 1998, I had high hopes that I would be able to advance into management in order to be better able to support my four small children and myself. Immediately after I was first hired, I spoke with Store Manager Steve Biermann and expressed my interest in going into management training. Mr. Biermann told me I would have to spend several years in different positions, including several department manager positions, before he would recommend me for the training program. He gave me an example of a woman [name unknown] who had been department manager in several departments for over five years, whom he was only now recommending for management training. At the time, I assumed that Mr. Biermann was telling me the truth about the time it would take to reach management training. I had never seen anything written about promotional requirements so I had nothing against which to compare Mr. Biermann's statements. Because I had been told that advancement into management at Wal-Mart would take at least five years, in the "Associates Comments/Goal Settings" section of my 1999 Performance Appraisal, I wrote, "My goal is to make it into management within 41/2 years." Attached hereto as Exhibit A is a true and correct copy of my Performance Appraisal dated November 24, 1999. In fact, during my tenure, I saw men who were put in management training after a much shorter period of time and without serving in different department

manager positions. For example, when I worked in the Hypermart in Kansas City, Missouri, Store Manager William Fryman told me he had moved from customer service manager to store manager within one and a half years.

5. While I worked in Sedalia, Missouri, I was not allowed to unload off of trucks, only off of the conveyer belt. My supervisors, including male Unit Lead Jesse Spencer, rarely allowed women to unload off of the trucks. In my experience, it was much more physically strenuous for workers to unload off of a moving conveyer belt because it required much more rapid and coordinated movement.

6. In 1999, Store Manager Biermann allowed me to transfer to a Wal-Mart Store that was closer to my family. Even though I would remain within the same district, Mr. Biermann told me that transferring would force me to lose my annual bonus. I transferred to the Wal-Mart in Marshall, Missouri and spoke with the Store Manager Garry Goldammer about moving into management and the management training program. He told me to "start" as a stocker, which I did. It seemed as if I was starting over, having to prove myself all over again.

7. In early 2000, I volunteered to work at the Wal-Mart convention in Kansas City, Missouri to help set up a demonstration of upcoming merchandise because I felt it would be a good way for me to continue to gain experience in order to move into the management training program.

8. A few months later, still in 2000, I was promoted to a support manager. At the time, Mr. Goldammer told me this was not an official position but, because there were no management trainees in the store at the time, they really needed someone to

complete a trainee's tasks. As a result, not only was I responsible for supervising customer service managers and cashiers, I was also trained by Mr. Goldammer and all the assistant managers to complete the tasks of a management trainee. This included making cash deposits and bank pick-ups, and learning alarm codes to close the store. I often completed these tasks alongside, or in place of, assistant managers. Even while I was trained and treated like a management trainee, and expected to perform the same tasks, I was not allowed the title or salary of an assistant management trainee, nor was I ensured a promotion into an assistant manager position after the training period. Store Manager Goldammer told me that accepting this support manager position would help me get promoted to the management training program and I wanted to believe him.

9. Also at this time, I continued to work on my days off as a customer service manager at the Kansas City Hypermart because Mr. Goldammer told me that the more experience I had, the better it would be to help me gain entry into the management training program. I spoke with the Kansas City Hypermart Store Manager Fryman about the opportunities for moving into management training. He told me that if I agreed to transfer permanently to his store, he would assist me in getting into management training. Despite a much longer daily commute and concerns about the high-crime area surrounding this store, I agreed to transfer because Mr. Fryman promised to help me advance in my career.

10. In June 2000, when I started work as the department manager of Hardware in the Kansas City Hypermart, Store Manager Fryman gave me one week to clear out all the overstock. I had only

been there one week before the department had a bad inventory. The inventory issue had arisen long before I arrived and I could not have done anything to fix in the few days that I had been responsible for the department. Nonetheless, Mr. Fryman berated and criticized me. I did not believe that the treatment that I received was appropriate. That same day, I also personally observed him yelling at another female department manager in front of coworkers until she was in tears. That day, I wrote a letter giving my notice and describing what had happened. Attached hereto as Exhibit B is a true and correct copy of my letter of resignation, dated July 20, 2000. I gave the letter to Assistant Manager Sheila Compton. She told me to speak with the male District Manager [name unknown] at the Lee's Summit, Missouri Wal-Mart Store. I called the district manager and he asked me to come to the store to discuss what happened. I went to the Lee's Summit Wal-Mart and explained what had happened, including describing Mr. Fryman's poor treatment of myself and the other female department manager. The district manager then told me he was "outraged" at Mr. Fryman's behavior, that I had a right to be upset, and he promised he would speak with Mr. Fryman over the weekend and that I should return to work on Monday to meet with Mr. Fryman about this incident.

11. When I returned on Monday, Mr. Fryman looked at me and asked, "What are you doing here, I have nothing to say to you." I felt that I was being retaliated against for using the Open Door policy. I called the district manager to ask whether he had spoken to Mr. Fryman over the weekend but he was unresponsive only telling me that I had a bad attitude. Finally, I insisted on having a meeting with

Mr. Fryman and Ms. Compton to discuss Mr. Fryman's behavior but he refused to acknowledge any of my concerns. He just kept repeating, "Well, I don't see it that way." When I realized that my concerns about mistreatment were not going to be addressed, I gave my notice and said goodbye. I really felt cheated because Mr. Fryman had assured me that, if I transferred to his store, he would assist me in advancing my career. Instead, I believe that he was looking for a scapegoat for existing problems in my store.

12. Despite the fact that I had been an excellent employee for Wal-Mart, I was never asked to fill out an Exit Interview and no one contacted me again about the reasons why I felt that I had to leave.

I declare under penalty of perjury of the laws of the United States and State of Missouri that the foregoing is true and correct.

This Declaration was signed by me on April 10, 2003, at Knob Noster, Missouri.

/s/ Paula Bird

Paula Bird

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF LISA BOUDREAUX IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, LISA BOUDREAUX, declare that:

1. I make this statement on the basis of my personal knowledge, and, if called as a witness, could and would testify competently to the facts herein.

2. I am a female and a current employee of Wal-Mart, Inc. I reside in Alabama.

3. In August 1995, I began working at a Wal-Mart store in Bessemer, Alabama as a produce sales clerk.

4. In July 1996, I was promoted to Produce Assistant Manager. The position was not posted. Produce Manager Wayne Terwilliger offered me the position.

5. In 1996, Store Manager Bruce Abbott told me that he was placing me in the produce manager training program. This position was not posted. In 1997, when my training was near completion, Produce Manager Arthur Honeycutt announced his resignation. I told Store Manager Abbott that I was interested in the produce manager position and he told me that I could not have the position because I was not able run a high volume store. I was trained to be a produce manager in this store so I did not understand why the Store Manager thought I was incapable of doing this job.

6. In approximately July 1997, District Manager Banwarth offered me a produce manager position in a Hartselle, Alabama store. My father had recently passed away and I was not ready to move to a city where I did not know anyone so I declined the offer.

7. Just before Mr. Honeycutt stepped down and my training was complete, a male, John Marshall, had been hired for the assistant produce manager position so that position was no longer available to me. District Manager Banwarth and Store Manager Abbot refused to consider me for the open produce manager position in my store so I was forced to take an hourly produce clerk position.

8. I asked Store Manager Abbott if I could manage the Produce Department for six months to prove that I was capable of working as produce manager. I was not allowed to manage the department. Assistant Produce Manager John Marshall, who had less experience with Wal-Mart than I did, became the acting Produce Manager. Unlike me, he had not completed the Produce Manager Training Program. I told District Manager Banwarth that I did not

think it was fair for John Marshall to be running the Produce Department when I, an employee who had just completed a Produce Manager Trainee program, was willing and able to manage the Produce Department. District Manager Banwarth then placed a male produce manager from Oneonta, Alabama, Charles Fairly, in the position as acting Produce Manager. Produce Manager Fairly worked in the Bessemer, Alabama store for one month before transferring to a Supercenter in Homewood, Alabama.

9. In approximately March 1998, Produce Manager Fairly asked me to transfer to Homewood and to be his assistant. I accepted this position and transferred to an assistant produce manager position in the Homewood, Alabama store.

10. In March 1999, a full year later, I was promoted to Produce Manager. After talking to two men Shelton Woods and John Marshall who had recently entered the Produce Manager Trainee Program; I learned that my Produce Manager salary was the same as what they said their salaries as Produce Manager Trainees were. This lead me to believe that I was not being paid an appropriate amount for a Produce Manager. I asked Store Manager Gary Jones for a pay increase that would increase my salary above what these male trainees were paid. He told me that District Manager Banwarth refused to the authorize a pay increase.

11. In September 1999, David Johnson replaced District Manager Banwarth. I again asked for a pay raise. District Manager Johnson approved a pay raise to $29,500 that would "bring [my salary] up to Wal-Mart standard for the position." (Attached hereto is a true and accurate copy of Associate's Commendation Form as Boudreaux Exhibit A.)

12. I have never been disciplined. On all of my performance evaluations as a produce manager my performance level either "meets expectations" or "exceeds expectations." (Attached hereto is a true and accurate copy of 2001 Management Performance Appraisal as Boudreaux Exhibit B.) In September 2001, I received a commendation, which stated, "Lisa has done an exceptional job in leading the Produce Department to a much higher level of performance than it has ever seen . . . Lisa not only performs well numerically, but demonstrates a great Wal-Mart spirit each day she works." (Attached hereto is a true and accurate copy of Associate's Commendation Form as Boudreaux Exhibit C.)

13. At the end of every year, District Manager David Johnson and Merchandiser Steve Mulford select Produce Manager of the Year and Produce Department of the Year. In 2001 I had the number one profit and the number one produce department in the district. I also had the number one profit in the region. At that time I was the only female produce manager in the district. Despite the fact that my department out-performed the other Produce Departments in the district, a male, Borris Owens, was awarded Produce Manager of the Year. His store had been open for less than one year. I think my department was not chosen because I am a woman; the man I replaced won numerous awards. In my store, male managers, including Meat Manager Kenneth Cook and Dairy Manager Rufus Clyde, were both awarded Department of the Year.

I have not been selected to be in the Rising Star program although I meet the qualifications listed on the computer in "The Manager's Workbench." I wanted to be on the Rising Star list because I understood that once an employee was on that list he/she would be considered for promotion within 18 months. An employee is eligible if he/she has an evaluation rating of 3.5 or higher, above average financial results, a high level of leadership skills, and is recommended by an immediate supervisor as an individual who has the capacity and desire to move into positions of greater responsibility within 18 months. All of my evaluation ratings exceed 3.5, I have the number one profit for a produce department in the District, and on all of my evaluations I commented that I would like to eventually move into a Co Manager, Store Manager or District Manager position. Yet, my Store Manager has not recommended me for the Rising Star program. Male assistant managers in my store have been placed in the program. In 2001 the Meat Manager Kenneth Cook was put in the Rising Star program and in 2003, Assistant Manager Johnny Harris was placed in the program. I have been working at the Homewood, Alabama store longer than both of these men. I believe I have not been placed on the Rising Star list because I am a woman.I declare under penalty of perjury of the laws of the United States and of the State of Alabama, that the foregoing is true and correct.

This Declaration was signed by me on April 12, 2003 at Midfield, Al, 35228.

/s/ Lisa Boudreaux

Lisa Boudreaux, Declarant

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF DANETTE BROWN BALLOU IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Danette Brown Ballou, declare:

1. I make this statement on the basis of my personal knowledge, and, if called as a witness, could and would testify competently to the facts herein.

2. I am a forty-one year old woman currently employed as the Health and Beauty Aids Department Manager at a Wal-Mart store in Bentonville, Arkansas. I have been an employee of Wal-Mart for over twenty-two years. I was first hired in September 1980 in El Reno, Oklahoma during the early days before Wal-Mart became the large company that it is today. During most of my time at Wal-Mart, I have received above standard performance evaluations.

3. I applied for a position with Wal-Mart because I wanted to work for a company where I thought there were opportunities for advancement with the company. When I first started with Wal-Mart, I worked as a part-time cashier. I worked in several positions in the store, working whatever hours were required of me, including weekends.

4. While I was in the El Reno store, I told store manager Marv Simon in approximately 1985 or 1986 that I was interested in entering the Management Training Program. I had not been aware, initially, of the Assistant Manager Training Program but had observed that management trainees came to the store for training during my time at the El Reno store, which had been a training store. I expressed interest in management training to Mr. Simon because it appeared to me that there was no potential for advancement in the El Reno store due to its size and low turnover in more responsible positions. I was willing to relocate to another store in an effort to take a more responsible position in the company.

5. Mr. Simon informed me that he would make some calls. However, when I was offered two new assignments, neither was an offer to enter the Management Training Program. Instead, I was offered other hourly positions: a cash office job in Oklahoma City, Oklahoma and a position in Lay-Away in Kingfisher, Oklahoma.

6. I accepted the cash office job in Oklahoma City in approximately October 1986 in the hopes of gaining more experience and job responsibilities and so be promoted into a managerial position. My job responsibilities during this time period also included working as relief for claims and the District Secretary for District Manager Chuck Myers. While I

worked in the Oklahoma City store, I expressed interest in becoming an assistant manager to Assistant Manager Clayton Crosby. Mr. Crosby did not tell me what I needed to do to be promoted. I am not aware of any action Mr. Crosby or any other member of management took to promote me into the Assistant Manager Training Program.

7. In October 1987, I accepted a job in the cash office and as a Support Manager in Fort Smith, Arkansas after my then husband Jack Brown, who was an Assistant Manager, was transferred to a Wal-Mart store in Sallisaw, Oklahoma. As a Support Manager, I performed many of the same duties as those of an Assistant Manager. I observed, however, that another female Support Manager, Karla Buck, and I performed the same duties, but a male Support Manager, Jerral was allowed to close the store, a responsibility neither Ms. Buck nor I were given while I was at the store. The only apparent reason that Jerral was allowed to close when Ms. Buck and I were not allowed to do so was because he is a man.

8. In September 1988, I transferred to the Home Office in Bentonville, Arkansas to work in the data communications department after my husband was transferred to the Fayetteville, Arkansas store. I worked in the Home Office for approximately four years. Initially, I supported what is now known as the SMART system and handled calls from Wal-Mart stores all over the country. During the years that I was in this position, computerized information available on the SMART system was available in each of the stores. Cash reports, payroll and warehouse orders were transmitted to the Home Office through the system.

9. My next assignment in the Home Office was in an area called Components supporting Telxon and Bass systems for Wal-Mart stores nationwide. Both Telxon and Bass are hand held devices used to order merchandise in the stores. The job required me to answer calls concerning problems with both devices from associates in the field. I was in this position for approximately a year and then went out on maternity leave. When I returned, I returned to components to a position in which I took messages. I was, soon after, assigned to the position of operator where I took messages from Wal-Mart stores nationwide for any problem in the stores. Finally, I moved to the point-of-sale group where I took calls from Wal-Mart stores nationwide in which the cash registers in the stores were inoperative. My responsibilities included ordering hardware for the stores and in other instances calling vendors for service.

10. My final assignment required me to answer calls and take messages for any problem in Wal-Mart stores nationwide.

11. I requested a transfer out of the Home Office because I did not feel that there were any other opportunities for me in the Home Office except continuing in field support. In July 1992, I transferred to the Supercenter store in Bentonville, Arkansas where I have been for the last eleven years. When I transferred there, I did not receive any additional training to work in the store. The store ran in the same manner as the three other Wal-Mart stores had before I transferred to Bentonville.

12. The positions I have held in the Bentonville store have included UPC clerk, invoice clerk, cash office manager, CSM, cost invoice clerk, deli clerk and, finally, Department Manager for Health and

Beauty Aids. Each of these positions is one typically held by female associates. I received a promotion to Department Manager of Health and Beauty Aids in November 2002. I have continued to be interested in management positions while I have worked in the Bentonville store. However, I have been discouraged from seeking the position of Assistant Manager Trainee because of the relocation requirement that exists within Wal-Mart. I observed that my former husband, Jack Brown, and other trainees were required to relocate. Because I was a single mother for much of the time I have been at the Bentonville store, I did not feel that I could enter into the Assistant Manager Trainee Program because it would require me to relocate and uproot my son. Moreover, the Resident Assistant Manager program, which allows an Assistant Manager to remain in the same store, was not an option because of the requirement that only one Resident Assistant Manager may work in a store. The Bentonville store has a male Resident Assistant Manager, Ron Evans, who has been with the company many years.

13. In an effort to broaden and expand my experience and responsibilities, I have expressed interest in working in departments that are typically filled by men. Throughout my employment with Wal-Mart, I have observed that the departments in the stores that are predominately staffed by men are hardware, automotive, sporting goods, the meat department, produce, receiving and unloading, and Tire and Lube Express ("TLE"). This observation has been reinforced by comments from Managers to whom I have expressed an interest in transferring into these departments. For example, in approximately late 1996 or early 1997, I informed TLE manager Steve Smith that I was interested in a Support

Manager position. He discouraged me and did not give me the position.

14. I also expressed interest in working in the produce department to Assistant Manager David Schuler sometime in approximately the summer of 2000. I was particularly interested in learning why primarily men worked in the area. Assistant Manager Schuler responded that the department needed men because of the lifting of heavy boxes of fruit and women could not or would not do the work. In the last year, I expressed interest in a position in sporting goods that was not posted to Store Manager Gary Rains. Store Manager Rains responded "what do you know about sporting goods?"

15. In November 2002, after my deposition was taken in this case, I was promoted to Department Manager for Health and Beauty Aids after I applied for the position. On March 21, 2003, I learned from District Manager Joe Mains that after 22 years I had been accepted into the Assistant Manager Training Program that started on April 5, 2003. This only occurred after I was allowed to apply on the Pipeline, the company's centralized computerized system, for the position in January 2003. This is the first time there was an opportunity to apply for the training program. Finally, I feel that I am being given an opportunity that I deserved long ago.

16. For most of the 22 years I have been with Wal-Mart, available positions have been rarely posted. The posted positions on Pipeline I viewed prior to late last year were frequently out of date. In each store where I have worked, I have frequently observed management making job assignments and promotional decisions without posting open opportunities or interviewing interested candidates.

17. I declare under penalty of perjury of the laws of the United States and State of Arkansas that the foregoing is true and correct.

This Declaration was signed by me on April 10, 2003, at Rogers, AR.

/s/ Danette Brown Ballou

Danette Brown Ballou, Declarant

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, KAREN WILLIAMSON, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF SUE BROWN IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Sue Brown, declare:

1. I have worked as a full-time sales associate in electronics in Wal-Mart, Inc.'s store # 1269 in Louisville, Kentucky, since October 1997. I have never been promoted.

2. I am a retired school teacher with a Master's Degree.

3. My starting rate of pay at Wal-Mart was $5.40. After 90 days, my pay was increased to $5.70; at my first annual evaluation in September 1998 it went up to $5.93; during my second year it was increased again to $6.24, and at my two-year evaluation in September 1999, I got another increase to $7.05; in September 2000, at my three-year evalua-

tion, I got another raise to $7.35; and at my four-year evaluation, my pay went to $7.64, and finally, at my five-year evaluation in September 2002, I got another increase to $7.95.

4. Sometime in mid-2000, I discovered that at least one of the high-school-age boys working in the electronics department was making more money than I was. His name is Ben Risner, then age 17. He was hired by the General Manager, Martin Wagner, and I trained him in our department. He told me he was making more money than I was and had started at a higher rate than I was making at that time. He recently told me that he is now making $8.35.

5. In June 2000, I asked my department manager, Judy Kuhn, why my pay was lower than a high school boy's and she said, "You don't have the right equipment." When I asked what she meant by that, she said, "You aren't male, so you can't expect to be paid the same."

6. One young man in the department, Joe [last name unknown], frequently used foul language and made lewd remarks in my presence. I asked him to stop talking like this in my presence, and he just said, "then don't listen." I complained to Ms. Kuhn, the department manager, but she just said "boys will be boys" and did not talk to Joe. I spoke with a male Assistant Manager, Chris Klein, who told me to put my complaint in writing, and when I did, he told me to take it to the General Manager, Mr. Wagner. He read it, laughed and said "whatever." None of these managers ever said they would talk with Joe, and as far as I know, none of them ever did. He continued to tell lewd stories in my presence throughout the time he worked there.

7. I am required to clean and stock the electronics department, but the boys working alongside me are not.

8. In July 2000, I asked my new department manager, Janet Chandley, why I have these additional responsibilities, and she told me that the boys' main job is "to service the customers." I believe that is my main job as well, but only Barbara Bartley and I, the only female sales associates in the electronics department, have these additional tasks, even though we have both worked there longer than any of the young boys.

9. On or about June 15, 2001, I talked with my department manager, Ms. Chandley, about getting a merit raise. I asked because I had learned from Ben Risner that he and Alex Young, another very young man, had gotten merit raises, and they were laughing and talking in my presence about having done nothing to deserve them. I had been at Wal-Mart almost four years and still was not making what these young men were making. Ms. Chandley told me that I probably would not get the raise I asked for, because she was the department manager and even her hourly rate was "lower than the guys' in the department."

10. A few weeks later, when I complained again to Ms. Chandley about my pay being so much lower than the young boys', she told me that she could not help me because she herself was also paid less than the male department managers in the store.

11. I was terribly discouraged by these comments and, as a result, and because of my bad experience when I complained about Joe's inappropriate conduct, I did not talk with anyone other than my department managers about the pay disparity.

12. Despite the fact that I have a Master's Degree and significant life experience, no one at Wal-Mart has ever encouraged me to seek a management position. Until January 2003, I had never seen any information in my store about a management training program, and I am not aware of any women in my store who have gotten into any program like that.

13. I did not actually see a description of the management training program that was announced in January 2003. I was out during that month for two weeks due to a severe sprained ankle, and when I returned to work, I saw a brief full color announcement next to the time clock announcing a new management training program for women and that application could be made on the store computer. The announcement had not been posted before I took my medical leave. However, I soon learned that the deadline for applying had also passed while I was on leave. If a longer application time had been given, I could and would have applied when I returned to work and saw the announcement.

14. I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Kentucky that the foregoing is true and correct.

This Declaration was signed by me on March 22nd, 2003, at Louisville, Ky.

/s/ Sue M. Brown

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, KAREN WILLIAMSON, on behalf of themselves and all others similarly situated, Plaintiffs, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF PATRICIA BUCKLEY IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Patricia Buckley, declare:

1. I am a female who lives in Noble, Oklahoma. From July 2000 to August 2001, I worked at the Wal-Mart Supercenter in Norman, Oklahoma.

2. When I applied at Wal-Mart, I was pursuing a degree in business management from Moore Norman Technology Center. I was looking for an opportunity to develop a career in business management

3. During my interview at Wal-Mart, I told Assistant Manager Mark that I was interested in management at Wal-Mart and that I was concurrently seeking my degree in that area. He told me that the only positions available in the store were cashier or people greeter positions, and that a cash-

ier was a good place to begin if I wanted to become a manager. He explained to me that the first thing managers need to learn is how to run the front end of the store, including the cashier, lay-away and customer service positions.

4. I took the cashier position believing that it would be a stepping stone to a management position. Once I learned the cashier position, I began asking Assistant Manager Mark and Assistant Manager Landon for training in customer service and lay-away to prepare myself to become a manager. Although I requested cross-training repeatedly, I was never provided any training in either of these areas for the entire year I worked at Wal-Mart.

5. I observed that most of the cashiers at the Supercenter were female. In contrast, most of the managers were male. The Store Manager, the Co-Managers and the majority of Assistant Managers at my store were male.

6. During my employment at Wal-Mart, I spoke to Assistant Managers Mark and Landon several times about my interest in business management. I even noted on my annual performance appraisal in June, 2001, that I wanted to "move up in the company."

7. Despite my interest in a promotion to the management level, neither Assistant Manager Mark nor Assistant Manager Landon offered me an opportunity to apply for the Management Training Program. I never saw any written information about the program, and during my time at Wal-Mart, I was never even told that this program existed. I was given no information concerning how to be promoted to management training, or what I needed to do to be promoted. To my knowledge, there were never any

positions posted for the Management Training Program during my employment at Wal-Mart. I also never saw any written information regarding any prerequisites for joining management at Wal-Mart.

8. After a year in the cashier position at Wal-Mart with no opportunity to gain additional knowledge or experience of store operations, and no encouragement from management, it was apparent that Wal-Mart was not going to advance me past my current hourly, non-management position. I terminated my employment with Wal-Mart in August 2001.

9. I would consider returning to work for Wal-Mart if I was assured that I would be provided fair opportunities for advancement, fair wages and a non-discriminatory work environment

I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Oklahoma that the foregoing is true and correct.

This Declaration was signed by me on 4/3, 2003, at Noble, Oklahoma.

/s/ Patricia A. Buckley

Patricia Buckley

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF VIVIAN CALIMEE IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, VIVIAN CALIMEE, declare that:

1. I make this statement on the basis of my personal knowledge and, if called as a witness, could and would testify competently to the facts herein. While employed by Sam's Club, I have also used the name Vivian Bowie.

2. I was hired to work for a Sam's Club in Joliet, Illinois in 1988 as a Sales Representative at $7.00 an hour. In 1990, in order to become an assistant manager, I was required by General Manager Louis Johnson and my Director of Operations [name unknown] to relocate to a Sam's Club in Madison, Wisconsin. Since 1990, in order to maintain my position as an assistant manager, my General Managers

and/or Directors of Operations have required me to relocate to several Sam's Clubs, including those in Streamwood, Illinois, Naperville, Illinois, Matteson, Illinois and Joliet, Illinois. I understood that I did not have a choice but to transfer to wherever management required.

3. My evaluation ratings have always been "met expectations" or "exceeds expectations."

4. Since I started at Sam's Club, I was interested in advancing my career into management. As early as 1991, I began expressing an interest in management to my supervisor. In my 1991 evaluation, I wrote that "I would love the opportunity to become Regional Marketing Director." Attached hereto as Exhibit A is a true and correct copy of my Management Performance Appraisal and Plan of Action signed on August 2, 1991.

5. The following year, I wrote, "My goal is to become a Gen. Mgr. within a year . . ." Attached hereto as Exhibit B is a true and correct copy of my Management Performance Appraisal and Plan of Action dated December 4, 1992.

6. Even though I was not promoted as I had hoped in 1992, I continued to believe that, with hard work and perseverance, I would reach my career goal of becoming a general manager. In my 1993 evaluation, I again wrote that my goal was to "[b]ecome a General Manager within a year." Attached hereto as Exhibit C is a true and correct copy of my Management Performance Appraisal and Plan of Action dated July 28, 1993.

7. Beginning in 1995, I regularly spoke with Director of Operations Brian Collins during my evaluations about my desire to move up in manage-

ment. In my 1995 evaluation, I again wrote that my goal was "[t]o be promoted to Gen. Mgr. this year or begin[ning] of 1996." Attached hereto as Exhibit D is a true and correct copy of my Assistant Coach Performance Appraisal and Commitment to Success dated June 6, 1995. I also had many informal meetings with Mr. Collins asking him for advice about what I could do to advance in my career. He once told me to learn operations and keep up with the merchandise. I followed his advice to the letter assuming that these extra efforts would finally bring me a promotion. Again, I was disappointed.

8. In 1995, I spoke with Regional Marketing Manager Gina Schieck during my evaluations and in various informal conversations about my interest in advancing in my Sam's Club management career. I also expressed concern to Ms. Schieck that I felt I was being blocked from further advancement. I told her I was not sure why I had not been promoted above an assistant manager position, despite having an excellent record and consistently expressing my interest over several years. She reassured me that she would assist me but gave me no specific advice or information about how I would be able to advance. I am not aware of any actions that she took to assist me after this conversation.

9. By 1996, I had been very vocal with several members of management about my desire to move up in management at Sam's Club. In a meeting with both General Manager Jeff Kulesa and Director of Operations Mr. Collins, I expressed concern over why I had not yet moved up in management, despite having been an assistant manager for six years and having an excellent record. I expressed frustration that, had I been promoted when I should have been, I

would have been making more money and would have been much more advanced in my career. Shortly after this meeting, I received my first and only coaching for what Mr. Kulesa called a "lack of follow-up" and "lack of urgency." I later heard from a male Assistant Manager [name unknown] that he had overheard a conversation between Mr. Kulesa and Mr. Collins about me and specifically about my repeated requests to move up in management. This assistant manager told me that, in this exchange, Mr. Collins suggested to Mr. Kulesa that I receive a write-up to "cool [me] down."

10. In 1998, while I was working as an assistant manager in the Naperville, Illinois Sam's Club, the General Manager Gilda Amoroso-Eboli quit and I was told to assume her responsibilities for several months. The store also had no co-manager and I assumed these responsibilities as well. I spoke with Director of Operations Collins when he visited the store about my interest in the open co-manager position. Despite having been an assistant manager for eight years and having successfully fulfilled my duties as acting co-manager and general manager, a male, Ron Suggs, was brought in from another store to fill the co-manager position. He was a good friend of Mr. Collins.

11. In 1999, Trip Gannon replaced Brian Collins as the Director of Operations. I spoke with Mr. Gannon about my interest in being promoted, including my goal of running my own store as a General Manager. Mr. Gannon told me that if I wanted to be promoted, I would have to prove myself to him. I felt this was unfair because I had spent the previous nine years proving myself in my position as an Assistant Manager and I had an excellent record.

12. By 2000, I had been an Assistant Manager for 10 years. Despite repeatedly expressing an interest in moving into a general manager position since 1992, I had not yet been promoted. In my 2000 evaluation I again wrote, "I look forward to becoming a General Manager in the near future." Attached hereto as Exhibit E is a true and correct copy of my Sam's Club Performance Planning and Review for Business Manager dated March 10, 2000. I continued to regularly speak with Mr. Gannon about my interest in becoming a general manager. I told him that I felt I was being blocked from advancing in my career and that I did not feel listened to or supported. Mr. Gannon promised me he would look into my concerns but he never got back to me.

13. Feeling that my own supervisors were indifferent to my concerns, I decided to speak with the Director of Operations of a different region, Bob Miller. I set up a meeting with him but he failed to show up, later claiming that he had forgotten about it. I then scheduled a second meeting with him. When we finally met, I told him about my interest in moving up in management and running my own Sam's Club as a General Manager. He told me that he liked my attitude and spirit but he did not commit to helping me, only stating that he needed more time to get to know my skills. I also asked whether there was anything I could do to improve my chances for a promotion. Mr. Miller told me that, with my character and ambition, I would become a General Manager "soon." It was frustrating to me that those to whom I had expressed an interest in advancing in my management career continued to be promoted and replaced so that I was left having to prove myself over and over to each new group of supervisors.

14. Later in 2000, I learned that the General Manager position of the Joliet, Illinois Sam's Club was open. I spoke with Director of Operations Collins about my interest in the position but he told me it was not my "time" yet. He told me, "timing is everything." I did not understand what he meant by that, especially since I had been an Assistant Manager already for 10 years. I finally asked him what was it about me he did not like. I told him I had done everything he asked me to do, including implementing programs, learning about operations, etc. In desperation, I asked, "What more could I do?" Mr. Collins was vague and unresponsive. This was extremely discouraging to me, especially when I found out that a less qualified male, Rodney Crockett, got the General Manager position. Less than six months later, Mr. Crockett left but, before I even knew the position was open, another male, Duane Ebach, got the position. The position was never posted and I did not have an opportunity to express my interest. I complained to the new Director of Operations, Larry [last name unknown], who told me there was nothing he could do about it because it had been decided before he came. I contemplated complaining to a higher level of management but I continued to be concerned about retaliation and did not want to risk it.

15. During my time as an assistant manager, I trained males who were hired after I was and who were promoted to co-manager and general manager positions while I was being told it was not "my time" yet. They included Dave Tanner, the General Manager of the Joliet, Illinois Sam's Club, whom I trained while we were in Matteson, Illinois, and Billy Herod, the General Manager of a Sam's Club in De-

troit, Michigan, whom I trained in 1989 in Joliet, Illinois.

16. In 2000, I injured my back while carrying boxes at the Joliet, Illinois Sam's Club. I have had to take several leaves of absence and, as of February 2002, I have been unable to work due to this injury. In May 2002, my doctor released me for light duty, but I was told that Sam's Club would not take me back until I was fully healed. I am currently not employed.

I declare under penalty of perjury of the laws of the United States and of the State of California, that the foregoing is true and correct. I signed this on March 19, 2003 in March.

/s/ Vivian Calimee

Vivian Calimee, Declarant

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF THEARSA COLLIER IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Thearsa Collier, declare:

1. I make this statement on the basis of my personal knowledge, and, if called as a witness, could and would testify competently to the facts herein.

2. I was employed by Wal-Mart, Inc. from January 2000 until January 2001. I am female. I have a Bachelor of Science degree and a Master's in Public Administration. I reside in Virginia.

3. Prior to working at Wal-Mart, I was in the United States Navy for nine years, and then I worked in retail. During my tenure in the Navy, I worked in the pediatric trauma unit, was responsible for a $260,000 annual medical budget, and supervised as many as 40 people. I also received leader-

ship training in two separate courses entitled Total Quality Leadership and Total Quality Management. I was honorably discharged as a Hospital Corpsman, Third Class. After my discharge from the Navy, I worked in retail as a sales associate for the Army Air Force Exchange Service (AAFES). At AAFES, I received training in customer service, stocking, zoning and running the cash registers.

4. During my time at AAFES, I fell in love with retail work and decided that I wanted to make a career out of it. Both my father and brother had worked for Wal-Mart, and I was impressed with what I thought was the Company's culture of valuing its associates and creating a good working environment.

5. In November 1999, I applied to be an Assistant Manager Trainee at Wal-Mart. I was interviewed by Bob Hart, a District Manager. During that interview, Mr. Hart stated that as a manager in Wal-Mart, I would be required to move from store to store. I explained to Mr. Hart that my father had just passed away, and that I needed to work in Northwest Florida so that I could be near my mother and help to take care of her. I explained that I would be glad to move from store to store, as long as those stores were in the Florida panhandle. Mr. Hart said 'okay', and I understood that I would only be relocated to locations within Northwest Florida. He said that he would be sending me a letter regarding relocation that I would need to sign, and I assumed when I signed it that it encompassed my understanding with Mr. Hart. Indeed, I thought that I would not have been hired if what I told Mr. Hart about needing to stay in that region was a problem.

6. In January 2000, I became an Assistant Manager Trainee at a Supercenter store in Crestview, Florida. I trained there for sixteen weeks with Mike Whittaker, an Assistant Manager. Mr. Whittaker was primarily a manager of hardlines, so I received extensive training in hardlines. I never received any written evaluation, but sometime in March, District Manager Hart provided an oral training review. He told me that both my Store Manager, Jon Kurpil, and Mr. Whittaker were impressed with my people skills and how fast I learn. Mr Hart also indicated that trainees usually complete all training before becoming a full Assistant Manager.

7. Toward the end of my training, Judy Langford, a District Manager from Alabama, and Steve Lawrence, a Store Manager from a store in Geneva, Alabama came to speak with me about an Assistant Manager position in Mr. Lawrence's store. The Geneva store was about 80 miles from where I was living, and outside of the area I had requested to work in. Additionally, it was not a Supercenter, so I knew I would not be able to work my way up to Co-Manager. When I asked to stay in the Crestview, Florida store, or relocate closer to my home and my widowed mother, I was told by Store Manager Kurpil that if I did not go to the store in Geneva, I could be sent anywhere, including California. I also asked District Manager Hart again about openings in the Florida panhandle, but he just became agitated and said that I had to be able to move within a five hour radius. Because I was afraid of getting transferred even further, I agreed to go to Alabama.

8. I was very disappointed that I had to move to a store in Alabama, and I was especially confused

about what the relocation policy required in light of what I learned from some men. First, Jesse Hill, a male manager of the meat department told me that I could stay in the Crestview store if Mr. Hart or Mr. Kurpill wanted me to stay; he said they could make it happen if they wanted. When I asked Mr. Hart about this statement, he did not specifically deny it, and his silence made me think it was true. Likewise, other male members of management told me that they were able to choose their stores. Specifically, Scott Suczes, a Store Manager, told me during a leadership training I attended in May 2000, that he was able to stay as an Assistant Manager in the store he trained in; similarly, Mike Whittaker told me he was able to choose the Crestview store, and David Moody, an Assistant Manager at Crestview, told me he was transferred to Ft. Walton Beach at his request. I was never informed exactly what the policy really required; after hearing all the conflicting stories, I felt like there was no real policy and that I just had no choice but to go to Geneva.

9. When I arrived in the Geneva, Alabama store in April 2000, I was given a position over softlines by Steve Lawrence, the Store Manager. There was one other Assistant Manager in the store, a male named Carl Gassett, and he was assigned to hardlines. In the Geneva store, the Assistant Managers did not rotate, and I was disappointed in being assigned to softlines. I had understood, based on my training at the Crestview store, that Assistant Managers rotate, but Mr. Gassett told me he never worked over softlines. I preferred hardlines because Mike Whittaker told me that managers over hardlines are normally promoted faster and given more opportunity for promotion; I hoped that I could move to hardlines soon. During a managerial meeting Dis-

trict Manager Judy Langford asked Store Manager Lawrence why he always put the female Assistant Mangers over softlines, and he told her "because that's what women know." Ms. Langford did not respond or disagree with his comment. District Manager Langford did not instruct Store Manager Lawrence to change the assignments, or to base assignments on any factors other than his stereotypical prejudices. Again, I believed I had no choice but to stay in softlines in that store.

10. Prior to beginning at the Geneva store, I had been scheduled to attend a leadership training school. Once in Geneva, Mr. Lawrence did not think I should attend, but District Manager Hart intervened and advocated on my behalf. After that, I was touring the store with Mr. Lawrence, and -- in a tone of disgust -- he told me that as a "black" and as a "woman", I would go far with Wal-Mart. I knew from his tone of voice that he would never give me a fair chance to succeed.

11. During this leadership training, I learned that there is no policy requiring an Assistant Manager to stay in a given store for a certain amount of time, and that, in fact, moving can help with promotion. More specifically, Mr. Scott Suczes told me that there are no set limits for how long one had to stay in a store, and that he moved several times in order to make himself more knowledgeable and promotable. Because of what he told me, because I felt like I could not advance as far as an Assistant Manager of softlines in the smaller Geneva store, and because of my continued need to help my mother, I requested to be transferred back to Florida as soon as I returned from leadership training. I made the request to Mr. Lawrence, the Store Manager. My request was de-

nied. Contrary to what I had been taught at the leadership training, Mr. Lawrence told me that I had to stay in his store for a minimum of eighteen months to two years. I made several other requests after this, and each time I was again told by Store Manager Lawrence and/or District Manager Langford that I would have to wait to be transferred even though I had been told differently by the men at the leadership training program.

12. During this time, I attempted to use the Open Door policy to address my concerns. This policy provides that any employee can discuss with any superior, up to and including the CEO, any concerns the employee has, and that the employee can expect a fair and responsible exchange. I called Regional Personnel Managers Steve Schultheis and Rudy Eckerman, several times to discuss my inability to be transferred, as well as continuing problems I was having with Store Manager Lawrence. In particular, I explained to them that Mr. Lawrence yelled at me on nearly a daily basis and embarrassed me in front of the associates. In contrast, Assistant Manager Carl Gassett made frequent mistakes and often could not work a register properly, but when I expressed concerns about him, Mr. Lawrence would say "that's just Karl." Admittedly, Mr. Lawrence had a loud voice, but his harsh tone, severe looks and bullying demeanor were generally reserved for me. Additionally, I was the only one he told: "We're all rednecks here, so you might as well get used to it." Mr. Eckerman told me that he had investigated the complaints by asking Mr. Lawrence about it, and that he believed Mr. Lawrence. I later found out that Wal-Mart had confirmed that Mr. Lawrence made the statement about everyone being a redneck, as well as the statement about blacks and women advancing.

(Attached hereto as Collier Exhibit A is a true and correct copy of a memo from Mr. Eckerman to Torn Coughlin, the President and CEO of Wal-Mart).

13. In late July 2000, I purchased some plants on my lunch hour. There was a pricing discrepancy, and the associate gave me a discount on one plant. Charles Howell, the Support Manager on duty then reviewed the policy on the computer and told me that I should get the lower price on all my purchases. When I asked the service desk for the discount for all the purchases, the associate was unable to re-ring the purchase with all the discounts. I then learned from one of the associates who was present, Theresa Bryant, that I should not have received any discount for any purchase. Again, however, the service desk associate was unable to re-ring the purchase to take off the discount before the store closed. As soon as I returned to work, I informed the new Store Manager, Kathy Searcy, about the error. I had been trained that Wal-Mart policy provides that if you learn of an error that has occurred, you are to inform management so that they can correct the situation, and that no form of retaliation will take place if you do so. Despite this policy; I received a written disciplinary note, or coaching, stating that my attempt to get the discount was "contrary to company policy." The coaching indicated that I had 45 days to show significant improvement. I had never seen any male Manager have their mistakes held against them in this way; in fact, it was Support Manager Charles Howell who gave me the wrong information on the company policy, and nobody said anything to him about that.

14. Shortly after this incident, I again called Mr. Eckerman to complain about my working conditions. I said that it was not right that I had been

disciplined for an honest error I had tried to correct, and that I was being discriminated against. In response to this attempt to use the Open Door, Mr. Eckerman told me that I would be transferred to a store in Thomasville, Georgia, a store that was three hours from where my mother lived and even further than the Geneva store. He also said that I would be monitored for six months instead of forty-five days, and that if I performed well during the six months, he would remove the coaching from my record. I told Mr. Eckerman that the coaching should be removed immediately altogether, but he said that was the best he would do. Mr. Eckermon expressed no concern with my report of discrimination nor did he indicate that there would be any investigation or followup. There was no indication of how long I would have to remain in Georgia, nor when, if ever, I could return to Northwest Florida.

15. In August 2000, I wrote a letter to the President and CEO of Wal-Mart complaining of discrimination based on gender and race. I never received any response to this Open Door effort. Instead, I was transferred to the Thomasville store in September, where I felt like my every move was being watched. I realized that the Open Door policy at Wal-Mart was a façade and resulted only in retaliation.

16. Sometime in December 2000 or early January 2001, Mitch Day, the District Manager for the Thomasville store, told me that he "did not believe what he had heard" and that I was a very good worker with a good personality. I knew that my use of the Open Door had not been confidential, and had resulted in my new District Manager receiving unfair reports against me before I had any chance to

defend my reputation. His comments solidified my belief that I was a victim of a good 'ole boys club.

17. As soon as I was told that I had to be monitored for six months, I gave up hope of making my career at Wal-Mart and began pursuing other jobs. In December 2000, I was offered a position at the AAFES, where I had worked prior to Wal-Mart. The position paid better, and I felt I would have a more fair chance to advance. I told Wal-Mart that I was leaving for a better job because I realized that Wal-Mart would not listen to my concerns, and that my efforts to address the discrimination that I had faced resulted only in retaliation and additional discrimination. After giving proper notice, I left Wal-Mart in January 2001.

I declare under penalty of perjury of the laws of the United States and State of Virginia that the foregoing is true and correct.

This Declaration was signed by me on April 11, 2003 at Hampton, Virginia.

/s/ Thearsa L. Collier

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, KAREN WILLIAMSON, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF JEANETTE CONNAKER IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Jeanette Connaker, declare:

1. I was employed at Wal-Mart from August 1994 until September 17, 1999. I worked at store No. 1507 in Wichita, Kansas, which was originally a regular Wal-Mart store and later became a Supercenter.

2. Before I began my employment at Wal-Mart I had retail work experience at Sears and several years of management experience. My first management opportunity was at Olive's East, a retail gift shop and cafe in Aurora, Colorado, where I worked as an Assistant Manager. I also worked as an Assistant Manager of Milo Beauty and Barber Supply when I lived in St. Louis, Missouri.

3. I excelled in all of my positions at Wal-Mart. Wal-Mart recognized my contribution to the store through promotions, raises and awards. However, despite my proven performance and my repeated communication that I wanted to become a support manager or assistant manager, Wal-Mart would not give me the opportunity to progress past the department manager/zone manager positions. After five years of service to Wal-Mart I finally realized I had reached a dead-end and left to pursue other opportunities to further my career goals.

4. Initially Wal-Mart hired me as a fulltime cashier. Within 90 days of being hired, I was promoted to customer service manager supervising the cashiers. In 1995, after working as a customer service manager for about a year, I decided that I wanted to work my way into a support manager and then assistant manager position with Wal-Mart. Since support managers and assistant managers had to be familiar with several different departments and positions in the store, I decided to step down from the customer service manager position in order to familiarize myself with other departments and positions in the store.

5. The first position I took was a sales associate position in electronics. In July 1996 I was evaluated as "above standard" on my performance in that position. On that evaluation, I communicated and recorded the career goals I had developed at that time, which were to learn the store "from front to back.," to work toward my fullest potential at Wal-Mart, to become a department manager and to work toward obtaining a support manager position. See Jeanette Connaker's July 1996 Associate Evaluation, a true and correct copy hereto attached as Exhibit A.

6. In September of 1996 I reached my goal of becoming a department manager when I was selected for the position of department manager of toys by Store Manager Mike Davison. In July of 1997 I was evaluated in the toy department manager position. Again I was rated as an "above standard" employee. And once again I informed Wal-Mart that I planned to continue to "strive for excellence" in my employment and to continue to obtain positions with "increase[d] responsibility." I set the goals of obtaining a promotion to Zone Manager, an hourly supervisory position, and to reach Assistant Manager within two years, which I stated on the evaluation. See Jeanette Connaker's July 1997 Associate Evaluation, a true and correct copy hereto attached as Exhibit B.

7. Within a few months of my 1997 annual performance evaluation, I reached my goal of becoming zone manager (similar to a department manager), when I applied for and received the position of zone manager of infants. I was evaluated on my performance in this position in July 1998. I continued to be rated as "above standard." I also continued to use the evaluation as an opportunity to remind Wal-Mart of my career goal to be promoted within the company. This time I wrote that I "would like to move up in management." See Jeanette Connaker's July 1998 Associate Evaluation, a true and correct copy hereto attached as Exhibit C.

8. Throughout my employment with Wal-Mart I tried to talk to my store's District Managers about getting into the Management Training Program. Both District Managers told me that I would have to relocate out of state to enter the program. I never saw a man relocate out of state when he entered the program. However, I was willing to consider reloca-

tion in order to become assistant manager and even spoke to Co-Manager Barry Barger about relocating to New Mexico.

9. When I talked to Co-Manager Barry Barger about entering the Management Training Program he told me to keep working, I was almost there. In the summer of 1998 Mr. Barger transferred to a store in New Mexico. I talked to him when he was in New Mexico about transferring into the Management Training Program in New Mexico. Mr. Barger told me I would have to transfer to New Mexico as a department manager. I did not want to take the chance of moving to New Mexico for just another hourly position and only the hope of a promotion. Therefore I decided not to make the move.

10. On September 17, 1998 I received a Great Job Award from Executive Vice President Tom Coughlin, Senior Vice President Kendall Schwindt and the Regional Vice President for my performance as zone manager of infants during Wal-Mart's Baby Week. The award states that Wal-Mart was recognizing me for "exceeding . . . [Wal-Mart's] expectations above and beyond!" Wal-Mart rewarded me with a Great Jobs button to wear on my uniform and one share of Wal-Mart stock. See September 17, 1998 Great Job Award and Letter from Kendall Schwindt, a true and correct copy hereto attached as Exhibit D.

11. My performance continued to catch the attention of Wal-Mart. In January 1999 I received a merit raise for developing the infants department into "one of the best departments, nationally." Mike Potter, my co-manager, filled out the Associate's Commendation Form. Mr. Potter praised me for increasing sales in my department by 19% and con-

tributing almost a half million dollars in profit to the store over the past year. He also commended me for consistently placing either first or second in sales volume for the district and also for creating a stable associate team in my department, marked by little turnover. See January 17, 1999 Associate's Commendation Form, a true and correct copy hereto attached s Exhibit E.

12. Less than one month later, in February 1999, I was chosen as Associate of the Month for my store.

13. In March 1999, a support manager position became available. I immediately applied because I had been looking for an opportunity to reach my goal of becoming a support manager. At the time I applied for the support manager position, I had four years experience with Wal-Mart, I had held three different management positions with Wal-Mart, and I had received two awards and a merit raise in those management positions. However, I was not even interviewed for the support manager position. Brian Brown, a young male, was selected for the support manager position instead of me. Mr. Brown had worked at Wal-Mart for less than a year as a stocker in the lawn and garden department. He had never held a management position with Wal-Mart.

14. After Wal-Mart overlooked me for the support manager position, I approached co-manager Mike Potter. I told him I wanted to know why I had not been interviewed for the position. I also told him I was upset that the support manager position had been given to a male associate who had less experience than me. Mike Potter became irate after I mentioned a male had been chosen for the position. He did an about-face and told me that my performance

evaluations were overstated and I was not worthy of a support manager position. He told me I would never move up within the company. Soon thereafter Mr. Potter gave me my first written coaching.

15. I then went to another co-manager and complained about not being interviewed and Mr. Potter's reaction to me, but the co-manager just ignored me. Then suddenly, two or three days after I complained that the support manager position was given to a less experienced male, Wal-Mart placed a female customer service manager in an overnight support manager position. This sudden, new support manager opening had never been posted.

17. In July of 1999 I received my last evaluation with Wal-Mart. I was rated as "exceeds expectations," the highest rating possible. Although I felt that Wal-Mart's decision to promote Mr. Brown instead of me and Wal-Mart's subsequent poor treatment of me indicated that they may never promote me, I still let Wal-Mart know that I was seeking a promotion during my evaluation. I noted that I wanted to "continued to learn and grow with Wal-Mart [and I] would still like to work toward support manager or assistant manager." See Jeanette Connaker's July 1999 performance evaluation, a true and correct copy hereto attached as Exhibit F.

18. During the first week of September 1999, I spoke with Kent Grier, assistant manager of softlines about not receiving the support manager position in March. Our District Manager was touring the store and I asked Mr. Grier if it would do any good to complain to the district manager about the position being given to Brian, who was less qualified than me, before I was even interviewed. Mr. Grier told me

that talking to the District Manager would be pointless. I was not going to get promoted.

19. After my conversation with Mr. Grier I was convinced that despite my hard work and my great performance evaluations I was not going to get promoted. I gave Wal-Mart my notice and then left Wal-Mart to pursue college coursework.

20. During my five years with Wal-Mart there were no female co-managers and there were no female store managers of my store. There were no female district managers in my store's district.

I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Texas that the foregoing is true and correct.

This Declaration was signed by me on March 30, 2003 at Round Rock, TX.

/s/ Jeanette L. Connaker

Jeanette Connaker

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF RITA COONES IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Rita Coones, declare:

1. I make this declaration on the basis of my personal knowledge, and, if called as a witness, could and would testify competently to the facts herein.

2. I was employed by Wal-Mart, Inc. in Austin, Texas from September 9, 1995 through October 15, 1999. I am female.

3. My initial assignment was as a stocker in the Receiving Department on the night shift. My job consisted primarily of unloading trucks and stocking merchandise into the correct storage locations. At the time I was hired, I was the only female on the night receiving team.

4. On my ninety day review, I received an "above standard" evaluation and a $0.35 an hour raise. This increased my initial pay rate from $6.50 to $6.85 an hour. One month later, in December 1995, I received another $0.20 an hour merit raise for my "hard work on night receiving" and "in appreciation and recognition of [my] capabilities." (Attached hereto as Coones Exhibit A is a true and accurate copy of the Commendation Form dated December 1995.). This raised my pay to $7.05 an hour.

5. Throughout the time I worked as a stocker, I observed that men were allowed to operate the forklift while female associates were not. Although I asked Store Manager Scott Sloan to be trained in the use of the forklift, he denied my requests without any explanation. I learned from my female co-workers, Dawn Luna and Cindy Brown, that they too had been denied training on use of the forklift when they worked as stockers. As I could not use the forklift, my ability to perform my tasks was by necessity dependent upon the cooperation of the male employees who had been provided the forklift training. I was not able to do all the tasks that the men in the Receiving Department could do, and I felt I was viewed as not as capable an employee.

6. In 1996, I asked Store Manager Sloan to be promoted to the support manager position for the night Receiving Department. I was qualified for this position because I had already been working there for one year. Store Manager Sloan gave the position to Mike [last name unknown]. Instead of a promotion, Store Manager Sloan moved me to a day receiving position in "directs." This position required me to scan merchandise that came in through the back

loading area. It did not involve unloading trucks or stocking merchandise.

7. On my annual evaluation in September 1997, I received another "above standard" ranking and in the comments section, I wrote: "My goal is to move up (Support Team Manager) . . . ." (Attached hereto as Coones Exhibit B is a true and accurate copy of my 1997 performance evaluation.) I also told Store Manager Sloan during our discussion of this evaluation that I wanted to advance with the company. I asked him what I could do to move up but he ignored my question and did not respond. Later, when two support manager positions opened up in the Receiving Department that year, I told Store Manager Sloan that I was interested in these promotions. I was not offered either position even though by now, I had been working in day and night receiving for about two years and was very capable of performing the support manager position. Instead, Store Manager Sloan again promoted two men into these positions, neither of whom, to my knowledge, had any prior experience working in Wal-Mart's receiving departments. One of the men who received the support manager position was Mike [last name unknown] who had worked in the Furniture and Sporting Goods Departments. He was fired after approximately three months in the position of support manager. As best I recall, the first name of the other man who was promoted over me at that time was Rodney. I no longer recall his last name or prior position.

8. In 1998, another night support manager position opened up in the Receiving Department. I again informed Store Manager Sloan that I wanted to apply for the position. Prior to promoting a male

into the night support manager position, Store Manager Sloan offered me the position of Department Manager of Lingerie. I told him that I would prefer the support manager position in receiving. He told me that he would prefer me in lingerie and that is the job I received. The Lingerie Department consisted exclusively of female associates and female department managers. With this promotion, I received a $0.50 an hour raise so that my pay rate was $8.50 an hour.

9. On my annual evaluation that same year, I again expressed interest in promotion. In the comments section, I wrote: "I will strive for excellence in my department . . . . I also would like to move up in the Company as a Support Manager and then a[n] Asst. Mgr." (Attached hereto as Coones Exhibit C is a true and accurate copy of my 1998 performance evaluation.) During my meeting with Store Manager Sloan regarding this evaluation, I again asked him what I could do to move up in the company. As before, he just ignored this question.

10. On my annual evaluation the following year, 1999, I continued to express my interest in promotion. I wrote: "Thank you for having given me the chance to exceed and give Wal-Mart my full attention. My goals are to advance in the Wal-Mart Company." (Attached hereto as Coones Exhibit D is a true and accurate copy of my 1999 performance evaluation.) Again, Store Manager Sloan brushed me off when I asked him how I could advance with the company during our meeting regarding this evaluation.

11. Despite my track record of average or above average performance evaluations and written and verbal requests for advancement opportunities, I was

never promoted above an hourly department manager position and my pay rate, after four years, remained below $10.00 an hour at $9.50. In October 1999, I left Wal-Mart because I did not feel there was any future for me there.

12. At no point during my employment at Wal-Mart did any manager inform me that Wal-Mart had a Management Training Program or how I could be considered for, or apply to, this program. I was never provided any information about the program in writing and I do not recall the program being posted on any store bulletin boards or discussed in the daily store meetings. Had I known of a Management Training Program, I would have expressed interest in participating. Had there been an application available, I would have applied to join.

I declare under penalty of perjury of the laws of the United States and State of California that the foregoing is true and correct.

This Declaration was signed by me on 4-21-03, 2003, at Butte County.

/s/ Rita S. Coones

RITA COONES, DECLARANT

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, KAREN WILLIAMSON, on behalf of themselves and all others similarly situated, Plaintiffs, v. WAL-MART STORES, INC.,	Case No. C-01-2252 MJJ **DECLARATION OF MARY CRAWFORD IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Mary Crawford, declare:

1. I am an African-American woman and a current employee of Wal-Mart. I reside in South Carolina.

2. I have worked at various Wal-Mart stores in North Carolina and South Carolina since 1988. I was told that I was ineligible for promotion to Assistant Manager because I was unable to relocate anywhere in the country, but I was then denied promotion to Assistant Manager in favor of a male employee with a similar work history who did not relocate. After I finally got promoted to Assistant Manager, I learned that I earned less than a male Assistant Manager with similar experience. I was retaliated against for using the Open Door Policy and forced to step down to Department Manager. After I was promoted again to Assistant Manager, I started

to express interest in promotion to Co-Manager. Despite positive evaluations and open positions in my store, I have not yet been promoted. There are currently male Assistant Managers at my store, who have less or similar experience than I have, who earn higher salaries than I do.

3. I was hired as a Customer Service Manager at a newly opened Wal-Mart store in York, South Carolina, in 1988. On my application, I noted that I had received a certificate in retailing from York Technical College in 1978 and that I had previous retail experience. (True and correct copy attached hereto as Crawford Exhibit A.) After about a year and a half, I was promoted to Department Manager. Starting in 1989, I began expressing my interest in the Management Training Program. On my 1989 evaluation, I received an above-standard rating and I wrote, "I would like some day to be a dept. manager and later an assistant manager." (True and correct copy attached hereto as Crawford Exhibit B.) On my 1990 evaluation, I wrote, "I would like to . . . in the future go into the management training program." (True and correct copy attached hereto as Crawford Exhibit C.)

4. When I first expressed interest in an Assistant Manager position, District Manager Millard Hare told me that I would be required to relocate to other areas of the country. I told him that I was unable to move my residence at that time because I did not want my seven school-age children to have to change schools.

5. In 1991, a Resident Assistant Manager position became available at the York store. I had never previously been informed about the Resident Assistant Manager program, nor had I seen any

written information about the program at the store, even though my managers knew I was both interested in management and unable to relocate. The position was not posted. I expressed my interest in the position to District Manager Hare, who told me that he had already selected a male employee, Clarence (Gordon) Welchel, for the position. When I asked Mr. Hare why Mr. Welchel was getting the position instead of me, Mr. Hare told me that Mr. Welchel deserved the position because he was the "head of his household." Mr. Hare told me that I did not "need" the position because I was a married woman.

6. Mr. Welchel only lasted in the position for about a month or two, after which he was demoted to Support Manager. After Mr. Welchel was demoted, I again expressed my interest in the position to District Manager Hare, who told me that the store was no longer going to have a Resident Assistant Manager. Mr. Hare did not explain why the position was being eliminated. I was not given an opportunity to apply. The elimination of the Resident Assistant Manager position from the York store made it seem like a position that Wal-Mart would use when it suited, rather than a formal company program.

7. I continued to express my interest in management positions. On my 1992 evaluation, on which I received an above-standard rating and a commendation for how well I managed the Cashiers, I wrote, "I hope that getting the [Cashier and Customer Service areas] running right . . . will help me get into the management program." On the same evaluation, Assistant Manager Troy Blackman wrote, "Mary is very capable of [illegible] management work. . . . I believe she is ready for management." (True and correct copy attached hereto as Crawford Exhibit D.)

8. In approximately 1992, I told our new District Manager, Richard Hinkebein, that I was seeking a promotion to Assistant Manager. Like Mr. Hare, Mr. Hinkebein told me I was not promotable because I could not relocate. Mr. Hinkebein did not discuss with me any other options and did not offer me a position as Resident Assistant Manager. He did not explain why there was no longer a Resident Assistant Manager position in the store.

9. Between 1991 and 1994, there were at least four open Assistant Manager positions at the York store. I was never encouraged to apply for any of those positions, nor were any of the positions posted. I was not told what I needed to do to become eligible for an Assistant Manager position.

10. In 1994, I was finally promoted to Assistant Manager at the York store, with the support of Store Manager Leonard (Keith) Parker. The position was not posted, and I was not interviewed for the position. I was not required to relocate. I was promoted directly to Assistant Manager and was not given any training through the Management Training Program. After I was promoted, male Assistant Manager Rickey Gainey told me that he earned a higher salary than I did. He had been promoted to Assistant Manager about a year before I was, after going through the Management Training Program.

11. In approximately 1995, a female Cashier at the York store told me that Store Manager John Locklear was sexually harassing her. As an Assistant Manager, I understood that I was required to take action on her complaint. I informed District Manager Michael Gillespie of the Cashier's complaint. I did this with some hesitation, as I had observed that District Manager Gillespie was a per-

sonal friend of Mr. Locklear. After another female employee also lodged a sexual harassment complaint against Mr. Locklear, Mr. Locklear was demoted and transferred out of the York store.

12. After Mr. Locklear was demoted, Mr. Gillespie began to harass and intimidate me on the job. It felt as though he was blaming me for Mr. Locklear's demotion. Although I had always received good evaluations and had no coachings as an Assistant Manager, Mr. Gillespie began to criticize my performance and blame me for errors in departments that were not my responsibility as Assistant Manager. I used the Open Door to discuss this with Mr. Gillespie, and let him know that his treatment of me was unfair and unjustified. Mr. Gillespie responded, "What are you going to do about it?" I took his comment to mean that he was going to continue harassing me in retaliation for reporting Mr. Locklear's behavior, and I felt that there was, in fact, not much I could do about Mr. Gillespie's treatment of me. I had already seen how male managers supported one another. In the face of Mr. Gillespie's direct threat to retaliate against me if I used the Open Door regarding Mr. Gillespie's behavior, I decided that I would probably lose my job if I used the Open Door again. Shortly after this conversation, I reluctantly requested and received a demotion to Department Manager. At the time I was separated from my husband and raising my children on one paycheck. I could not afford to lose my job.

13. Store Manager Parker, who had supported my original promotion to Assistant Manager, had transferred to a Wal-Mart store in Rock Hill, South Carolina. Mr. Parker found out that I had stepped down to a Department Manager position at the York

store, and he offered me a Support Manager position in Rock Hill in June 1997. I accepted the transfer and promotion. Four months later, I was promoted back to Assistant Manager and transferred to a store in Charlotte, North Carolina.

14. At that point, I still intended to make a career in management at Wal-Mart. I identified my next step as promotion to Co-Manager, and I began to express interest in that position. In my nine years at Wal-Mart, I had never seen any written information about requirements for the job of Co-Manager, nor had I seen information about an application process. District Manager Hinkebein had told me that I would only be promoted to Co-Manager if I first worked as an Assistant Manager at a Supercenter. The Charlotte store was not a Supercenter. For that reason, I repeatedly requested a transfer to a larger store starting in about 1997. In 1998 my request was granted, and I transferred as Assistant Manager back to the Rock Hill, South Carolina store.

15. On each of my annual evaluations since 1998, I have written that my goal is to become a Co-Manager. (True and correct copies of 1999 and 2000 evaluations attached as Crawford Exhibits E and F.) Since 1998, there have been at least four openings for Co-Manager in the Rock Hill store. None of those positions were posted. Despite my positive evaluations and lack of disciplinary action, I was not interviewed for or offered any of those Co-Manager positions. In the four years I have worked at the Rock Hill Wal-Mart, this store has had six Co-Managers, only one of whom was a woman.

16. In approximately 2001, I used the "Management Career Selection" ("MCS") computer system at Wal-Mart to apply for an available Co-Manager

position at a store in Columbia, South Carolina. The computer system blocked my application and reported that I was "not eligible" to apply for that position, but it did not give any further details about how to become eligible or why I was ineligible. After that experience, the "MCS" system seemed useless to me and I have not used it since. I have still not seen any written information on the requirements for promotion to Co-Manager.

17. For some time I have been aware of Wal-Mart's Rising Star program, whereby upper-level managers identify "highly promotable" employees who then receive priority for promotion. In 2002, Store Manager Chad Guest told me he was going to recommend me to District Manager Bob Davis for the Rising Star program. However, when I later reminded Mr. Guest that we needed to complete paperwork in order to add my name to the Rising Star program, Mr. Guest rescinded his promise. Mr. Guest told me that I was not performing well enough to qualify for the Rising Star program, even though I have consistently received positive evaluations. After Mr. Guest told me he would recommend me, I looked up the qualifications for the Rising Star program on Wal-Mart's internal computer system. The requirements included a certain level of evaluation rating and a certain level of sales. I know that I met the evaluation criteria, and District Manager Davis had recently complimented my sales performance to Co-Manager Dorsey Thomas from the York store. As far as I know, I have yet to be nominated as a Rising Star.

18. I have learned that at least three male Assistant Managers at the Rock Hill Wal-Mart, who have similar or less experience than I have, earn

higher salaries than I do. I have been an Assistant Manager for seven years and my base monthly salary is about $3,200. Peter Espina has only been as Assistant Manager for about three years and his salary is higher than mine. Ronald Glock has only been an Assistant Manager for about one year and his salary is higher than mine. Dennis Smith, who recently transferred out of the Rock Hill store, has only been an Assistant Manager for about three years and his salary is higher than mine. I have been given no explanation for these pay inequities and know of no legitimate reason that these men should be paid more than me for doing the same job.

19. In my 15 years at Wal-Mart, I have received 17 evaluations, more than half of them with ratings of above standard or exceeds expectations. I have not received any formal discipline since 1994, when I was an hourly employee.

20. I am currently attending classes in child care at York Technical College. I have lost hope that Wal-Mart will ever promote me to Co-Manager, despite my qualifications and my loyalty to the company.

21. I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and the State of South Carolina that the foregoing is true and correct.

This Declaration was signed by me on April 10 (month and day), 2003, at Clover, S.C. (city and state).

/s/ Mary Crawford

Mary Crawford

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, KAREN WILLIAMSON, on behalf of themselves and all others similarly situated, Plaintiffs vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF TRUDY CROM IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Trudy Crom, declare:

1. I make this statement on the basis of my personal knowledge and, if called as a witness, could and would testify competently to the facts herein.

2. I began working at a Wal-Mart Store in Frisco, Colorado in 1990 in the snack bar making $6.25 an hour working full-time. Almost immediately, I expressed an interest in entering the management training program by speaking with any members of management with whom I came into contact. This included Store Manager Dennis Dean, District Manager Bill Moore, Assistant Managers Brian Wood and Michelle Koch, and Department Manager of Menswear Bonnie Larson. I also expressed my interest in writing in at least two evalua-

tions while in the Frisco, Colorado Wal-Mart. In my 1990 evaluation, I wrote that I was interested in learning as much as I could in order to "move up the la[dd]er to ass[istant] manager." Attached hereto as Exhibit A is a true and correct copy of my 90-day Associate Evaluation, dated October 12, 1990. In my next evaluation, I wrote that "I would like to learn to do the Service Desk + Layaway [and] learn more about CSM job, so I can advance more in the store." Attached hereto as Exhibit B is a true and correct copy of my 6-month Evaluation, dated March 12, 1991.

3. In 1993, I still had not been promoted. I wrote a letter to Don Soderquist at Wal-Mart Headquarters in Bentonville, Arkansas about my frustrations regarding my promotional opportunities and lack of management support. I also expressed concern that, with job openings not being posted, I was not being given a fair chance to apply for positions. Attached hereto as Exhibit C is a true and correct copy of my letter to Don Soderquist dated July 22, 1993. Shortly thereafter, Store Manager Dean told me that the District Manager Buddy Caldwell was going to come into the store to speak with me about the letter. I never saw him in the store that day and he never discussed the letter with me.

4. Soon after, I began experiencing constant criticism from Store Manager Dennis Dean and Assistant Manager Cory Best. Both of them would walk around my department and berate me. On more than one occasion, Mr. Best humiliated me in front of customers and co-workers by loudly criticizing my department on the sales floor. Nothing like this had happened before I sent the letter. I repeatedly attempted to use the open door about the abusive con-

duct by speaking with District Manager Jim Mohan, Assistant Manager Brian Wood, and Softlines Department Managers Sharon Grove and Tracy Parmley but they were unresponsive. None of them agreed to do anything about the harassment that I was experiencing and none seemed to take it seriously. I found this extremely discouraging. In March 1996, after suffering through three years of constant harassment with no end in sight, I agreed to a $.75 pay cut, down to $9.25 an hour, in order to transfer to the Fort Collins, Colorado Wal-Mart Store as a Stocker.

5. Over the next three years at the Fort Collins, Colorado Wal-Mart as a Stocker and as the Department Manager of Shoes, I spoke regularly with Store Managers Bob Longnecker, Ed Hohlt, and Lonnie Hirth, District Manager Jim Mohan, Assistant Managers Jack Gunn and Rick Wilms, and the District Manager of Shoes and Jewelry Noel Mundy about my interest in the management training program. I spoke with them individually and during my evaluations. I also wrote in all of my evaluations that my goal was to advance in my career at Wal-Mart and to enter the management training program. In my 1997 annual evaluation, I wrote in the "Associate Comments/Goal Setting" section, "My goals in the company are to advance. I want to move up to the training program as an Assistant Manager of Division 1 . . ." Attached hereto as Exhibit D is a true and correct copy of my Annual Associate Evaluation dated September 12, 1996.

6. In 1997, I requested a meeting with District Manager Mr. Mohan about my Wal-Mart career goals. I again articulated my interest in becoming an Assistant Manager. Mr. Mohan asked if I would be willing to relocate and I told him I would. Even after

the meeting and agreeing to relocate, I did not get into the management training program for another two years. In my 1997 annual evaluation, I wrote, "My goals are to try and go into management and hopefully do a real[ly] good job." Attached hereto as Exhibit E is a true and correct copy of my Annual Associate Evaluation dated August 12, 1997.

7. In 1998, I continued to inquire about promotional opportunities. I also continued to learn as much as I could about different departments in the hope that I would increase my chances of promotion. In my 1998 annual evaluation I wrote in the "Associate Comments/Goal Setting" section that "I hope that with all the cross training that I've been doing, it will help me some day soon get to my goal as a[n] Assistant Manager." Attached hereto as Exhibit F is a true and correct copy of my Annual Associate Evaluation dated August 12, 1998.

8. In 1999, I was told by Mr. Mohan and Store Manager Jon Ball that I could enter the management training program but, because relocation was required, I had to transfer to the Loveland, Colorado Wal-Mart Store. I accepted. Once my training was over, I was required to transfer to the Lafayette, Colorado Wal-Mart Store in order to become an Assistant Manager. I personally observed that Ted Vasquez, with whom I had been an hourly employee in the Fort Collins store, never had to relocate for management training or to become an Assistant Manager. Mr. Vasquez remained as a management trainee and Assistant Manager in the Fort Collins, Colorado Wal-Mart.

9. In addition, even with persistent inquiries and meetings with management expressing my interest, it took me nine years to get into the manage-

ment training program. I know of at least one male, Mark Zens, with whom I worked in the Fort Collins Wal-Mart, who got into the management training program within five years of beginning his employment with Wal-Mart. He also became a Co-Manager in less time than it took me to even get into the training program.

10. In 2000, while I was Assistant Manager in Loveland, Colorado, I received what I believed to be an unfair coaching and subsequent demotion. In my 10 years with Wal-Mart, I had never received a coaching or any type of disciplinary action. All my evaluations as an Assistant Manager were rated "Exceeds Expectations." I believed I had followed management direction and that the situation was handled poorly by Store Manager John Murray and acting Store Manager John Engle. In June 2000, while Store Manager John Murray was away on vacation, he had given written instructions to all the assistant managers to perform coachings for those associates who worked overtime. After noticing that several associates had worked over 40 hours, I discussed the matter with acting Store Manager John Engle. Mr. Engle instructed me to give these associates coachings. After doing so, several associates complained to District Manager Mohan and myself about the coachings. I spoke with acting Store Manager Engle again and he reassured me that as long as I was consistent, the coachings should remain. When Mr. Mohan confronted both myself and acting Store Manager Engle about the coachings, Mr. Engle denied giving me instructions to give coachings to the associates. I tried to discuss the matter with Store Manager Murray when he returned from vacation but he refused to listen. It was at this time I received my first and only coaching. I felt I had been

undermined and totally unsupported by management. I used the open door by speaking with Regional Vice President Buddy Caldwell (he had since been promoted) about my concerns. He told me he would look into it but he never got back to me. I then wrote and sent a certified five-page letter to Don Soderquist at Wal-Mart headquarters in Bentonville, Arkansas explaining what had happened and expressing my concerns. I never heard back from anyone. Attached hereto as Exhibit G is a true and correct copy of the letter that I sent to Don Soderquist in 2000.

I declare under penalty of perjury of the laws of the United States and State of Colorado that the foregoing is true and correct.

This Declaration was signed by me on March 24, 2003, at Pierce, Colorado.

/s/ Trudy Crom

Trudy Crom

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF DARLENE CROWDER IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Darlene Crowder, declare:

1. I am a woman and a former Wal-Mart employee.

2. I began working at Wal-Mart in July 1991. Prior to working at Wal-Mart, I had managed a Rite-Aid drug store for approximately two years. I also worked at the Ramada Inn for one year where I had managerial responsibilities.

3. Even though I had previously worked as a manager of a retail store, Wal-Mart hired me to work as an hourly employee at a Wal-Mart store in London, Kentucky. From approximately 1991 until 1999, I held various hourly positions, including sales associate, cashier, department manager and support

manager. It took me eight years to get promoted to a salaried management position at Wal-Mart.

4. I repeatedly told Wal-Mart managers that I was interested in becoming a manager. At my hiring interview in 1991, I stated that I wanted to work in management. Early on in my career with Wal-Mart, I asked Assistant Manager Johnnie Flatt if he thought that I had the potential to be a manager. Mr. Flatt agreed that I did.

5. While I was an hourly employee, I always worked very hard and performed my job well. I was never disciplined. On my performance evaluations, I was consistently rated "above standard," "exceeds requirements," or "outstanding." I took on additional responsibilities, including writing the store's newsletter and serving on the safety team. In 1995, I was asked to assume the duties of an Assistant Manager assigned to the overnight shift for about three or four months when an Assistant Manager was on maternity leave. I was given a fifty cent per hour raise for assuming the Assistant Manager duties, bringing my wage to $7.50 per hour, but I was not paid a salary as other Assistant Managers were. I believed that my hard work and commitment to Wal-Mart's success would enable me to advance.

6. In approximately June 1995, I received an annual evaluation. At that time, I was working as a support manager, an hourly position. Assistant Manager Larry Holland wrote on the evaluation that I had worked hard to prepare myself for promotion and that I had the ability to go as far in Wal-Mart as I wanted. A true and correct copy of this evaluation is attached hereto as Crowder Exhibit A. The next steps would be the management training program and then an Assistant Manager position.

7. In early 1997, the support manager position was eliminated from the London store where I worked. Instead of promoting me into the management training program at that time, Wal-Mart demoted me to a department manager position. I was not told by my managers why I was not being promoted.

8. In late 1997, Store Manager Larry Ryan asked me whether I wanted to be promoted into management. I answered that I was very interested, but that I could not relocate my home because my mother, who lives in area, had been diagnosed with ovarian cancer. I was not promoted to the management training program until two years later, in 1999.

9. I am aware of three male employees -- Allen Otis, Steve Keeton, and Jimmy Lewis -- who completed the management training program and were assigned to stores which were located in places where I was able to work. In approximately 1992, Allen Otis completed the management training program in the London Wal-Mart store and became an Assistant Manager in the same store. In approximately 1994, Steve Keeton completed the management training program and was assigned to a Wal-Mart store in Williamsburg, Kentucky as an Assistant Manager. In approximately 1998, the personnel manager at the London store, Jimmy Lewis, was promoted into the management training program, and subsequently continued to work in the London store as an Assistant Manager on the overnight shift. That was the position that I had held temporarily in 1995 while an Assistant Manager was on maternity leave.

10. I never saw a posting or application for any of the positions described in the preceding para-

graph. I did not know the positions existed until I heard that they were filled by the male employees whom I identified in the preceding paragraph. There may have been other openings for Assistant Managers within commuting distance of my home of which I was not aware. If I had been permitted to apply for those positions, I would have done so. I did not know what I could do to get promoted other than wait for an invitation.

11. From August 1999 until December 2001, I worked as an Assistant Manager for Wal-Mart. I was assigned to stores in Berea, Manchester, and Corbin, Kentucky. I also worked out of the District Manager's office where I trouble-shot on difficult stores. As an Assistant Manager, I was never disciplined and was always rated "exceeds expectations" on my annual evaluations.

12. Upon becoming an Assistant Manager, I began aspiring to become a Store Manager. In February 2000, I received my first annual evaluation as an Assistant Manager. I was rated "exceeds expectations." I wrote on that evaluation that I wanted to become a Store Manager. A true and correct copy of that evaluation is attached hereto as Crowder Exhibit B. On at least one occasion after receiving that evaluation, I was told by a Wal-Mart manager that I had to be willing to relocate my home in order to be promoted to a Store Manager position. Because I understood Wal-Mart's relocation policy to prohibit my promotion, I became discouraged about becoming a Store Manager, even though there were about seven Wal-Mart stores within commuting distance of my home.

13. In approximately June 2000, I was assigned to the Manchester, Kentucky Wal-Mart store. When

the Store Manager, Marvin Bauman, took a leave of absence for approximately two weeks, I filled in as Acting Store Manager. I did not receive any additional compensation for assuming this responsibility. While I was Acting Store Manager, Regional Vice President Bill Dilaha visited the store. I later learned from District Manager Steve Falcon that Mr. Dilaha was extremely impressed with the store's condition.

14. While I was an Assistant Manager, I was designated a "Rising Star." I was never told how this designation would benefit me or how it would enable me to advance my career with Wal-Mart. When I worked in the district office, I saw a list of the Rising Star Assistant Managers in our district. Clark Susong and John Burton, both males, were on that list. Mr. Susong and Mr. Burton attended Wal-Mart's annual meetings in Texas. I was not invited to attend these meetings.

15. In approximately November 2001, District Manager Matt Belcher asked me to transfer laterally from the Wal-Mart store in Manchester to the Wal-Mart store in Corbin. I had reservations because the Corbin Store Manager, Brian Kitchen, had a reputation for disliking women. I agreed to transfer, despite my reservations, because I wanted to be a team player.

16. Wal-Mart stores receive what is known as a "UPI" rating. The UPI rating measures employee morale. A low UPI indicates high employee morale and, conversely, a high UPI indicates poor employee morale. At the time that I was transferred, the Manchester store had a UPI of approximately 8, while the Corbin store had a UPI of approximately 23, which is considered very high.

17. The Corbin store had a Store Manager, two Co-Managers, and approximately five Assistant Managers. With the exception of me, all of these managers were male. I replaced a female manager named Tiffany Gray. I suspected that I was transferred to the Corbin store to serve as a token female manager.

18. I was treated differently than the male Assistant Managers in the Corbin store. I frequently was required to oversee the front-end, in addition to my other areas of responsibility. I often had to respond to most of the customer calls. I often noticed the male Assistant Managers sitting around the office not working, when I was very busy. I did not feel that the male managers treated me as their equal.

19. Because of the discriminatory conditions that I experienced in the Corbin Wal-Mart store, on December 23, 2001, I resigned from Wal-Mart. After I resigned, I spoke with District Manager Matt Belcher. Mr. Belcher offered to demote me to an hourly position. He did not offer to place me in another Wal-Mart store as a salaried manager.

20. I am currently an Assistant Manager at Big Lots, another retail store. I would be interested in returning to work for Wal-Mart if I were guaranteed that I would be treated fairly, without discrimination, and with equal opportunities to advance.

21. I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Kentucky that the foregoing is true and correct.

This Declaration was signed by me on April 17, 2003, at Somerset, KY (city and state).

/s/ Darlene Crowder

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, KAREN WILLIAMSON, on behalf of themselves and all others similarly situated, Plaintiffs, v. WAL-MART STORES, INC.,	Case No. C-01-2252 MJJ **DECLARATION OF LAURIE DEWALL IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Laurie DeWall, declare:

1. I am a woman and a former employee of Wal-Mart.

2. I worked at a Wal-Mart store in Watertown, South Dakota, from July 2, 1990, to August 18, 2001. I worked in the Watertown store both as an hourly employee and later as a Resident Assistant Manager. I had no difficulty managing employees with whom I previously had worked as an hourly employee.

3. As detailed below, I received less thorough training than the male Assistant Managers I trained and worked with, resulting in lower evaluation ratings and lower annual pay increases than the male Assistant Managers received. Two male Assistant Managers in the Watertown store made more money than I did, both as trainees and as Assistant Manag-

ers, even though I had substantially more experience as a Wal-Mart employee and as an Assistant Manager than they had.

4. I started at Wal-Mart as a Cashier in 1990. In 1992, I was selected by an Assistant Manager to train as a Customer Service Manager in recognition of my excellent performance as a Cashier. The position of Customer Service Manager was not posted, and I do not remember being interviewed for the promotion. My promotion to Customer Service Manager sparked my interest in management positions at Wal-Mart. I wrote on my 1992 annual evaluation, "I am interested in how more [store] areas work together and why." (True and correct copy attached hereto as DeWall Exhibit A.) In 1994, I applied for promotion to Head Customer Service Manager. The position was posted, and I was chosen for the position after an interview with an Assistant Manager. In 1995, I was selected by Store Manager Charlene Walls for promotion to Support Manager, an hourly supervisory position. That position was not posted, and I was not interviewed.

5. During the years I worked as an hourly employee, I received eight merit raises, in addition to my annual pay increases. Store Manager Charlene Walls recognized that I was an asset to the company and in 1997 she wrote on my evaluation that I was ready for the Management Training Program. (True and correct copy attached hereto as DeWall Exhibit B.) I had never seen a written description of the Management Training Program, and I had falsely assumed that the Management Training Program required a college degree, which I did not have. Store Manager Walls explained to me that a college degree was not a requirement.

6. Store Manager Walls also told me about the Resident Manager Program, whereby I could be an Assistant Manager in the Watertown store, rather than relocating to another area. Watertown has been my home since 1975. My family and I have many ties there, including my husband's job as Deputy County Sheriff. After I learned about the Resident Manager Program, I was eager to be a manager at Wal-Mart. I interviewed with Store Manager Walls and District Manager Pam Casey in 1998, and I entered the Management Training Program in June or July 1998.

7. I was not allowed to do my training at the Watertown store. Instead, I was assigned to a store in Brookings, South Dakota, which is about an hour's drive from my house. I was not trained in the merchandising aspects of being an Assistant Manager. I was only trained in office procedures. I did not request to not be trained in merchandising. The lack of training I received in merchandising is reflected in my "Management Training Final Performance Appraisal Form," which states "no training in merchandising – only offices." (True and correct copy attached hereto as DeWall Exhibit C.)

8. I went back to the Watertown store as an Assistant Manager in August 1998. In early 2000, Ben Hoffmann was promoted from Management Trainee to Assistant Manager at Watertown. Mr. Hoffmann had worked as an hourly employee and as a Management Trainee at the Brookings store, which I know because he worked there as an hourly employee when I was a Management Trainee in Brookings. Mr. Hoffmann was allowed to train for management in the same store where he had been an hourly employee. In contrast, I was required to com-

mute two hours every day to do my training in Brookings. I did not receive any extra compensation for the time I spent traveling.

9. I have learned that Mr. Hoffmann earned a higher salary as an Assistant Manager, even though he had less experience as a Wal-Mart employee and as an Assistant Manager than I had. In about March 2001, I had two and a half years' experience as an Assistant Manager, and my monthly salary was approximately $2,800. At the same time, with only one year's experience as an Assistant Manager, Mr. Hoffmann's monthly salary was approximately $2,900. (See Affidavit of Attorney Brad Seligman, filed herewith.)

10. I was an Assistant Manager at Watertown for three years. I spent 30 of those 36 months on the overnight shift. I did not receive any extra compensation or "shift differential" for working an overnight shift. No male Assistant Manager who I worked with during those three years spent as many months on the overnight shift as I did. Because I rarely worked day shifts, I was denied training that the male Assistant Managers received. Specifically, I was denied training in merchandising responsibilities, supervising Department Managers, and other duties of a day Assistant Manager. I was criticized on my annual evaluations for not knowing the duties of a day Assistant Manager – including the "Store Within A Store" program – but it was impossible to learn those duties on the night shift. (True and correct copies of two relevant performance evaluations attached hereto as DeWall Exhibits D and E.) When I complained to Store Manager Scott Ferguson about my schedule, he told me he was not going to make any changes. My lengthy assignment to overnight shifts

led me to believe that I was not being groomed for a long-term management position at Wal-Mart, in contrast to the male Assistant Managers with whom I worked, who received more thorough training than I did.

11. In 2001, Store Manager Ferguson formally disciplined me for keeping three associates at work for an extra two hours each to cover for two employees who had called in sick. I believed the write-up was unfair. I used the "Open Door" and spoke to District Manager Steve Hanselman, who instructed Store Manager Ferguson to retract the write-up. After I complained to District Manager Hanselman, Store Manager Ferguson retaliated against me by threatening to take away my status as a Resident Assistant Manager and transfer me to Sioux Falls, South Dakota, which is almost a two-hour drive from my home. Store Manager Ferguson's threat to transfer me to Sioux Falls made it seem like the position of Resident Assistant Manager existed at the whim of management and was not an official Wal-Mart program.

12. After Store Manager Ferguson retaliated against me for using the Open Door with District Manager Hanselman, I never used the Open Door Policy again, even though I was frustrated by the length of time I had been assigned to the night shift. I eventually left Wal-Mart in August 2001, out of frustration over my schedule and my inability to get the training necessary to get higher evaluation ratings and higher pay raises.

13. After leaving Wal-Mart I got a job at First Premier Bank Card. I have received two promotions, and I am currently a top-level customer service associate.

14. I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of South Dakota that the foregoing is true and correct.

This Declaration was signed by me on 4-4 (month and day), 2003, at Watertown, S.D. (city and state).

/s/ Laurie DeWall

Laurie DeWall

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF ANNA DOBBS IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Anna Dobbs, declare:

1. I make this statement on the basis of my personal knowledge and, if called as a witness, could and would testify competently to the facts herein.

2. I began working for a Wal-Mart Store in 1979 in Aberdeen, Mississippi as a sales associate in the Fabric Department making about $3.00 an hour. I was 20 years old and this was my first full-time job. I hoped to have a long-term career at Wal-Mart and always had the goal of advancing into management. I was department manager of Health and Beauty Aids in the Aberdeen Wal-Mart from approximately 1981 to 1992.

3. In 1992, I voluntarily transferred to the Amory, Mississippi Wal-Mart Supercenter because I thought this experience would be better for advancement in my career at Wal-Mart. Store Manager Bobby Shumpert told me I was responsible for the duties of both support manager and department manager of Health and Beauty Aids.

4. After I transferred to the Amory Supercenter in 1992, I began speaking with both Store Manager Shumpert and District Manager Eddie Williams about my interest in moving into management training. Mr. Williams told me that I would be required to relocate to Philadelphia, Mississippi to complete the training. I observed that Wanda Watkins was sent to Alabama for management training and, like myself, had a great deal of difficulty transferring back to the Amory or Tupelo stores even where positions became available.

5. I also know of several male employees who worked in the Amory Supercenter and were allowed to complete their management training and remain as assistant managers in the same store. Keith Sanders, Chuck Holcomb, and Carl Hayward all trained in the Amory Supercenter and remained there as assistant managers.

6. In 1995, 16 years after I started my career with Wal-Mart, District Manager Williams allowed me to enter the management training program because I agreed to relocate to Philadelphia, Mississippi. I left my 14 year old son and 74 year old mother behind in Amory in order to relocate to Philadelphia, Mississippi for management training. When I began the training program, Mr. Williams agreed to pay me a salary of $23,000. When I told him that that was less than what I made as a de-

partment manager with overtime, he offered me $24,500. I accepted. After I completed the program, I found out that the starting salary for an assistant manager trainee at that time was $27,500. I had always been told that I could be fired for discussing salary issues so I was afraid to tell anyone that I had been significantly underpaid.

7. When I entered the management training program in 1995, Mr. Williams assured me that, after training, I would be allowed to return to a Wal-Mart store that was closer to my teenage son and elderly mother. Six months later, when my training period was ending, assistant manager positions opened in two separate Tupelo, Mississippi stores, both of which would have been closer to my family. I asked Mr. Williams to be transferred to either store but he placed males Cornelius Thomas, Jeff Miller, and Joe Carter as the assistant managers in those stores. Jeff Miller was hired off the street to fill one of these assistant manager positions.

8. I remained as an assistant manager in the Philadelphia, Mississippi Wal-Mart for almost two more years. In 1997, I was finally allowed to transfer to one of the Tupelo Wal-Mart Stores that was closer but still 50 miles away from my family. I continued to ask Store Manager Howard Brandon and District Manager Williams about returning to the Amory, Mississippi Wal-Mart. At one point, Mr. Williams told me that if I didn't stop asking, he would ship me so far away that I would never get home. I was surprised by the forcefulness of this statement, especially since previous to my entering the management training program, Mr. Williams seemed supportive of my desire to work in a location that was close to my family. This statement intimidated me from asking

for a while but finally, in 1998, three years after entering the management training program, I was allowed to transfer to the Amory, Mississippi Wal-Mart Store as an assistant manager. Within nine months, however, Mr. Williams transferred me again to another Tupelo, Mississippi Wal-Mart Supercenter. Based on Mr. Williams' previous attitude about my transfers, I did not believe I had a choice but to accept this transfer.

9. I had originally been very interested in pursuing a store management position and throughout my time as an assistant manager in Philadelphia and Tupelo, I was often sent to other stores in Alabama in order to help them straighten stockrooms and set up stores for perpetual inventory. When we were severely shorthanded, I consistently worked 60-70 hours a week overnights unloading pallets off of trucks. My performance evaluations also reflected my hard work and I regularly received exceptional reviews. I always believed this was an indication that I was doing an excellent job and was headed in the right direction for advancement into store management. Even so, Mr. Williams continued to verbally criticize my performance and often told me I should "just resign."

10. I finally realized that, without District Manager Williams' support, even after 20 years of hard work and commitment, I would never be given the opportunity to advance in my career at Wal-Mart. As a result, I decided to retire from Wal-Mart in 1999 and obtain work elsewhere.

I declare under penalty of perjury of the laws of the United States and State of Mississippi that the foregoing is true and correct.

This Declaration was signed by me on March 26, 2003, at Aberdeen, Mississippi.

/s/ Anna Dobbs

Anna Dobbs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES,
PATRICIA SURGESON,
CLEO PAGE,
CHRISTINE KWAPNOSKI,
DEBORAH GUNTER,
KAREN WILLIAMSON
AND EDITH ARANA, on behalf of themselves and all others similarly situated,

Plaintiff,

vs.

WAL-MART STORES, INC.,

Defendant

Case No. C-01-2252 MJJ

DECLARATION OF JULIE DONOVAN IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I, Julie Donovan, do hereby declare:

1. I make this statement on the basis of my personal knowledge, and, if called as a witness, could and would testify competently to the facts herein. I am female.

2. I was employed by Wal-Mart in the Home Office from August 1996 until November 1997 as a Senior Buyer.

3. I graduated from Marymount University college with a Bachelor's degree in Fashion Merchandising in 1990. Prior to my employment with Wal-Mart I was in the executive training program at Macy's in New York and was later employed by

Jamesway, in New Jersey, and Office Depot in Florida.

4. In August 1996, while working at Wal-Mart's Home Office in Bentonville, AR I was told by Ray Hobbs, Sr. Vice President and General Merchandise Manager, that he was surprised that I, as a woman, was in such a high position at Wal-Mart, and that it would be better if I were at home raising a family.

5. During that same time frame I was told by Mr. Hobbs, that I did not play well with the "boys" in the company. Specifically, I was told that because I did not hunt, fish, or do other typically-male activities, that I probably would not advance any further with Wal-Mart.

6. I met with Mr Hobbs for my performance evaluation in approximately October 1997. We were talking about the next position I could seek to advance my career and he said I should not worry about that, because "you aren't a part of the boy's club, and you should raise a family and stay in the kitchen" instead of seeking to advance my career.

7. I traveled to Kansas City twice for company-wide managers' meetings. I observed that approximately 85% of the managers present were men. When I attended these meetings, there were no other women from the department attending who I could share a hotel room with, and thus I had my own hotel room. Rather than recognizing that there were simply too few women in positions at my level, Kaman Wood, a buyer, made comments to the effect that I was receiving preferential treatment because I was a woman.

8. In order for me to engage other managers or upper level officials in conversation, the discussion generally had to be centered around hunting or sports-related topics to gain their respect. At one Kansas City managers' meeting I had to base my presentation on Monday Night Football to ensure my credibility with the other male managers.

9. I made informal comments to my supervisor Vice President and Divisional Merchandise Manager, Bill Long, about how I was being treated. He told me to shrug it off and that I needed to "have a thick skin." I also discussed my situation with Bill May, a buyer who is now a Vice President at Wal-Mart, and he told me the same thing as Mr. Long.

I declare under penalty of perjury of the laws of the United States and of the State of New Jersey, that the foregoing is true and correct. I signed this on April 17 , 2003 in Mahwah, New Jersey.

/s/ Julie Donovan

Julie Donovan

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiffs, vs. WAL-MART STORES, INC., Defendant.	Case No. C-01-2252 MJJ **DECLARATION OF BETTY DUKES IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Betty Dukes, declare:

1. I am a current employee at the Wal-Mart store in Pittsburg, California. I am 53 years old and have worked for Wal-Mart for almost nine years. I am paid $8.44 an hour. I am an African-American woman and a named plaintiff in this case.

2. Prior to my employment at Wal-Mart, I had many years of experience in the retail field. I had also been very active in my church. I had never been discharged from any position and, prior to my experience at Wal-Mart as detailed below, I had never been disciplined at any job.

3. I was hired by Wal-Mart in May 1994 and paid $5.00 an hour. Within the first 30 days of my employment, I asked Store Manager Rick Pace how I could advance in my career at Wal-Mart. Mr. Pace responded only by telling me to finish my first 90 days of employment. I received a good 90 day performance evaluation and a raise to $5.25 an hour. Mr. Pace never provided to me any information about how to progress in my career.

4. Within my first year of employment, I received a promotion to full-time status and a merit pay raise to $5.50 an hour.

5. In April 1996, I asked Assistant Manager Mike Lancaster to consider me for a promotion to Customer Service Manager ("CSM"), which I believed would be the first step into management. He told me he would speak with Store Manager Raps. He later replied that I would not receive a promotion at that time. He was vague, and did not tell me what I needed to do in order to receive a promotion. In the latter part of 1996, I asked Store Manager Raps to consider giving me more responsibility or assignments on the sales floor. I reminded Ms. Raps that I had experience at previous jobs as a head cashier, and that I was interested in promotion. She responded by saying that she would take my input into consideration, but took no action.

6. There were no postings of promotional opportunities for the first few years of my employment at Wal-Mart. Instead, I could rely only on word of mouth and observation. There was no application process to complete to apply for these positions. The only way I knew to express interest in promotion was to talk with management, and I continued to do this. I repeatedly asked Store Manager Raps, Assistant

Manager Lancaster, and CSM Jan [last name unknown] to consider me for promotion to CSM or to give me experience on the sales floor. Because I was assigned as a front lane cashier, I was often unaware of opportunities in other parts of the store until the positions were already filled. It was difficult to express interest in a particular position, but I made my desire for promotion well known. I saw no information about management training. No one ever provided any information to me about management training.

7. By June 1997, open positions were sometimes posted. I signed up to be considered for several positions, but did not receive a promotion. I spoke about promotional opportunities with Assistant Manager Chuck Thomas when he gave me my 1997 performance evaluation. In June 1997, I was promoted to Customer Service Manager. This position had not been posted.

8. In approximately September or October 1997, Leilani (Lonnie) Barrett was promoted to Head CSM without the position being posted and without the opportunity for me to apply or interview for the job.

9. Soon after her promotion, Head CSM Barrett and Store Manager Ken Cagle began to discriminate against me by treating me more harshly than they treated other employees. I tried to use the Open Door policy without success. Head CSM Barrett retaliated against me in February 1998 with a written disciplinary coaching, claiming I returned late from breaks. Male employees returned late from breaks and lunch, and even failed to clock out for their breaks and were not disciplined. I am unaware

of any male employee receiving a coaching for this infraction.

10. Six weeks later, in March 1998, I received another retaliatory coaching. This time, I was accused of having a cashier cover my lunch break, a common occurrence at the Pittsburg store. I used the Open Door again without success.

11. As a result of these coachings, my eligibility for promotion was limited. Wal-Mart policy prohibits promotion of employees who have received a coaching within the last year. Consequently, as a result of the retaliatory coachings, I was ineligible for promotion from February 1998 until April 1999.

12. In July 1999, I expressed interest in receiving a promotion to Department Manager. I had successfully fulfilled the role of Customer Service Manager for two years. I asked Store Manager Cagle to provide me with the training I needed to be a Department Manager. He provided no guidance or encouragement to me and gave me no indication what I needed to do to receive a promotion. My request for training and promotion was ignored.

13. In August 1999, I was again disciplined when I was accused of violating company policy. I was given another coaching and demoted from Customer Service Manager to cashier. My pay rate was decreased by $0.37 an hour. I was directed by Store Manager Cagle and Assistant Manager Joe Oquelly to take my lunch break and return to work as a cashier. I have never witnessed a similar public humiliation of a male employee. Again, by disciplining me for what was a common practice in the store, I was made ineligible for promotion for a year. I am not aware of any male employees who have been disciplined for similar transactions. As a result of this

discriminatory treatment. I filed a charge on or about June 1, 2000 with the Equal Employment Opportunity Commission, attached hereto as Dukes Exhibit A. I received a notice of my Right to Sue on or about June 15, 2000, attached hereto as Dukes Exhibit B.

14. During the next twelve months, when I was ineligible for promotion due to the wrongful coaching, I was unable to apply for several positions in which I had interest. I missed the opportunity to become a Support Manager or Manager of the Domestics/Furniture Department. The latter position was filled by Joseph Topasna.

15. When I was once again eligible for promotion in August 2000, I watched as positions were filled without being posted. Three men, Richard Morales, Joseph Topasna, and Robert (Aaron) Mendez, were promoted to Support Manager in the fall of 2000. I did not have the opportunity to express my interest or apply for these positions, as they were not posted. I was not interviewed for any of these promotional opportunities. In addition, several department manager positions also were available during this time period. A male employee, Will Martines, became Department Manager for Tire and Lube Express. This position was not posted.

16. Because of the way I had been treated, and the treatment I witnessed of other female employees, and the long pattern I had observed of positions being given to male employees selected by management before any applications were even sought, I believed there was no point in going through the motion of applying for a promotion. I had made my goals and aspirations for promotion clear from my first weeks of employment, and yet, after years of hard work, I

was still a cashier. Attached hereto as Dukes Exhibit C is a true and correct copy of the charges I filed in May, 2001 with the Equal Employment Opportunity Commission. Attached hereto as Dukes Exhibits D is the Notice of Right to Sue which I received from the EEOC.

17. I remained a cashier until July 2001 when, due to work-related physical injuries, I was reassigned to the position of Greeter. I am currently a Cashier/Greeter.

18. In January 2003, for the first time there was an opportunity to sign up to express interest in joining the Management Training Program. I learned of this procedure only from my counsel in this case. I later learned that the application process for this opportunity was mentioned briefly in meetings conducted at the store, but not all employees were told of these meetings, including me. The information about this process was never posted. This was the first time in my nine years at Wal-Mart that there was any chance to apply for management training. There were only a few days in which applications could be submitted. I attempted to sign up for the program on the intranet system. However, my application was rejected. One of the questions in the application inquired of my availability. From the commencement of my employment, I have been unable to work on Sundays due to my strongly held religious beliefs. My application for the Management Training Program was automatically rejected when I had to truthfully respond that there was a limit on my availability. I remain interested in management training.

19. Although I have worked at this store for nine years, I am paid less then $9.00 an hour. I have

recently learned of a male employee, Carl Kirkland, who was hired to be a greeter in the fall of 2002 in the Pittsburg store. He was paid more than me, despite his lesser seniority. Another male, Isidro Francisco, hired in 1996, became a greeter in 2000 and is also paid a higher hourly rate than me. Attached hereto as Dukes Exhibit E is a true and correct copy of the charge I filed with the Equal Employment Opportunity Commission.

20. I decided to become a named plaintiff in this action because I have been unfairly denied promotional opportunities and equal pay. My primary goal is to ensure that the employment practices at Wal-Mart which hinder the progress of women wishing to enter management be changed, to ensure fair and equitable treatment of female employees, and to ensure women receive equal pay. I understand the responsibilities of a named plaintiff and I am prepared to fulfill my duties to the women in the class.

21. I have personal knowledge of each and every fact set forth in this Declaration, and if called as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and the State of California that the foregoing is true and correct.

This declaration was signed by me on April 17, 2003 in Pittsburg, California.

/s/ Betty Dukes

Betty Dukes

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF DIANE DURFEY IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Diane Durfey, declare:

1. I was an Assistant Manager at a Wal-Mart Store in Utah. I quit in August 2000 because it became apparent I would not be promoted. I reached this conclusion because I experienced a belittling working environment directed at women and I lost respect for the management of Wal-Mart.

2. I was graduated from Brigham Young University in December 1998 with a degree in Business Administration. Before finishing my degree, I had obtained an Associates of Arts degree from a community college and had worked full-time as an office manager for a podiatrist and in the office and production department of a publishing company. I had

also spent 18 months in Ecuador. Soon after receiving my Bachelors of Art degree, I saw at the career services center at Brigham Young University that Wal-Mart wished to interview recent graduates for managerial positions. I had observed the growth of Wal-Mart in Utah, and was aware that the company was expanding overseas. I believed that a company of that size would present tremendous opportunities for me. I was at the beginning of my professional career and had no reason, at that point, to doubt that I could have a long and successful career with Wal-Mart. I signed up for an interview.

3. I interviewed with Oneil Clark, a Regional Personnel Manager, for the position of management trainee. In this March 1999 interview, Mr. Clark asked me if I was relocatable. I responded by telling him I had no geographical limitations at all and, in fact, would be interested in working in the International Division. Mr. Clark made a note of my response to this question concerning my ability to relocate. (Attached hereto as Durfey Exhibit A is a true and correct copy of the Interview notes produced by Defendant at my deposition.)

4. I received a confirming letter, which set forth the terms of my employment as a Manager Trainee. (Attached hereto as Durfey Exhibit B is a true and correct copy of this letter.) Upon receipt, I telephoned to negotiate the starting salary of $27,500.00 but was unsuccessful at negotiating a higher rate. I was told that the salary was set by Home Office in Bentonville, Arkansas. I accepted the job and was sent to Shelton, Washington for training. I spent approximately 17 weeks in Washington in the Management Training Program.

5. Upon completing my training in August 1999, I was assigned as an Assistant Manager at the Wal-Mart Store in American Fork, Utah and remained there until I quit. The practices and procedures I learned in Washington were applicable in Utah and I needed no additional training to work in Utah. The handbook used in the Shelton, Washington store was the same as the handbook used in Utah. The reports that the stores made to Home Office were of the same type. The guidelines, reports, and policies sent by Home Office to the stores were the same. The videos shown to new employees, the Computer Based Learning ("CBL") modules, and the orientation procedure were the same in Utah as I had experienced in Washington, as they were all created in Bentonville, Arkansas. The set-up of the store, the reporting chain of command, the personnel policies, the merchandising practices, and the day-to-day operations were all similar in Washington and Utah. Both of the stores used the same computer systems, and I was able to access the same reports, guidelines, and policies on the computer in Utah that I had in Washington.

6. After I was in the Utah store for approximately six or seven weeks, a male Assistant Manager, Matt Garrett, was assigned to the same store. He had commenced his training six or seven weeks after I had begun my training, and this was his first assignment a: Assistant Manager. Although I had the six or seven weeks of additional experience, Matt Garrett was paid more than I was. I learned this when another Assistant Manager, Holly Gibby, saw written confirmation of our salaries and told me.

7. It became apparent that Matt Garrett was being groomed for rapid promotion and I was not. He

was rotated into the Night Receiving Assistant Manager, which was widely seen as a stepping-stone to imminent promotion. I complained to Store Manager Mark Weatherhogg, as did Holly Gibby and other Assistant Managers. I was then assigned to help Mr. Garrett in the receiving department, as there was a lot of extra work to do, including a new back room set up and an upcoming inventory audit. When Mr. Garrett rotated out of that position, I was able to run the position entirely on my own but was not allowed this opportunity. Another male Assistant Manager, Jeff, was put in to help me although there was no longer a lot of extra work. Unlike Mr. Garrett, I was not given the opportunity to shine in that position and show what I could do.

8. I observed gender stereotyping in assignments throughout the store. Women were not placed in some departments, including sporting goods, garden, and hardware. Women were not assigned as cart pushers. Women were assigned to the office, and to fabrics and cashiering. This gender segregation was widely acknowledged throughout the store, and was the subject of several conversations among the female office personnel.

9. Store Manager Mark Weatherhogg toured the store daily with one or more Assistant Managers. Upon one occasion, in approximately July 2000, as I and Assistant Manager Marjorie Fonnesbeck toured with him, he started yelling at us. When we arrived in the Infants Department, Mr. Weatherhogg got even angrier, and screamed at the female hourly Infants Department Manager, Julie Weber. He pulled approximately six pieces of furniture down from the shelves, throwing them onto the floor. Ms. Weber walked out of the store. Several associates witnessed

this and appeared very upset. More than one associate called the District Manager, Jim Curtis, who sent Mr. Weatherhogg home for the day. District Manager Curtis also directed Ms. Fonnesbeck and me to conduct an investigation of the incident. Assigning this task of investigation put Ms. Fonnesbeck and me in very difficult positions, as we were being asked to review and report on the actions of our direct supervisor. I felt this assignment was an attempt to intimidate us and send us a message that we were not to report on the bad actions of our Store Manager. When I approached Mr. Weatherhogg to tell him that employees were walking out and were very upset, he placed the blame on the Assistant Managers for provoking him. I never observed or learned of any time when Mr. Weatherhogg yelled at male Assistant Managers or male Department Managers.

10. Upon many occasions, I went to Store Manager Weatherhogg to discuss a number of concerns, including my career. In many of these discussions, Mr. Weatherhogg told me that "retail is tough" and that it might not be "appropriate" for women. Mr. Weatherhogg said this to me on more than one occasion. I discussed this with female Assistant Managers Marjorie Fonnesbeck and Holly Gibby who told me that Mr. Weatherhogg said the same thing to them. This attitude of Store Manager Weatherhogg was so well known, and the favoritism he displayed to male associates was so apparent that it became almost a joke for my fellow Assistant Managers to refer to Wal-Mart as a "good 'ole boys' club." I recall specifically Store Manager Mark Weatherhogg making this comment at lunch on more than one occasion.

11. I became very concerned about my career opportunities, having seen a less experienced man, Assistant Manager Matt Garrett, receive a greater salary and more managerial grooming, observing the biased behavior of my supervisor, and having my Store Manager express doubts that I, as a woman, should even be in this field of employment. I tried to use the Open Door, contacting District Manager Jim Curtis, but received no response. Wal-Mart's Sundown Rule requires that all phone messages be returned the same day received, so the lack of response was significant to me. I understood that the district manager was so uninterested in talking to me that he was willing to violate this basic rule of Wal-Mart policy and culture. I wrote a note to the President, Lee Scott, and again received no response. I called the legal department and yet again received no response. I telephoned and e-mailed the Store Manager I had trained with in Washington, Greg Sullivan, but received only a pep talk.

12. I believed that I could not get promoted, in light of the attitudes I had observed. I found that no help was available for me through the Open Door. The working conditions were belittling and I had no respect for the management. I quit on August 31, 2000. I conducted my own exit interview, finding myself to be rehirable. No member of Wal-Mart management made any effort to persuade me to stay.

13. I had intended to make my career at Wal-Mart. Given a fair opportunity, I anticipated becoming a Store Manager and perhaps joining the International Division. Instead, I experienced discrimination and hostility towards me because I am a woman. But for the discrimination, the behavior of my managers, and the lack of response from upper manage-

ment to my concerns. I believe I would have stayed at Wal-Mart.

I have personal knowledge of each and every fact set forth in this Declaration and, if called to testify as a witness, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and of the State of Utah that the foregoing is true and correct.

This declaration was signed by me on April 9, 2003 at Orem, Utah.

/s/ Diane Durfey

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, KAREN WILLIAMSON, on behalf of themselves and all others similarly situated, Plaintiffs, v. WAL-MART STORES, INC. Defendant.	Case No. C-01-2252 MJJ **DECLARATION OF MICKI EARWOOD IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Micki Earwood, declare:

1. I am a 32 year old female and live in Springfield, Ohio.

2. During my employment at Wal-Mart Stores, Inc., ("Wal-Mart") I encountered discrimination based upon my gender with regard to promotions. I also observed discrimination against other women at Wal-Mart with regard to pay. I reported the observed pay disparity to management and was terminated in retaliation for reporting discrimination.

3. I was employed at Wal-Mart from January 12, 1989, until September 28, 2000. I initially was employed in the Urbana, Ohio Wal Mart Store and remained in that store until the end of 1992. I worked for a short period of time in the Mentor, Ohio

Store and then transferred to the Bellfontaine, Ohio Store. I transferred back to the Urbana, Ohio Store from the Bellfountaine, Ohio Store and remained there until my termination on September 28, 2000.

4. Throughout my career at Wal-Mart, I worked in numerous departments as an associate and as a Department Manager. I was an associate in the Receiving, Housewares and Beauty Aides Departments. I was a Department Manager in Electronics, Housewares, Hardware, Household Chemicals and Furniture, and Food. I also served as a Support Manager and I was the Personnel Manager at the Urbana Store at the time of termination in September 2000.

5. I performed well in all my positions at Wal-Mart. With one exception only, my evaluations were either meets standards, exceeds standards, or outstanding. At the time of my termination at Wal-Mart, I was making $12.62 per hour.

6. On many of my evaluations, I expressed an interest in progressing into management with the company. I also orally informed my store managers throughout my employment that I wanted to progress into management.

7. In the Summer 1998, I spoke with my District Manager, Cindy Range, who asked me if I was interested in the Management Training Program. I told Ms. Range that I was very much interested in the Management Training Program and we agreed to speak again.

8. Ms. Range and I spoke again shortly thereafter and she asked me if I was willing to transfer to either Illinois, Michigan or New York in order to be in the Management Training Program. I told her

that I was willing to transfer and I would prefer to transfer to New York. Ms. Range told me that she would get back to me regarding the Management Training Program.

9. During the Summer and throughout the Fall of 1998, Ms. Range never got back in touch with me despite my numerous calls to her office. I spoke with her assistant and asked him if she would meet with me the next time she was in my store. I never heard back from her or her assistant concerning this request. I talked to my Store Manager, Jim Phelps, about Ms. Range's failure to get back to me regarding the promotion to the Management Training Program on numerous occasions. Mr. Phelps repeatedly told me he could not help me in this regard. I asked him if he could speak with Ms. Range about this issue since he meets with her every week and he refused. Mr. Phelps informed me that he had nothing to do with promotions and he would not help me in any way.

10. I know that Mr. Phelps could have helped me in this regard if he had chosen to as I had observed him help men at my store get into the Management Training Program. Mr. Phelps helped Phillip Roher, Ben Perry, and Tony Walters get into the Management Training Program during the same time frame that he was denying me any assistance.

11. I also observed Mr. Phelps fail to assist other women in my store who wanted to get into the Management Training Program. I know that Glenna Buuck tried to transfer to another district so she could be promoted and Mr. Phelps refused to permit her transfer thereby denying her the promotional opportunity. To my knowledge, Mr. Phelps never interfered in any male's transfers.

12. Angie Hart was a college student working at the Urbana, Ohio Wal-Mart who wanted to become involved in the Intern Program but Mr. Phelps would not assist her. Ms. Hart found it necessary to move from the Urbana Store into another district so she could get into the Intern Program.

13. At the time that Mr. Phelps was interfering in Ms. Buuck's transfer and refusing Ms. Hart's request to be in the Intern Program, our District Manager was Mike Fetrow (Ms. Range's successor). Mr. Fetrow also refused to allow Ms. Hart into the Intern Program and both Mr. Phelps and Mr. Fetrow permitted Ben Perry, a male, to be placed in the Intern Program in the Urbana, Ohio Store.

14. While I was at the store, I personally observed Mr. Phelps constantly treat male employees better than he treated female employees. When women came into the personnel office to speak with him, he would make them beg for any request that they needed granted. Mr. Phelps was condescending towards the women that approached him and he would rarely would look women in the eye. Mr. Phelps always made it more difficult for women to voice complaints or to obtain pay raises to which they were entitled. Mr. Phelps would always put off women and delay acting on their requests.

15. After I was denied the opportunity to be in the Management Training Program, I remained as a Support Manager. I was then transferred to Food as a Department Manager. After that position, I learned that the Personnel Manager position was open and I applied for that job. I had previously expressed my interest in the Personnel Manager position to Mr. Phelps as well as previous managers before him and I felt that this was another track that I

could be promoted from into management. Virtually everyone in the store knew I wanted to be the Personnel Manager so when the position was posted, I was the only applicant. I became the Personnel Manager on August 5, 1999, and remained in that position until I was terminated in September 2000.

16. As Personnel Manager, I did all the new hiring for new associates. I also did all of the scheduling for the entire store with the exception of Special Divisions. I was also in charge of posting hourly job openings. However, I was not in charge of posting any job openings for management positions. To my knowledge, none of the management training positions or assistant manager positions were posted while I was employed at Wal-Mart. As Personnel Manager, I also was privy to payroll information regarding all of the employees of the store where I worked. I understood that the payroll information was confidential and I never disclosed the information I obtained while viewing the payroll to anyone other than upper level management when I reported pay inequalities that I observed.

17. During the Summer of 2000, I called Mr. Fetrow, my District Manager to report that Mr. Phelps was awarding men raises that were outside the guidelines and that he was not giving women comparable raises. I gave Mr. Fetrow specific examples. Mr. Fetrow never responded to my phone calls regarding this issue, so I contacted Don Swann, Regional Vice President. Mr. Swann told me that Mr. Fetrow was a very busy man and that I should just give him another chance to try and work it out and fix this situation. When Mr. Fetrow eventually returned my call, I mentioned the pay disparity issue to him. Mr. Fetrow told me that he would be in the

store the very next day and would discuss this issue with me. When Mr. Fetrow came into the store the next day he ignored me and did not speak to me regarding the pay disparity issue.

18. Some of the specific instances of unequal pay that I reported to Mr. Fetrow were, Roger Hart receiving a $1.00 per hour raise when he was only making $7.00 per hour which was far in excess of the 5% pay increase policy at Wal-Mart. While I was Personnel Manager, I did not observe any women receive a raise of $1.00 per hour. I also reported Kevin Sanderson receiving raises of the same magnitude of Roger Hart and the fact that women never received those types of raises. I also reported the fact that Jerry Lewis received a raise every 90 days from Mr. Phelps for total raises of over $3.00 per hour in less than 1 ½ years. I personally observed Mr. Phelps tell many woman who were requesting raises that he could never give more than a 5% raise.

19. I observed another example of unequal treatment of women with respect to pay and promotions. Robert (Pat) Bing, a male associate, and Shelley Engle, were both promoted on the same day and were told they would be receiving their raises for the promotion when the pay review occurred in 60 days. Robert (Pat) Bing was given a raise and Shelley Engle was not given a raise.

20. On another occasion, Mr. Phelps ordered me to post a support manager position and to include in the posting that applicants would be required to work nights and weekends. Mr. Phelps then stated, "so they can't have kids." I believed that this was a form of illegal discrimination. I was also personally offended by this comment since I was a single mother and had worked as a support manager while my

daughter was three years old. I reported this incident regarding Mr. Phelps to both Mr. Fetrow and Mr. Swann. To my knowledge, nothing was ever done by upper management with regard to this particular complaint.

21. On September 15, 2000, Mr. Fetrow and I were supposed to meet regarding the issues I had raised. Mr. Fetrow came into the store, but he did not initiate a meeting. Mr. Fetrow then came into the store on September 16, 2000, where, again, I was supposed to meet with him regarding the issues I had raised. Instead, at the end of the day (2 hours after I was regularly scheduled to leave work that day), I was put into a room behind closed doors with three males, Mr. Fetrow, Mr. Phelps and Anthony Detillio of loss prevention. I was informed in that meeting by Mr. Fetrow that I was being investigated because I allegedly had a tape recorder at work and was allegedly taping conversations of management. I told him that I did have a tape recorder but did not know where it was, and that I had not taped any conversations at work. Mr. Fetrow told me that I was being placed on paid leave while I was being investigated. I was called back to work approximately ten days later and was told I was being terminated. I believe I was investigated and terminated in retaliation for having reported my Store Manager, Jim Phelps, to his superiors for his discrimination against women.

I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Ohio that the foregoing is true and correct.

This Declaration was signed by me on April 11, 2003 at Springfield, Ohio.

/s/ Micki Earwood

Micki Earwood

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, KAREN WILLIAMSON, on behalf of themselves and all others similarly situated, Plaintiffs, v. WAL-MART STORES, INC. Defendant.	Case No. C-01-2252 MJJ **DECLARATION OF PENNY ELKINS IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Penny Elkins, declare:

1. I am a 42 year old female living in Rio Rancho, New Mexico. I worked at four different Wal-Mart stores in Albuquerque, New Mexico, and one in Santa Fe, New Mexico, from September 1, 1993, until I resigned on November 13, 1999, to escape the discriminatory atmosphere fostered at Wal-Mart and directed toward its female employees.

2. I have been subjected to gender discrimination by Wal-Mart with regard to my compensation and work assignments. I have also experienced retaliation from Wal-Mart because of my use of the Open Door Policy.

3. I started working at Wal-Mart as a Sales Associate in the Electronics Department in 1993 and

was working as a Support Manager within a year. In June, 1996, I asked Scott Dragoo, the Store Manager, to be placed into the Management Training Program. My request was accepted, and I completed the Management Training Program in only three months, approximately half the typical time period allotted for training, in the fall of 1996. I then worked as an Assistant Manager until I resigned from Wal-Mart.

4. Although it was obvious from the day I started working at Wal-Mart that the atmosphere was sexually charged, with male management and hourly employees openly making sexually-related remarks about female customers and females in general, I did not encounter gender discrimination directed toward me personally until after I completed the Management Training Program in late 1996.

5. In January, 1997, I moved to another store in Albuquerque and started working there as an Assistant Manager. Within one month, Jim Gray, the Store Manager, assigned me to work as an Assistant Manager for Night Receiving, even though two male Assistant Managers, David Brown and Bill Burroughs, were next in line for assignment to Night Receiving. I ended up working in the undesirable Night Receiving position for approximately six months, which is far longer than most male Assistant Managers were required to work in Night Receiving. I asked Mr. Gray, the Store Manager, and Peter Abbott, the District Manager, numerous times to be transferred from Night Receiving, but they significantly delayed my return to a day schedule because they were accommodating a male Assistant Manager's desire to spend time with his children in the evenings. Even though I complained to Mr. Gray and Mr. Abbott that I was raising four children at

the time and wanted to spend time with them in the evenings, Wal-Mart unfairly prolonged the duration of my Night Receiving assignment.

6. I also began to realize that a number of male Assistant Managers that completed the Management Training Program with me, and even after me, made a higher salary than me. For example, Gavin Pearlman, who completed the Management Training Program with me, made more money than me as an Assistant Manager. In addition, I know Mehran "Danny" Hakhamian, an Assistant Manager who completed the Management Training Program after me, made more money than I did when he became an Assistant Manager.

7. In February or March, 1997, I asked Rick Adams, the Store Manager, for a merit raise because I had done a good job in cleaning up the night receiving area. Mr. Adams denied my request and told me that Assistant Managers never received merit raises. In the summer of 1999, however, I know that Todd Hildan, a male Assistant Manager, received a significant merit increase because he had cleaned up the night receiving area. When I visited the personnel office for a matter concerning my employment, I inadvertently saw Mr. Hildan's personnel records, which were laying in plain sight on a desk and which showed this merit increase. It became very clear to me that Wal-Mart paid me a lower salary than my male Assistant Manager counterparts and discriminatorily denied me merit raises because I am a woman.

8. In early 1999, I transferred to another Wal-Mart store in Albuquerque. Not long after working in this store, Peter Abbott, the District Manager, approached me and insisted that I transfer to the Santa

Fe, New Mexico, store. I resisted this move and told Mr. Abbott that such a move would decrease the time I could spend with my children in Albuquerque and it would be difficult for me to commute daily from Albuquerque to Santa Fe because our family only had one reliable car that my husband and I both used. Mr. Abbott became hostile and threatened to demote me from my Assistant Manager position if I did not transfer to the Santa Fe store. I was concerned about this threat and used the Open Door Policy to contact the Regional Manager and explain my situation. The situation was resolved, and I was able to stay at the Albuquerque store. Mr. Abbott, however, held a grudge against me and retaliated against me, as described later in this Declaration.

9. In the summer of 1999, George Wagner, the Store Manager, and Peter Abbott, the District Manager, ordered me and Mary Louise Linton, a female Assistant Manager, along with a male Assistant Manager Trainee, to work nights at the Santa Fe, New Mexico, store for approximately one month. We were told our task was to rip up old carpeting in order to set up the Ladies Department at the store. Even though neither I nor Ms. Linton were in charge of the Ladies Department in the Albuquerque store, Wal-Mart chose us instead of any of the male Albuquerque Assistant Managers to perform this bottom-of-the-barrel work. During my month of working nights at the Santa Fe store, I lived in a hotel in Santa Fe and rarely was able to reunite with my family due to my night schedule and the long drive from Santa Fe to my home in Albuquerque. I felt this assignment was directed by Mr. Abbott in retaliation for using the Open Door Policy.

10. Soon after I returned from my assignment at the Santa Fe store to the Albuquerque store, I received unjustified discipline or coaching from George Wagner, the Store Manager. Peter Abbott, the District Manager, had ordered Mr. Wagner to give me this coaching due to the poor shape of my department in the Albuquerque store. Since I had been on assignment at the Santa Fe store for one month, it had been impossible for me to properly service my department at the Albuquerque store. I believe that Mr. Abbott ordered this disciplinary coaching as retaliation for my previous actions in going over his head and using the Open Door Policy when he threatened to demote me for refusing to transfer to the Santa Fe store. Not only was this coaching retaliatory, it was discriminatory because male Assistant Managers rarely received coachings due to the poor status and mis-management of their departments. By receiving this coaching, I was not eligible for promotion for a year. After receiving this coaching, I used the Open Door Policy to complain to the Regional Personnel Manager, Debbie Moody, to no avail.

11. In August, 1999, Wal-Mart selected me to attend the year-end, week-long meeting in Dallas, Texas. All of the Wal-Mart Home Office executives were there, as well as Store Managers, Co-Managers and top Assistant Managers, including me, that were considered "Rising Stars." During one of the first events, I observed the Home Office executive team sitting in chairs on a stage. There appeared to be approximately 50 executives on stage, but I could only see one woman among them. When Thomas Coughlin, a Wal-Mart Executive Vice-President, gave his speech, he even acknowledged that there were

very few women executives and "promised" that Wal-Mart would address gender issues in the near future.

12. In November, 1999, I received an offer to work as an Assistant Manager at SteinMart, a discount retailer, in Albuquerque. I accepted the job at SteinMart and resigned from Wal-Mart, even though I took a $6,000 per year pay decrease. SteinMart told me in my interview that within a year I would be managing my own store. When I compared this opportunity to the gender discrimination directed toward me at Wal-Mart, it was an easy decision for me to abandon the higher Wal-Mart salary and six years of seniority I had accrued. During my exit interview process, I met with Larry [last name unknown], the new District Manager, and told him I would stay at Wal-Mart if he promised that I would be promoted to a Co-Manager position, which I was qualified for, within two years. Larry [last name unknown] would not make that promise. In contrast to Wal-Mart, SteinMart promoted me to the General Manager position at its Albuquerque store in approximately January, 2001.

13. If Wal-Mart could provide me the assurance that I would be given the chance to compete with males on an even footing for pay and promotional opportunities, I would consider returning to employment at Wal-Mart.

I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of New Mexico that the foregoing is true and correct.

This Declaration was signed by me on April 16, 2003, at Albuquerque, New Mexico.

/s/ Penny Elkins

Penny Elkins

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, KAREN WILLIAMSON, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF SHIRLEY ERVINE IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Shirley Ervine, declare:

1. I have personal knowledge of each and every fact set forth in this Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

2. I was employed by Wal-Mart, Inc. at Store No. 2099 in Paso Robles, California from August 8, 1994 through September 11, 2001. I am female.

3. At the time of my application to Wal-Mart for employment, I had significant retail management experience running garden centers. On my application and during my initial interviews, I expressly requested work in the garden center. I was told that a male had already been hired as head of the garden

department so that this position was not available to me.

4. After I was hired, Wal-Mart initially assigned me to the fabric department. During the seven years I worked at the Paso Robles store, the fabric department was comprised exclusively of female associates and there was never a male department manager.

5. My initial rate of pay was $6.00 an hour. After my 90-day review, I was given a 25 cent raise so that I was now earning $6.25 an hour. During that first year, I was moved from the fabric department to the toy department to the garden department. In May 1995, I was given a merit raise of 25 cents for my excellent performance in the garden department. In July 1995, I received an "above standard" rating on my first annual evaluation and was given a 40 cent raise. This brought my pay rate to $6.90 an hour.

6. While I was working in the garden department, I learned through the grapevine that the department manager, Steve Romo, was being moved out. The garden department manager was the position that I had first applied for. I still wanted it very much so I took my resume to Assistant Manager Michael Denham and told him that I was interested in the position. The job was not posted and I did not know any other way to make my interest in the position known.

7. Despite having given my resume to Assistant Manager Denham and telling him expressly that I wanted the position and despite my excellent performance in the garden department, I was never interviewed for the job. Instead it was given to Troy Clark, a newly hired male associate who appeared to

be about 25 years old. At the time, I had more than five years previous experience working in garden centers, including two years as Assistant Manager at Pacific Home Improvement, three years as a sales associate for Pacific Coast Garden Center, seasonal work with Tree Man, and approximately one year as a cashier at the Miramar Naval Air Station, which required knowledge of the various plants and garden products sold.

8. In approximately September 1995, Assistant Manager Debbie Smith informed me that the department manager position was open in the pets department and asked me if I wanted the position. The job was not posted. I did not formally apply for the position or interview with anyone. I just told Assistant Manager Smith that I wanted the position and that is how I became department manager over the pet department. I received a 60 cent raise so that my hourly rate as a department manager was $7.50.

9. In approximately May 1996, Store Manager Mike Martin asked me if I would be department manager over the garden department after the current manager moved out of that position. The job was not posted and I did not formally apply for the position or interview with anyone. I just told Store Manager Martin that I would accept the position and that is how I finally became department manager in the garden department. The Associate Commendation Form approving this move states "Shirley is being given another challenge of taking on dept. 16 because of the hard work you (sic) have done. Thank you. I appreciate it." (True and accurate copy attached as Ervine Exhibit A) I received a 50 cent raise with this move which brought my hourly rate to $8.00

10. One of my responsibilities as the garden department manager was selling soil, bark and statuary. This merchandise arrived by truck on pallets and needed to be unloaded in a corral. This often required the use of a forklift. During my employment at Wal-Mart, I observed many men being trained to drive the forklift, including but not limited to Assistant Manager John Gatlin, associates Marvin Lee and Harry Balsom, and associates Abel [last name unknown], Billy [last name unknown] and OJ [last name unknown] who were overnight stockers. When I asked Store Manager Nick Sigala to allow me to be trained on the forklift, he refused.

11. After Store Manager Sigala denied me training to operate the forklift, I sought and obtained operator safety certification on my own from the company that serviced Wal-Mart's forklift, Graylift. (True and accurate copy attached as Ervine Exhibit B.) When I gave a copy of my Certificate of Achievement to Store Manager Sigala, he threw it on the desk and told me to leave his office. Throughout the time I ran the garden center, Store Manager Sigala continued to deny me training on, and use of, the forklift. As a result, I was forced to find a male associate to unload the pallets of soil, bark, and statuary from the delivery trucks whenever the delivery trucks did not provide that service. During the seven years I was employed at the Paso Robles store, I only observed one female associate operate the forklift and she was the Overnight Assistant Manager.

12. During the time I was garden department manager, the Home Office in Bentonville recognized the Paso Robles garden center as No. 1 in the Company for sales of Rubbermaid Sheds and awarded the garden center $500. On January 26, 1998, Divisional

Vice President Kendall Schwindt sent me a letter of congratulation, informing me that I had been selected to represent my district in the company-wide Lawn and Garden Seminar in Kansas City, Missouri. (True and accurate copy attached as Ervine Exhibit C.) At this end-of-the-year meeting, the Paso Robles garden center was listed as No. 1 in the Company for sales of Murray Log Splitters. I found it ironic that my Divisional Vice President considered me qualified enough to represent my district at a nation-wide company seminar while my Store Manager did not think me capable of operating a forklift.

13. In July 1996 and July 1997, I received "above standard" performance evaluations as garden department manager. In July 1998, I was ranked as "standard." However, despite my consistently good performance during these three years and the superior ranking of the Paso Robles garden center when I was the department manager, I received only one merit raise for 25 cents an hour and what I considered to be only meager annual raises: 40 cents, 43 cents, and 37 cents, respectively. After four years with Wal-Mart, my pay rate was still under $10 an hour at $9.55.

14. In approximately April or May 1999, TLE Manager Jill Sinclair asked me if I was interested in becoming a support manager in the Tire Lube Express center. This is an hourly position. I applied for this position on the computer. I interviewed with TLE Manager Sinclair and she later informed me that I received the position plus a 50 cent raise, which brought my hourly rate to $10.05.

15. During the two years I worked in the TLE center, I was ranked either "above standard" or "meets expectations" on my evaluations but the an-

nual raises I received were still less than I felt I deserved based on my performance: only 50 cents and 44 cents, respectively. I also received two merit raises, one for 25 cents and the other for 35 cents. After six years with Wal-Mart my pay rate was $11.59 an hour.

16. The TLE support manager position is the highest position I held with Wal-Mart and the last time anyone "tapped" me for promotion.

17. None of my store managers ever talked to me about Wal-Mart's Management Training Program or offered me any other promotions. There was nothing posted anywhere in the store that informed interested employees on how to apply for management training or management opportunities. The Management Training Program was not discussed at the daily store meetings I attended. I never saw any application or was told how to apply for the Management Training Program or any other management opportunity.

18. When I first became a Wal-Mart employee, I had retail management experience and I was interested in management opportunities at Wal-Mart. I was excited about making a career with a company as successful as Wal-Mart, a company in which I owned stock. However, after observing the number of assistant managers and management trainees assigned to the Paso Robles store and the frequency with which they transferred to other stores, I learned that Wal-Mart required its store level managers to relocate. Because I owned a home, had three children and a husband, I was not able to relocate.

19. When a female management trainee who was visiting our store asked me how high in the Company I was planning on going, I told her a sup-

port manager position because they did not have to move. This woman did not refute my understanding of the relocation requirement and she definitely did not inform me that Wal-Mart had a "resident assistant manager" program that provides for the training and promotion of assistant managers within the same store.

20. I did not learn about the "resident assistant manager" program until sometime in 2001, the last year of my employment with Wal-Mart. I learned about the program through the grapevine, not by having observed an Assistant Manager become an Assistant Manager through the resident assistant manager program. By then, I had become so disillusioned by the way I had been treated and the lack of opportunities for women at Wal-Mart that I decided there was no future for me there.

I declare under penalty of perjury of the laws of the United States and State of California that the foregoing is true and correct.

This Declaration was signed by me on March 11, 2003, 2003, at Atascadero Ca.

/s/ Shirley Ervine

Shirley Ervine

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES,
PATRICIA SURGESON,
CLEO PAGE,
CHRISTINE
KWAPNOSKI,
DEBORAH GUNTER,
KAREN WILLIAMSON
AND EDITH ARANA, on
behalf of themselves and
all others similarly
situated,

Plaintiff,

vs.

WAL-MART STORES,
INC.,

Defendant

Case No. C-01-2252 MJJ

DECLARATION OF GINA ESPINOZA-PRICE IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I, Gina Espinoza-Price, declare:

1. I make this statement on the basis of my personal knowledge, and, if called as a witness, could and would testify competently to the facts herein.

2. I was employed by Wal-Mart, Inc. from November 1990 through April 1997. I worked as a sales associate, Personnel Manager, and overseeing operations for Wal-Mart's One-Hour Photo Division in Wal-Mart stores in California, Arkansas, Michigan, Indiana, Illinois, Wisconsin, Canada and Mexico. I am female.

3. I supervised census-interviewers for Imperial County, California during the 1990 United States census count before working for Wal-Mart. I

applied for a position with Wal-Mart after reading an article about Sam Walton in Fortune magazine. I was impressed with Mr. Walton's "Our people make the difference" motto. After finishing the article I thought that Wal-Mart sounded like a wonderful place to work.

4. In November 1990, I was hired by Wal-Mart as an hourly associate in the Hardware Department of a Wal-Mart store in El Centro, California. I applied for a Hardware Department Manager position but a man, David Caudillo, was given that job.

5. In February 1991, Co-Manager John Sablan asked me if I would be interested in a Personnel Manager position. The position was not posted. Later that day, I met with Co-Manager Sablan and Store Manager Phil Lopez. They told me that they were impressed with my work and offered me the position without interviewing me. I accepted the position because I was interested in moving up within Wal-Mart.

6. In February 1992, Store Manager Norman Banwarth told me that Photo District Manager Matt Tankersley was looking for candidates for a salaried Photo Lab Department Manager position for the El Centro store. The position was not posted. Store Manager Banwarth told me that he had recommended me for the position and if I wanted, I could meet with Photo District Manager Tankersley to talk about it. Several days later, Mr. Tankersley and I had an informal meeting in the snack bar of the El Centro store. In that meeting he offered me the position, which I accepted. Belen [last name unknown], a female photo lab technician, told me that she did not understand why the position was not posted because

she would have applied for the position had she known about it.

7. In February 1992, I went to Bentonville, Arkansas for training on Wal-Mart One-Hour Photo Division policies, management procedures and equipment operation. When I arrived at the Home Office for a meeting, I saw a list of Wal-Mart senior management on a wall in the main hallway. Of approximately fifty names, I can recall only one name that appeared to be a woman's. I remember thinking, "I'll change that." My goal was to one day be listed on that wall.

8. I was willing to transfer to any Wal-Mart location in the United States, Canada, or Mexico if it meant that I would continue to receive promotions. In February 1992, while I was at the Wal-Mart Home Office for training, I was given a form to complete which asked where in the United States I was willing to transfer. I checked the boxes next to every region in the country to indicate that I was willing to move anywhere in the United States if it would help advance my career with Wal-Mart.

9. By summer 1992, I was helping Wal-Mart set up One-Hour Photo Departments in new stores across California. In the training I received at Wal-Mart's Home Office and from Wal-Mart manuals, I was taught that Wal-Mart polices and practices were to be applied consistently in every Wal-Mart store. Additionally, I was trained that the policies and procedures for matters such as hiring, employee training, operations of the photo lab equipment, opening and closing departments, cash registers, and customer service were to follow the same guidelines in every Wal-Mart store.

10. In May 1993, Photo District Manager Matt Tankersley told me that he was recommending me for an open Photo Division District Manager position. The position was not posted. I was interviewed for the position in Indiana by a Regional Manager and Customer Service Manager Diane Ault. The next week I was offered the position, which I accepted.

11. In July 1993, I moved to Lansing, Michigan to begin working as a Photo Division District Manager for the District comprising Michigan and northern Indiana. I was also responsible for a Wal-Mart Specialty Division Distribution Center located in Lansing, Michigan.

12. Initially I was given a Specialty Distribution Center operations manual by my assistant Ms. Miller. I found that this manual did not provide me with sufficient guidance for operating a Wal-Mart Distribution Center. Over time, I developed written guidelines for managing Wal-Mart Specialty Distribution Centers and rewrote the manual. I sent the rewritten manual to Mike Johnson, District Head of Wal-Mart Distribution and Safety, whose offices were in Bentonville, Arkansas. He told me that the manual was very good and sent a memo to all of the One-hour Photo District Managers stating that they should call me if they had questions about Specialty Distribution Center operations. At the annual meeting of all of the photo District and Regional Managers in Fayetteville, Arkansas in the Spring of 1994, Mr. Johnson asked me to stand up and speak about Specialty Division Distribution Center operations.

13. In fall 1993, the Director of Wal-Mart's One-hour Photo Operations, David Rogers, sent me to Pennsylvania, to train One-hour Photo District

Manager David Scott, in the Specialty Distribution Center operations that I had, in part, developed.

14. In approximately October 1993, Regional Photo Manager Joe Lisuzzo told me that Wal-Mart was placing me on a transition team in Canada to convert Woolco stores to Wal-Mart stores. I was the only woman in a team of five. I did not apply for this position and it was not posted. This assignment was to be completed in addition to my tasks as Photo District Manager of Michigan and northern Indiana. I accepted the assignment. I knew that it would be difficult to supervise Wal-Mart stores and a Distribution Center in the United States while helping to establish new stores in Canada. I wanted to be promoted by Wal-Mart and I thought that by performing difficult tasks and traveling extensively Wal-Mart would see that I was a hard-worker and that I was committed to the Company. At the time, I aspired to be Regional Photo Manager.

15. In approximately February 1994, Director of One-hour Photo Operations David Rogers advised me that Wal-Mart needed me to help supervise a photo lab equipment change in Chicago, Illinois. Like the assignment in Canada, this task was to be performed in conjunction with my tasks as the Photo District Manager of Michigan and northern Indiana and Wal-Mart stores. During this time, I was also still traveling to Canada as a part of the transition team.

16. In approximately February 1994, during a conference call of Wal-Mart Photo District Managers, One-hour Photo Divisional Manager Joe Lisuzzo announced the promotion of Photo District Manager David Scott to Regional Photo Manager. The position had not been posted. And I had been given no oppor-

tunity to express interest in the position. After the conference call ended, I called Director of One-hour Photo Operations David Rogers and asked why the open Regional Photo Manager position had not been posted. Mr. Rogers did not answer this question but stated that Wal-Mart needed me in Chicago. I then asked if any one besides Mr. Scott had interviewed for the position. Mr. Rogers did not respond. I felt that I was not considered for this position because I am a woman. I believe that I was much more experienced that Mr. Scott. I had gained personnel experience while working as a Personnel Manager. I had worked for Wal-Mart for a longer period of time than Mr. Scott. I had even trained Mr. Scott in the fall 1993 on Specialty Distribution Center operations. I believe that since I had created most of the Specialty Distribution Center operations that were beginning to be used more and more consistently in Wal-Mart Specialty Distribution Centers across the United States and Canada, I was an excellent candidate for this position. Because of my qualifications, I thought that I should have had at least an opportunity to interview for the Regional Photo Manager position.

17. In approximately October 1994, Clay Usseleton, Regional Photo Manager, asked me to come to Bentonville, Arkansas to interview for an open Regional Photo Manager position in California. I understood that I was being considered for this position because I had complained about not being interviewed for the last open Regional Photo Manager position. After arriving at Wal-Mart's Home Office, I met with Director of One-hour Photo Operations Rogers and Photo Personnel Manager Barbara Kulwicki. During the interview, Mr. Rogers began to describe the position as an international position that would involve opening stores in Mexico. This puzzled

me because I thought that the position I was interviewing for was in California. Mr. Rogers told me that the California position had already been filled. I begrudgingly accepted the District Manager position in Mexico because it would allow me to live in San Diego, California, two hours from my family. Also, I believed that if I declined the position, I would not be considered for other promotions. After leaving the meeting, I called Mr. Ussleton. Mr. Uffleton told me that the Regional Photo Manager position in California had been given to a man, Jeff Gwartney who had been hired by Wal-Mart approximately two years earlier as a photo lab manager and promoted to a District Photo Manager position approximately one year later. I had been with Wal-Mart for four years. I believe I was not considered for this position because I am a woman.

18. From fall 1995 until March 1997, I was the Photo District Manager of Mexico and eight Wal-Mart stores in the San Diego area.

19. Male Photo Division Management behaved in ways that demeaned and belittled women and minorities. In fall 1996, there was a Photo District Manager meeting in Valencia, California. Wal-Mart had just hired a second female Photo District Manager for the western region, Linda Palmer. During dinner, Jeff Gwartney introduced all of the District Managers to Ms. Palmer using nicknames for the minorities and women. I was introduced as Gina, "the little Mexican princess." I was very offended by Mr. Gwartney's comment and left the dinner early. Throughout the meeting, men made sexual statements and jokes that I thought were very offensive. For example, a flyer with an offensive joke about women being stupid was left on my belongings. In

February 1997, during an evaluation, I complained to One-hour Photo Divisional Manager Joe Lisuzzo about harassment based on gender at the previous Photo District Manager meeting. He replied that he would take care of it. I knew from trainings on Wal-Mart's sex harassment policy given by Wal-Mart Legal Department employee Canetta Ivy that company policy mandates that when someone complains of sexual harassment, an investigation must begin within twenty-four hours. Therefore, I expected to be interviewed as a part of an investigation. I was never called. A couple of weeks later, in March 1997, I saw Mr. Lisuzzo at a meeting. I asked him if he had been conducting an investigation of my sexual harassment complaint. He replied that it was being taken care of. I was never aware of any action taken in response to my complaint. Six weeks after complaining about sexual harassment, I was terminated.

20. In March 1997, Director of Photo Operations, David Rogers, called and told me that I was being placed in the position of International Liaison of the Photo Division. The position was not posted and I was offered the position without having to interview for it.

21. Wal-Mart terminated me in April 1997, falsely claiming that I had interfered with a loss prevention investigation. On April 1, 1997, I received a phone call from Stephanie Agnew, a Photo Center Manager in a Lakeside, California Wal-Mart store. Ms. Agnew had been contacted by loss prevention for taking prints from the store without paying for them. Ms. Agnew told me that she had been testing the photo equipment by developing some of her film with it, a procedure that was often used to check machines. When she was leaving the store, Ms. Agnew

had said, she was unable to find the store manager so she was unable to notify him that she was taking prints without paying. I told her that she should have told someone that she was taking the prints. I then called Regional Photo Coordinator Jeff Gwartney and told him what had happened. I was on vacation and I notified him so that he could begin an investigation of the incident. Later that week, I returned to my home store in San Diego, California to find Ms. Agnew working there. Ms. Agnew normally works in the Lakeside, California store. She told me that Mr. Gwartney had told her to work in the San Diego store. I was surprised that Ms. Agnew had not been suspended because Wal-Mart policy is that anytime there is an investigation for a breach of integrity, the employee under investigation is to be suspended. I called Mr. Gwartney to ask if the investigation was finished and he told me it was not. I then asked why Ms. Agnew had not been suspended and he directed me to suspend her, which I promptly did. Mr. Gwartney assured me that he would handle the investigation. On April 11, 1997, Mr. Gwartney called me into his office and told me that I was being terminated for lack of integrity because I interfered with a loss prevention investigation. The reason given by Wal-Mart for my termination is false and contradictory to my actions, as my actions initiated and facilitated the investigation.

22. For the six and one-half years that I worked for Wal-Mart, I was an extremely valuable asset to the company. I created operations for Wal-Mart's Specialty Division Distribution Centers that would eventually be used around the country. I played a key role in establishing the One-hour Photo Centers in new Wal-Mart stores throughout the United States, Canada, and Mexico. All of my performance

evaluations rated my performance level at least "exceeds expectations." (Attached hereto is a true and accurate copy of 1997 Management Performance Appraisal as Espinoza-Price Exhibit A.) I believe that I was terminated for complaining about sexual harassment, and because I am a woman who wanted to be promoted within Wal-Mart. I believe that Mr. Gwartney, who terminated me, was especially resentful of my promotions and my use of the Open Door. When I was promoted to International Liaison for the Photo Division, I called to ask him a question about how I would divide my time between supervising San Diego and international stores. He was silent for a few moments and then stated that no one asked him if I should be promoted to this position. His reaction led me to believe that he resented my promotion and did not want to see a woman who had complained of his sexist conduct promoted.

23. I would be willing to consider returning to Wal-Mart if I could be assured that policies that afford equal opportunities for women to advance in the Company would be fairly enforced.

I declare under penalty of perjury of the laws of the United States and State of America that the foregoing is true and correct.

This Declaration was signed by me on April 17, 2003, at San Diego, CA.

/s/ Gina Espinoza-Price

Gina Espinoza-Price

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF BRENDA EVANS IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Brenda Evans, declare:

1. I make this statement on the basis of my personal knowledge, and, if called as a witness, could and would testify competently to the facts herein.

2. I started working at Wal-Mart, Inc. in 1986 as a cashier at the Jackson, Mississippi Sam's Club. In 1992, I was promoted to Cashier Operations Supervisor ("COS"), and promoted again in 1998 to Front End Area Manager. I became Receiving Area Manager in 2000. During my sixteen years at Wal-Mart, I always worked at the Jackson, Mississippi store.

3. In mid-1997, I along with various other women, including Patricia Barnes, and Dorothy

Greer, complained to our General Manager, Travis Malone, that only men were being promoted to store management positions, such as area and assistant manager positions. We met with Mr. Malone for about ten minutes, asking him about why only men were being promoted, and all he said in response was that at the last Club where he worked, the women had also talked to him about the same problem. He had no other response and did not do anything else about our complaints. The Home Office in Bentonville, Arkansas, became aware of our concerns, because soon thereafter, the Home Office sent representatives to our store to discuss giving more women promotions. The group from Bentonville was at our store for two days, and talked with a number of the women employees, including myself, about promotion opportunities. It was only after all this that I received a promotion to salaried management.

4. After I become Front End Area Manager in 1998, I often asked my General Manager, John Woodall, about advancement opportunities. I had told him repeatedly that I wanted to become an Assistant Manager, and he responded by saying that first I would have to learn both receiving and merchandising as an area manager. In 2000, after working as an area manager for two years, and after working with the company for fourteen years, I was asked to go to receiving and become an area manager there. The person who replaced me at the front end was named Robert Cathey, a male who had been hired as the receiving manager at the Jackson store one year earlier, in 1999. I had known that I would be moved to receiving, because Mr. Cathey had previously told me that he wanted to "switch positions" so that he could gain "front end experience." When I left the front end in 2000, I was making about

$25,000 per year. Soon thereafter, Mr. Cathey told me he was making about $35,000 a year as the Front End Area Manager. When I complained about this to Mr. Woodall, he laughed and denied that the pay disparity was true. Several months later, in about June, 2000, Mr. Cathey became a merchandizing area manager. Later, in April of 2002, right before I left Sam's, it was announced at a Monday morning meeting that Mr. Cathey was to become a business manager/assistant manager.

5. In 2002, after two years as Receiving Area Manager, I indicated to the new General Manager, Silvario Rodriguez, that I wanted to take the next step on my way to becoming an assistant manger and learn merchandising. Mr. Rodriguez responded by telling me to "keep up the good work." Mr. Rodriquez never expressed any intention to promote me. In fact, soon thereafter, Mr. Rodriguez asked me to move back to the front end, and told me that he wanted to do this in order to make room for Pelmer Alston, a male, who needed to learn receiving. Since I had already worked as a Front End Area Manager for more than a year, I did not believe this move was beneficial to my career. I was ready for a promotion to Assistant Manager, or to move into a merchandizing position. It was apparent that Mr. Rodriguez was not supportive of my career and that he would eagerly move me aside to benefit the career of a male employee. I refused to go back to this position. Upset and discouraged at being passed over again, I resigned.

6. I have worked at the front end of Sam's Club for fourteen years. During that entire time, I have seen that virtually all cashiers at Sam's are

women. Other parts of the store, such as the grocery department, were virtually all men.

I declare under penalty of perjury of the laws of the United States and of the State of Mississippi that the foregoing is true and correct. I signed this Declaration on April 19, 2003 in Jackson, Mississippi.

/s/ Brenda Evans

Brenda Evans

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, KAREN WILLIAMSON, on behalf of themselves and all others similarly situated, Plaintiffs, v. WAL-MART STORES, INC. Defendant.	Case No. C-01-2252 MJJ **DECLARATION OF DEDRA FARMER IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Dedra Farmer, declare:

1. I am a 32 year old female and live in Lawrence, Kansas.

2. During my employment at Wal-Mart Stores, Inc., I encountered discrimination based upon my gender with regard to compensation and promotions.

3. I worked at Wal-Mart from November 10, 1989 through December 31, 2002. My first job at Wal-Mart was as an associate in both the automotive and sporting goods departments. Throughout my tenure at Wal-Mart I was an associate in hardware, a sales associate in TLE (Tire Lube Express), a Department Manager of TLE, a TLE Manager, and a Department 1 (food) Manager. My starting pay in 1989 was approximately $4.45 an hour and I was

making $14.55 an hour when my employment ended at Wal-Mart on December 31, 2002. During my tenure at Wal-Mart I received a standard evaluation during the first year of my employment as an associate. Thereafter, I always received exceeds expectations or above standard evaluations while I was an associate. During the period of time I was a manager I always received 3.0 or above ratings.

4. I began to experience discrimination because of my sex once I became an associate in Division 6, which is also known as TLE. TLE is a division of Wal-Mart that performs basic oil changes, tire replacements, tire repairs, installs batteries, headlights, wiper blades and provides other minor automobile services to Wal-Mart customers. TLE also sells tires, batteries, oil, oil filters, air filters, head lights, replacement bulbs and automobile accessories.

5. I enjoyed working in TLE as I always had an interest in automobiles and their maintenance and repair, probably, in part, because my father was an automobile mechanic. I found the physical nature of the job invigorating and the seasonal changes in the work exciting. Once I started working in TLE, I intended to make advancement through the TLE Division my career with the ultimate goal of moving to the top level of TLE Division Management.

6. The TLE Division of Wal-Mart was male dominated. I worked in the TLE Division in the Manhattan, Bonner Springs, and Lawrence, Kansas stores. In each of those stores, the hourly associates were 90-95% males.

7. When I became a TLE manager, I was the only female TLE manager in my district. While I was a TLE manager there was one additional female who

was made a manager. I attended a training program for TLE managers. Less than 10% of the TLE managers at this school were female.

8. Soon after I became an associate in TLE, I decided that I wanted to be a TLE manager and I expressed that desire to my TLE Manager and my District Manager on numerous occasions. I first began showing an interest in becoming a TLE Manager in 1993 and for the next several years I witnessed male associates with less experience and less time with Wal-Mart being promoted into the TLE Management Training Program over me. I witnessed male associates being put into the training program who did not even know how to order supplies. I observed that 90-95% of the male associates who were put into the TLE Management Program were promoted from inside my store. These individuals were Jim Macmillan, Mike Mussleman, Frank Brown, Bob Zerskey, Will Gold and an individual named Bob who was from the Division 1 side of my store. These individuals were all placed in the Management Training Program either by my TLE Managers, Don Dennison and Mike Thompson, or my District Manager, Dave Runyon. I believe these individuals were placed in the Management Training Program over me because they were men and I am a woman. During the same time frame that these men were placed in the program, I received exceeds expectation evaluations, I was dedicated to Wal-Mart and I had expressed a desire to get into the program. Whenever I sought management's recommendations for the program, they would simply come up with some suggestion as to areas that I needed to improve in order to get into the program. These suggestions were vague and had no real basis in fact.

9. I complained of discrimination to a Shoes and Jewelry Regional Manger, Nancy [last name unknown], in 1996. I went to her to complain of discrimination with respect to my promotions because I had no success following my own chain of command. Prior to going to Nancy, I had previously requested entry into the Management Training Program from Don Dennison, my TLE Manager, and his successor, Mike Thompson, and Dave Runyon, my District Manager. A woman that I knew at Wal-Mart had suggested that I speak with Nancy even though she was a Shoes and Jewelry Regional Manager because she might be willing to listen to my complaint. Within 48-hours after having discussed my discrimination claim with Nancy, I was called into a meeting with Dave Runyon and Mike Thompson in which they told me they would never discriminate against women. Nevertheless, Mr. Runyon told me that he still was not going to promote me into the training program as he did not believe I was ready for the program. I asked him to simply give me a chance as I felt I was ready and he refused. He did indicate that he would let me interview with another District Manager in Kansas City and I agreed to do so. I met with the TLE District Manager in Kansas City, Paul, and the interview went well. During the interview, Paul asked me if I was willing to relocate to be a TLE Manager, and I told him I would relocate anywhere other than North and South Dakota. The interview with Paul occurred in July 1996, but I was not notified that I was admitted into the Management Training Program for TLE until October 1996.

10. Upon being admitted to the Management Training Program, I was informed by Mr. Runyon that I was being transferred to the Lawrence, Kansas store for training. I expressed my displeasure in

having to move my residence just for the training program and was told by Mr. Runyon that I could not train in my home store. I knew this was not a valid reason for me being sent to Lawrence as I had observed other men being trained in their home stores. Nevertheless, I did relocate to Lawrence, Kansas for the training program.

11. After I completed my training, I was assigned to the store in Bonner Springs, Kansas. I was aware of the condition of this store because I had previously been sent to the store to help "clean it up" as the TLE Department was in bad shape due to an incompetent TLE Manager who had been running the store. I was aware that the store was an old, small, understaffed and a low volume store and that it was not a store that you could ever be promoted from, because it did not do the volume necessary for one to progress in the company. I informed Dave Runyon of all of my concerns about the Bonner Springs store and told him that I did not feel that it was fair to send me to this low volume store. Mr. Runyon told me that I would only have to stay in this store for a short period of time. I was aware that, at the same time that I was being placed in this low volume store, other TLE trainees, all of whom were men, were being placed in high volume stores. The effect of being in a higher volume store is that the TLE Manager's bonus is based on the profit of his department which is always higher in a store with higher volume sales. Consequently, the new TLE Managers in the higher volume stores, at the time I was placed at the Bonner Springs store, all men, were making more money than me for doing the same or similar work. I felt that this was another form of discrimination that I experienced at Wal-Mart. The individuals that I know who were placed

into high volume stores on their first assignments as managers were James Scott, Jim McMillan, David McMillan, Rusty Goodmiller, Jared Budreau and Todd [last name unknown].

12. I requested a transfer from my District Manager, Dave Runyon, from the Bonner Springs store on numerous occasions. Time and time again my transfers were denied by Mr. Runyon while other male TLE trainees were placed in more profitable stores.

13. I was denied transfers to the Manhattan, Kansas and the Ottawa, Kansas stores. I learned of the openings at the Ottawa store and requested of my District Manger, Dave Runyon, a transfer to that store. Mr. Runyon's only response was "we'll see." The next time I inquired about the position it had already been filled and I was never even considered for this position. I asked Mr. Runyon why I was not considered and he indicated that I had not spent twelve months in the Bonner Springs store which was a requirement before transfer to another store. I know this was not a valid reason because the individual who was placed in the Ottawa store, Jared, only managed that store for three to four months before he was sent to manage the Junction City store which was an even higher volume store. I believe this is another form of discrimination as men were not held to these so-called "rules" when it came to their promotions while these "rules" were used against me, a woman, when I tried to improve my position in the company.

14. I also asked Mr. Runyon if I could transfer to the Manhattan, Kansas store when I learned of an opening in that store. The Manhattan store was also a higher volume store than the Bonner Springs store.

Mr. Runyon denied my request to transfer to that store claiming that I could not be a manager in that store because that was my original home store. However, I know that this was also an invalid reason as the individual that was placed in the Manhattan store as TLE Manager came from the Photo Department of the Manhattan Store. His name was Rusty Goodmiller.

15. In 1999, I became aware of the fact that the Lawrence, Kansas store, a high volume store, was terminating its TLE Manager and I requested a transfer to that store as TLE manager. The TLE Manager position was given to James Scott, a trainee with much less experience and competence in the TLE division than me. I know that he was given this position without interviewing for the job and that, in fact, this position was never posted and was only given to James Scott on the recommendation of the TLE Manager who was just fired. I believe that this was another form of discrimination exercised against me as I had been in the Bonner Springs store for the appropriate amount of time to train, I had improved the Bonner Springs store, and I was well qualified to run a large volume store, yet it was given to a less qualified male.

16. While I was a TLE Manager I was aware that the bonus potential was less in the Bonner Springs store than in the larger volume stores and I expressed my concern in that regard to my direct supervisor, Dave Runyon. My concern proved to be justified as it became clear to me while I was TLE Manager in the Bonner Springs store that the other TLE managers in my district, who were all in higher volume stores, were receiving larger bonuses than I was receiving. The Lawrence, Kansas store was one of

the highest volume stores in the district and the TLE Manager in that store would necessarily receive a higher bonus and have a better opportunity to be promoted up the TLE ladder.

17. After I was turned down for the transfer to the Lawrence store I determined that it was in my best interest to resign as a TLE Manager. I discussed this with Dave Runyon before doing so and again expressed my concern over the lack of promotional opportunities and the lower pay I would be receiving so long as I remained at the Bonner Springs store. No one at Wal-Mart offered me any alternatives to remaining at the Bonner Springs store, so I resigned as TLE Manager and transferred to the Lawrence, Kansas store as an associate.

18. I also believe that I was discriminated against in the way I was treated by upper management while I was a TLE Manager. The District Manager, Dave Runyon, and the Regional Manager, George Alderman, would frequently socialize with the male TLE Managers and would exclude me from the group. It was the practice of the Regional Manager, George Alderman, to take the TLE trainee and the TLE Manager to lunch when he was visiting the store where the TLE Manager worked. I observed Mr. Alderman engage in this practice in previous stores where I worked. The only time that I noticed that he did not take the TLE Manager to lunch when he visited a store was when I was the TLE Manager. I believe the different treatment I received from my District and Regional Managers was because I am a woman.

19. When I went to the Lawrence, Kansas store I was made the Department Manager for TLE and assisted James Scott, the TLE Manager. I essentially

ran the entire TLE Department for Mr. Scott. I chose to transfer out of that department due to my lack of desire to run the department for the TLE Manager. Mr. Scott was upset when I transferred departments as he was concerned that he would be unable to run the TLE Department without my assistance. Within several weeks after I moved out of the TLE area, Mr. Scott resigned. I was transferred to foods as a Department Manager and remained in that position until my employment at Wal-Mart ended. I continued to receive exceeds expectations on all my performance appraisals after I transferred to the Lawrence, Kansas store.

20. Apart from my own experience, I did observe other women at Wal-Mart being paid less than men with either similar or less experience. As an example, Louise Rails has been with Wal-Mart for over eight years and is still only making between $8.00-9.00 per hour. Louise Rails has never received a merit raise in her eight years even though she is a dedicated employee who is well respected for her work. Dennis Lowe, a man that worked for Wal-Mart with less experience than Louise Rails, received two merit raises in one year for a lateral move.

21. I raised the gender gap pay issue with Wal-Mart's CEO Lee Scott by sending him two e-mails, one on August 30, 2000, a copy of which is attached hereto as Exhibit 1, and the other on February 12, 2001, a copy of which is attached hereto as Exhibit 2. These e-mails raised several issues regarding the work environment at Wal-Mart as well as the equal pay for women issue. In response to my August 30, 2000 e-mail, Wal-Mart sent Brad Shaffner and Mel Stos to my store to discuss with me and Alis McKenna the issues raised in the e-mail. Eventually

Wal-Mart largely resolved the issues other than discrimination raised in the e-mail. Mr. Shaffner and Mr. Stos told Alix and I that they were going to run spreadsheets to analyze the gender pay gap and that they would get back to us after they ran the spreadsheets. One of the reasons I sent the February 12, 2001 e-mail to Mr. Scott was to follow up on Wal-Mart's promise to run spreadsheets on the gender pay gap issue since we had heard nothing on this issue since our meeting with Mr. Shaffner and Mr. Stos. No one at Wal-Mart has ever responded to our inquiry in the February 12, 2001 e-mail about the gender pay gap analysis. Wal-Mart never showed us any spreadsheets or even advised us if the spreadsheets were ever run or analyzed.

22. While employed at the Lawrence store there were approximately 25-35 department managers. Only four to six of the department managers were men and the remainder were women. There were approximately six assistant managers at the Lawrence, Kansas store and only one of those managers was a female.

23. On December 31, 2002, I was terminated from my employment at Wal-Mart. Originally I was told that I was being terminated because I "stole" time from Wal-Mart by taking too many breaks and that my breaks were too long. Later, when it became apparent that this was not true, Wal-Mart came up with a different justification, equally untrue. I believe that I was actually terminated in retaliation for my long standing complaints regarding the presence of sexual discrimination at Wal-Mart. I have complained of sexual discrimination since 1996 when I was being denied promotion opportunities. I continued to complain of sexual discrimination when I was

placed in the Bonner Springs store, when I joined this case as a class member (I was deposed in the case by Wal-Mart on August 30, 2002), and most recently when I supported a female employee of Wal-Mart who was making a sexual harassment complaint against Wal-Mart.

24. My support of the sexual harassment complainant was known to Wal-Mart management because the complainant informed the Store Manager that I was either a witness to the sexual harassment or that I had experienced sexual harassment from the same manager she claimed had harassed her. I did advise this particular female associate to use the Open Door policy when her complaints were not taken seriously by the Store Manager. She followed my advice and ultimately the District Manager investigated the complaint and terminated the male associate. It was after the upper management investigation of the sexual harassment complaints that the Store Manager fired me on December 31, 2002. I used the Open Door policy to appeal the firing to the home office. The Home Office told me that they were going to take the matter seriously, investigate and meet with me. They later informed me that they were going to affirm the termination and explained I was terminated for clocking-in early, not for taking too many breaks. I had never been coached or warned about the alleged clocking-in too early behavior and I was not given an opportunity to confront management about the new alleged basis for my termination.

25. I received numerous commendations throughout my career with Wal-Mart and never received a single coaching during the thirteen years that I worked for Wal-Mart. Different reasons being

given at different times for my termination, my long standing complaints about sexual discrimination, the timing of the termination in conjunction with my assistance to the female associate complaining of sexual harassment and my participation as a class member in this case, cause me to believe that I was terminated in retaliation for expressing my feelings about sexual discrimination at Wal-Mart.

26. After I stepped down as TLE Manager, I was approached on occasion by another female TLE Manager, Ann McCune, as to whether or not I would be interested in re-entering the TLE Management training program and I indicated to her that, as long as the discrimination against women in the workplace was occurring with respect to females progressing in management I would not be interested in being in the management training program. However, I told her that if Wal-Mart did change its discriminatory policies than I would be interested in being placed back in the management training program in Wal-Mart.

I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Kansas that the foregoing is true and correct.

This Declaration was signed by me on April 7, 2003 at Lawrence, Kansas.

/s/ Dedra Farmer

Dedra Farmer

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C 01-2252 MJJ **DECLARATION OF JENNIFER FURTADO IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, JENNIFER FURTADO, declare:

1. I have personal knowledge of each and every fact set forth in this Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

2. I was employed by Wal-Mart, Inc. from January 4, 1992 through March 5, 1999 at three different stores in New Hampshire and two different stores in New Mexico. I am female.

3. Wal-Mart was my first full-time job after graduating from high school. Although I started out as a cashier, I worked my way up to Department Manager, Support Manager and then into the Man-

agement Training Program. I was never promoted to an Assistant Manager position.

4. During my employment with Wal-Mart, I was never disciplined and my performance evaluations were always at least "standard" and most often "above standard" and "outstanding." On four separate occasions, I received "Great Job" Awards for "exceeding [Wal-Mart's] expectations above and beyond." (Attached as Furtado Exhibit A is a true and accurate copy of my January 1999 award.)

5. During the first six years of my employment, I was working mostly full-time while attending university full time as well. In May 1998, I obtained my Bachelor of Arts degree from the University of New Hampshire. At no time did any of the many different Store Managers I worked for inform me about Wal-Mart's First In Line Program. I later learned that this program allowed junior and seniors who were Wal-Mart associates to train as Company managers as a part of their educational program. Upon graduation, they would be " first in line" for an Assistant Manager position without having to go through Wal-Mart's internal Management Training Program.

6. During my first six years at Wal-Mart, I worked at stores in Derry, Somersworth, an Portsmouth, New Hampshire and in Albuquerque, New Mexico. I observed that both the operational and personnel policies and practices in each of these stores were the same. In addition to these four stores, I was often sent to other stores that were opening in New Hampshire as part of a "set up" team to ensure that the new stores were operating consistent with Wal-Mart policies and practices. Each store was linked directly to corporate headquarters in Bentonville, Arkansas through computers. The computers al-

lowed store management to receive daily recap reports from Bentonville that highlighted any problems areas that needed to be addressed. The Store Manager would review information from these reports with us each morning.

7. After graduation, I requested a transfer to New Mexico where I was employed again in the same Albuquerque store and also in the Belen store. The Belen store operated similarly to each of the other stores I had worked in. The same personnel policies and practices were in effect and it was linked to Bentonville through computers.

8. During the more than seven years I was employed by Wal-Mart, none of the jobs or promotions I attained were posted. Instead, I got the positions by expressing interest in them to a department or assistant manager after learning from other employees or personal observations that someone had quit, been fired or transferred. Sometimes I was preselected for promotion without even asking. For example, I was promoted from a stocker position to Department Manager in the Boys Department at the Derry store when Assistant Manager Michelle [last name unknown] asked me if I wanted the job and I accepted. I was promoted from a sales associate position to Department Manager in the Girls Department in the Albuquerque store when Assistant Manager Patty Hudson told me they were splitting that department off from the Infant Department and asked me if I wanted the job.

9. I began to seriously explore a management career with Wal-Mart when I spent my junior year as an exchange student at the University of New Mexico. Although no one ever informed me about the First In Line Program, I knew that Wal-Mart had a

Management Training Program from talking with Management Trainees who had been assigned to my stores, both in New Hampshire and New Mexico. While I was working in the Albuquerque store, I told Assistant Manager Patty Hudson that I was interested in the program. I also had several conversations with District Manager Peter Abbott about entering the Management Training Program. He told me that I should apply for it when I finished school. He also indicated to me that he thought I would be able to move through the program rapidly because I had so much experience. At the end of the school year, District Manager Abbott had to approve my request to transfer back to New Hampshire. On the form, he wrote, "This associate is an outstanding person[.] [D]oes a great job. Thanks." (Attached hereto as Furtado Exhibit B is a true and accurate copy of the Transfer Notice.)

10. When I graduated from the University of New Hampshire in May 1998, I decided to return to New Mexico to join the Management Training Program there. I called my former Store Manager from Albuquerque, Ken Estes, who informed me that Peter Abbott was no longer the District Manager. However, he offered to talk to the new District Manager, Larry Wilcockson, on my behalf. My transfer was approved in June 1998 and several weeks after returning to the Albuquerque store that I had originally worked in, I met with Mr. Wilcockson at his office in the Belen store. We discussed the Management Training Program. Shortly thereafter, in approximately July 1998, I reported to the Belen store to begin the program.

11. One of my co-trainees at the Belen store was Mike Estrada. Mr. Estrada was already in the

Management Training Program when I arrived. Mr. Estrada's training period was very short and he was promoted to an Assistant Manager position in the Belen store while I was still a trainee.

12. Part of my management training included helping the Albuquerque store where I was originally assigned move to a new building and re-open as a Supercenter. Although District Manager Wilcockson had told me initially that I would be responsible for the receiving area of the new Supercenter, I ended up "setting up" the Apparel Department while Assistant Manager Mike Maholic took over the receiving area. By the time the new Albuquerque Supercenter opened, I felt ready for promotion. All I lacked was training in the Receiving Department.

13. At the time it opened, the Albuquerque Supercenter was still in need of one Assistant Manager so I talked to Store Manager Estes about filling that opening after I completed the training program. Mr. Estes, the Set-Up Managers and the other Assistant Managers would joke with me an tell me to take off my "trainee" badge since I was already an Assistant Manager. Finally, I asked District Manager Wilcockson how much longer my training program would take and if he knew what store I would be going to. Mr. Wilcockson named several stores, including Espanola, which was a 3 to 4 hour roundtrip commute from my home.

14. In subsequent discussions with District Manager Wilcockson, I tried to convince him to assign me to the Albuquerque Supercenter. He told me that trainees were not allowed to become Assistant Managers in the same store they trained in. I did not believe this to be true since I was aware that my former co-trainee, Mike Estrada, had trained and

been promoted to an Assistant Manager in the same store. Nonetheless, I told Mr. Wilcockson that while I was willing to change stores, my circumstances had changed, that my husband had a job in Albuquerque paying more money than I was making, and that it did not make sense for us to relocate two hours away to Espanola. Mr. Wilcockson was very displeased with my unwillingness to relocate outside of the Albuquerque area.

15. Even though Store Manager Estes told me that he wanted to keep me as an Assistant Manager in the Albuquerque Supercenter, he said that the decision where I would be placed was within the control of the District Manager. At no point in time did he or District Manager Wilcockson inform me about Wal-Mart's Resident Assistant Manager program. This program allows associates to train for management and promote to an Assistant Manager position in the same store. Eventually, District Manager Wilcockson assigned a male, Robert Phillips, to the open Assistant Manager position in the Albuquerque Supercenter. Mr. Phillips, who had recently been hired from outside the Company and who was not required to complete the Management Training Program, was allowed to promote to an Assistant Manager position within the same store where he was currently working, just as Mike Estrada had been allowed to do.

16. Over the next few months, District Manager Wilcockson continued to be vague regarding when I would be promoted and to where. By now, I had been in management training for approximately sixteen to eighteen weeks. During this same time period, Wal-Mart realigned some of the Albuquerque stores into another district headed by Peter Abbott. I asked Mr. Wilcockson to talk to Mr. Abbott, my former District

Manager, to see whether he had any stores I could be assigned to. I was never offered an Assistant Manager position by District Manager Wilcockson or District Manager Abbott.

17. Although there were at least seven other Wal-Mart stores within a reasonable commute from my home, I was not able to determine whether there were any Assistant Manager openings in these stores because Wal-Mart does not post or advertise the Assistant Manager position in any manner. Management trainees are not allowed to "apply" for an Assistant Manager position after they complete the program. Instead, they must wait until the District Manager hand-selects them for placement. District Manager Wilcockson's refusal to allow me to relocate to another store in the Albuquerque area convinced me that I had no future with Wal-Mart.

18. In November 1998, after I had completed approximately twenty weeks of management training, I finally decided to talk to District Manager Wilcockson about stepping down from the Management Trainee Program. His only response was to tell me that I would lose my salary and GAP [geographic adjustment payment]. This confirmed my understanding that he had no intention of promoting me unless I agreed to relocate to the Espanola store. I subsequently asked Store Manager Estes to find an hourly position for me within his store.

19. After I was in the Management Training Program, I was taking graduate business courses at the University of New Mexico. One class, entitled "Organizational Behaviors and Diversity Awareness," required me to do a research project on the glass ceiling phenomenon. I decided to research whether gender balance existed in upper manage-

ment at Wal-Mart. To do this, I reviewed the Company's lists of Store Managers for each of the forty-one states for which data was available on the computer as well as its lists of District Managers, Regional Managers and Regional Vice Presidents. After printing out these lists, I counted the number of men and women on each list.

20. When I started this project, I thought that women were being held back at Wal-Mart by only one District Manager: Larry Wilcockson. After reviewing the data, however, I realized that the lack of female managers at Wal-Mart was a wide-spread Company problem, and not an isolated event. For instance, I counted only 286 female Store Managers compared to the 1742 male Store Managers, or 14% female. And the numbers were significantly worse the higher up the corporate ladder I investigated. At the Regional Manager level, I counted only two females out of 29, or 7%. I made pie charts to demonstrate the result of my research and gave an oral presentation to my class. (Attached hereto as Furtado Exhibit C are true and accurate copies of some of my data, pie charts and oral presentation for the glass ceiling project.) This research, combined with my own experience of being unable to advance at Wal-Mart, led me to leave the Company in March 1999.

I declare under penalty of perjury of the laws of the United States and State of Massachusetts that the foregoing is true and correct.

This Declaration was signed by me on April 23, 2003, at 6:36 p.m.

/s/ Jennifer Furtado

Jennifer Furtado

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF ANITA GALENTINE IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Anita Galentine, declare:

1. I make this statement on the basis of my personal knowledge and, if called as a witness, could and would testify competently to the facts herein.

2. I was hired to work for Wal-Mart at a Supercenter in Dublin, Ohio in May 2001. At the time I applied, I already had 20 years of retail and hotel managerial experience. Despite my past experience, I was hired as a Cashier making about $8.00 an hour. I asked about available management positions but they told me they only had cashier positions. They did not mention anything about the management training program or the possibility of advancing into management.

3. A few months later, still in 2001, I transferred voluntarily to a Wal-Mart Store in Cartersville, Georgia as a Sales Associate. Almost immediately, I expressed an interest in the management training program. I spoke directly with Assistant Manager Mark Hamby and Assistant Manager Keith [last name unknown]. I spoke with them informally on the sales floor, as well as individually in their offices. Mr. Hamby told me that he would be harder on me than anyone else. While he did not explain himself, I felt that he expected me to work extra hard to prove myself to him.

4. I could not locate any written information about the process of applying for management training. I was very goal-oriented and really wanted to find out more about moving into management. Later in 2001, I spoke with District Manager Rudy Sims and Regional Manager Tony Samples about moving up into management training. I spoke with them both informally on the sales floor and in separate meetings. Neither of them was very responsive and I did not feel they were taking my requests seriously. I reminded both of them of my 20 years of prior retail and management experience but they remained uninterested. I also spoke with Store Manager Fred Whitmer about my interest in advancing into management training. He told me I had to move to Inventory Control in order to learn the layout of the store. He immediately moved me into the position of Inventory Control Specialist. I was not interested in this position and did not receive a raise but I felt I had no choice if I wanted to move into the management training program. I never saw any men required to work in Inventory Control prior to entering the management training program. I did observe a male Grocery Manager named Ira [last name un-

known], who went directly into the management training program, without working in Inventory Control. In addition, a male Produce employee [name unknown] was allowed to enter the management training program without going through Inventory Control.

5. In the Fall 2001, Co-Manager Paul Davis began to subject me to a series of his own "tests" claiming they would demonstrate whether I was ready for management training. Because Wal-Mart did not provide any information about the process or requirements for admission to the management training program, I had no way of knowing whether these "trials" were, in fact, part of the process. For example, I was repeatedly ordered to re-set modulars and would often spend 14-15 hours at a time doing so. I was not paid overtime for these extra hours and, in fact, was specifically told that overtime was not allowed. Each time, Mr. Davis determined that I had completed the task incorrectly and forced me to take a day off from work without pay. I felt that these seemingly endless "trials" were intended to discourage me from pursuing a management position. In my observation, none of the other employees in my department, even those who had expressed an interest in management training (all males), were required to undergo these demeaning tests. I continued to stay late and work on my days off in the hope that I might be promoted to the management training program. It never happened.

6. When I left in December 2001, I was still an Inventory Control Specialist making $8.84 an hour. Despite my commitment and hard work, no one in management every completed a performance evaluation for me. I had received no coachings and contin-

ued to remain a diligent employee. On December 19, 2001, Mr. Davis terminated me for eating a $1.59 popcorn chicken in the workplace before paying for it. I regularly observed male employees doing the same thing for which they were never disciplined. I feel that I was terminated because I was very vocal and persistent in my interest in advancing into management training.

7. I am now employed with the State of Georgia as a Clerk II with the Department of Transportation.

I declare under penalty of perjury of the laws of the United States and State of Georgia that the foregoing is true and correct.

This Declaration was signed by me on March 16, 2003 at ______________.

/s/ Anita Galentine

Anita Galentine

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES,
PATRICIA SURGESON,
CLEO PAGE,
CHRISTINE
KWAPNOSKI,
DEBORAH GUNTER,
KAREN WILLIAMSON
AND EDITH ARANA, on
behalf of themselves and
all others similarly
situated,

Plaintiff,

vs.

WAL-MART STORES,
INC.,

Defendant

Case No. C-01-2252 MJJ

DECLARATION OF CATHERINE GORBA IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I, Catherine Gorba, declare:

1. I make this statement on the basis of my personal knowledge, and, if called as a witness, could and would testify competently to the facts herein.

2. I am female and a college graduate. I had eight years of retail management experience prior to working for Wal-Mart Stores. From 1990 to1998, I was a cashier for Sheetz and a Store Manager for Sunoco and Barber Oil Co., where I was responsible for personnel, profitability, ordering, and finances.

3. On May 26, 1998, entered Wal-Mart's Manager Training Program at the Indiana, Pennsylvania store. I remained in Indiana until October 1998, when I finished the Manager Training Program and

received a promotion to Assistant Manager of the Ebensburg, Pennsylvania Wal-Mart. I remained in the Ebensburg store until I resigned from Wal-Mart Stores on September 8, 2000.

4. I participated in the Manager Training Program with three other associates, two of whom were female, the other male. The two female management trainees and I had, on occasion, discussed our salaries. We affirmed that we were all earning the same amount. However, Lynn [last name unknown], one of the female trainees, showed both the other female trainee and myself the salary of the male manager trainee, Steve Dumm, on Wal-Mart's payroll computer system. I was shocked to learn that Mr. Dumm was earning considerably more than the two other female associates and myself. My pay rate as an assistant manager was $29,500, compared to the $32,000 Mr. Dumm was earning. Lynn, who like myself was earning $29,500, shared a similar background with Mr. Dumm. They both had worked at the same grocery store prior to entering Wal-Mart's Manager Training Program.

5. While participating in the Manager Training Program at the Indiana store, I was present at a manager meeting when my District Manager, David Rulli, stated that he was getting grief for not meeting his quota for female managers. His comment was consistent with his attitude toward me later in my employment. It was as if I had been hired as a token female rather than a college graduate with eight years of retail experience.

6. After I began working at the Ebensburg store in 1998, two male Assistant Manager Trainees, Bill Cogan and Larry McDermott, bragged to me their starting salaries were high. Mr. McDermott's

pay rate was $35,000, which was considerably higher than my salary.

7. In mid-1999, I was present when Vicki Stahal, Department Manager of Lawn and Garden, told acting Store Manager of the Ebensburg store, Jim Linsenbigler, about her interest in entering the Manager Training Program. I heard Mr. Linsenbigler tell her that she was not ready for training and that they should discuss it again at a later date. Mr. Linsenbigler confided in me a few weeks later that Ms. Stahal, who was several months pregnant at the time, would have too many responsibilities at home and he was skeptical that she could handle the rigors of a management position. In contrast, during that same time, I heard Mr. Linsenbigler publicly encourage a male hourly Associate, Duane [last name unknown], to pursue management opportunities. Mr. Linsenbigler often would discuss at manager meetings those he wished to see advance in the company. Dan [last name unknown], Department Manager of Electronics, as well as Jay [last name unknown], former Department Manager of Sporting Goods and current Assistant Manager, were also enthusiastically discussed by Mr. Linsenbigler at manager meetings. Throughout my tenure at Wal-Mart, I never saw Mr. Linsenbigler approach any equally qualified and interested female employees regarding promotion opportunities.

8. In March 1999, my Store Manager, Sandy Hill, changed my schedule so that I worked from 5:00 p.m. until 3:00 a.m. three days a week and from 3:00 p.m. until 2:00 a.m. two days a week. Ms. Hill and I agreed that because my daughter is diabetic and I needed to be with her overnight, it was acceptable for me to work through my lunch break so that I could

leave my shift an hour early on the days I was to work until 3:00 a.m.. I accepted this change in my schedule, despite the fact that I did not know why I was placed on a shift that was unique for an Assistant Manager. However, after working this shift for a few months, I grew concerned that I was not learning enough about the different areas of the store, which was slowing my promotability at Wal-Mart.

9. In July 1999, Mr. Linsenbigler took me aside and told me that I had no business working for Wal-Mart because I had a sick child at home. He questioned my ability to give 100 percent to Wal-Mart because my family needed me. He then stated, "Wal-Mart does not deserve to have someone like you working for them. Wal-Mart needs someone who can dedicate all her time and energy to the store." I was shocked and offended at his comment because I never had missed a day of work due to my daughter's condition.

10. Also in July 1999, I asked Mr. Linsenbigler for a day off from work so I could accompany my husband to the doctor. Despite my explanation of my husband's condition, Mr. Linsenbigler denied my request for the day off. When male Assistant Manager, Steve Dumm, asked Mr. Linsenbigler for extended time off to care for his wife during her pregnancy, Mr. Linsenbigler approved Mr. Dumm's time away from work. Furthermore, Mr. Linsenbigler, himself, had taken several days off from work to care for his ill mother.

11. As a result of these three concerns, I decided to use the Open Door. I approached my District Manager, Mr. Rulli, in July 1999. I told him my concerns regarding my schedule, the comment made by Mr. Linsenbigler about my need to care for my fam-

ily, and my denial of a day off to accompany my husband to the doctor. He responded that we could talk in greater detail later that day. When I returned at the requested time, I was surprised to see Mr. Linsenbigler at the meeting as well as Mr. Rulli's assistant, Barb [last name unknown], since I thought that my use of the Open Door meant our conversation would be kept confidential. Mr. Rulli told me at the meeting that I was to be pulled off the hybrid daytime and overnight shift that I had been working. He said that I would be informed later as to whether I would be required to work an overnight or daytime shift. Mr. Rulli did, however, agree that Mr. Linsenbigler should have granted my day off to accompany my husband to the doctor.

12. After several days had passed, Mr. Linsenbigler told me that I had to work an overnight shift from 10:00 p.m. until 7:30 or 8:00 a.m. Because of my daughter's condition, I could not work such a schedule. Furthermore, because of the retaliation I experienced for using the Open Door, I thought it futile to attempt to negotiate a new schedule. I instead took a voluntary demotion to Department Manager of Lingerie the following week to ensure that I only would be scheduled for daytime shifts. Despite my desire to continue to pursue management opportunities, I remained Department Manager until I left Wal-Mart Stores the following year.

I declare under penalty of perjury of the laws of the United States and State of Pennsylvania that the foregoing is true and correct.

I signed this on ________________, 2003 in Elmora, Pennsylvania.

/s/ Catherine Gorba

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, KAREN WILLIAMSON, on behalf of themselves and all others similarly situated, Plaintiffs, v. WAL-MART STORES, INC.,	Case No. C-01-2252 MJJ **DECLARATION OF EARNESTINE GORDON IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Earnestine Gordon, declare:

1. I am female and a current employee of Wal-Mart. I am African American and reside in Pittsburg, California

2. I have worked at the Wal-Mart store in Pittsburg, California, since 1992. I have worked both in Division 1, which is the main division, and in Division 6, which is the Tire and Lube Express (TLE) division. I was denied a raise when I was promoted to TLE Support Manager in 1998. I was denied information that would have allowed me to compete for a TLE Manager position, which I am very interested in and qualified for.

3. I was hired in 1992 as a Cashier in Division 1 for the winter holiday season. In March 1993, I was promoted to permanent status. From 1992 to 1994, I

worked in Division 1 as a Cashier, at the Courtesy Desk, and in Lay-Away. None of these positions were posted, and I was not interviewed. I was selected for each assignment by a manager.

4. In 1994, a Division 1 Customer Service Manager position became available. The position was not posted, but I knew it was available because the employee who held the position had left. Assistant Manager Ricky Robinson gave me the promotion without an interview. As a Customer Service Manager, I trained and supervised Cashiers, handled customer complaints, and kept all customer service departments stocked with necessary supplies.

5. In 1995, I was asked by Store Manager Rick Pace to return to the Courtesy Desk because the area was understaffed. I agreed, but I was unhappy to lose my supervisory duties. I started looking for a position elsewhere in the store.

6. I saw a position for TLE Cashier posted near the time clock. Even though the position was not an hourly supervisory job, I was interested because it paid more money. I was also interested in working in the TLE Division because it is a smaller division and I believed I would have more opportunities to prove myself and gain promotions. I applied for the Cashier position and was hired in approximately May 1995 after an interview with TLE Manager Matt Steigert. Shortly after I took the TLE Cashier position, the new TLE Manager, Scott Thomas, promoted me to Perpetual Inventory Specialist. I had not applied for the position. I held that position until approximately 1998, when my job title changed to TLE Department Manager. Although my job title changed, my job duties did not change substantially.

7. In approximately March 1998, TLE Manager Marco Campbell promoted me to TLE Support Manager. The position was not posted, and I was not interviewed. Although my job duties increased substantially, as described below, I did not receive a raise when I was promoted, and TLE Manager Campbell described the change as a lateral move.

8. As TLE Support Manager, my responsibilities included running daily computer reports, calculating time and service charges for automobile technicians, handling customer complaints, directing associates to the appropriate manager for specific issues, scheduling associates for work, and performing the duties of the TLE manager in his or her absence.

9. Early in my career at Wal-Mart, I became interested in a management position with the company. In 1993, I wrote on my annual performance appraisal that my goal was to "become a manager of a department and go on from there." (True and correct copy attached hereto as Gordon Exhibit A.) After several years of merit raises, promotions, and "outstanding" performance evaluations, I knew that I had proved myself as a valued Wal-Mart employee and I believed I could win further promotions. On my annual performance appraisal for 1998, I commented that I wanted to "learn more about the duties of TLE Manager." (True and correct copy attached hereto as Gordon Exhibit B.)

10. I never saw any written information about the job of TLE Manager. I never learned of a way to apply directly for the job of TLE Manager. I expressed interest in the TLE Manager position to three different TLE Managers during 1998 to 2002: Martin Vandenberg, Marie Perkins, and Michelle Notah. In response to my inquiries, all three manag-

ers told me that TLE Managers are required to relocate for training and placement. When I told each manager that my family responsibilities prevent me from relocating out of the Pittsburg area, each manager told me that the door to TLE management was closed.

11. No TLE Manager ever informed me of the Resident Manager Program, which I would have been interested in pursuing. I live with and care for my grandson, my mother, and my infirm husband, and my son and daughter frequently live with me as well. These responsibilities make it impossible for me to move away from the Pittsburg area. If I had been informed of the Resident Manager Program, I would have been very interested in pursuing a Manager job. If applications were available, I would have applied.

12. Since 1998, when I was promoted to TLE Support Manager, the TLE Department has had five new TLE Managers. I have never been encouraged to apply for any of the TLE Manager positions, even though I have received many "outstanding" and "exceeds expectations" evaluations and I have frequently performed the duties of the TLE Manager when he or she was away.

13. Wal-Mart had a short open application process for the Management Training Program in January 2003. Because I am currently the only morning Cashier in the TLE Department, I am not able to attend the morning meetings, where the application period was announced. If had known about the application period, I would have applied for a resident management training position.

14. On February 14,2002, I was demoted to TLE Sales Associate because I was not available to

work on Sundays because I attend church. My availability had never previously been a problem in the TLE Department. I currently remain a TLE Sales Associate.

15. I work in the same store as named plaintiff Betty Dukes. I have never heard other employees criticize Ms. Dukes' work performance. I have never had any complaints about Ms. Dukes' work performance.

16. I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and the State of California that the foregoing is true and correct.

This Declaration was signed by me on April 7 (month and day), 2003, at Pittsburg, California (city and state).

/s/ Earnestine Gordon

Earnestine Gordon

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF DEBORAH GUNTER IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, DEBORAH GUNTER, declare:

1. I have personal knowledge of each and every fact set forth in this Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

2. I was first employed by Wal-Mart, Inc. during the 1993 winter holiday season as a seasonal employee in Texas. I had previously met Sam Walton in Dallas and was very impressed with him and his Company. My full-time career with Wal-Mart began several years later in Southern California. I was employed from April 2, 1996 through August 25, 1999 at three different stores in Riverside, Perris, and Lake Elsinore, California. I am female. I

had more than twenty years' experience working in retail, including supervisory and management experience, prior to working for Wal-Mart. During the three years I worked at Wal-Mart, I was repeatedly denied training and management opportunities. I never obtained a department manager or support manager position, much less my goal of becoming a company leader.

3. I first learned about this lawsuit after watching a television news program during which a named plaintiff and her attorney were interviewed regarding Wal-Mart's employment practices. Everything she said about Wal-Mart was so similar to what I had experienced that I called the news station to get the number of the attorney who was suing the company. I wanted to do whatever I could to support a lawsuit that would end gender discrimination in promotion and pay and open up advancement opportunities for women at Wal-Mart. I became a named plaintiff myself because I too was unfairly denied promotional opportunities, training, and equal pay during my three years with the company. I want to change Wal-Mart's corporate culture and employment practices so that women have the same opportunity to advance with the company as men currently do. Through this lawsuit, I seek to hold Wal-Mart accountable for providing women with equal access to the training and mentoring necessary for promotion into the more desirable, higher paying positions; equal opportunity for promotion into store, district and regional level management positions; and equal pay for their work. I understand the responsibilities of a named plaintiff and class representative. I am prepared to fulfill my duties to the women in the class so that they achieve fair and equitable treatment. I am willing to return to Wal-

Mart if this lawsuit results in equal opportunities for women to advance in the company so long as Wal-Mart also ends its on-going retaliation against me and other women who have complained about its gender discriminatory practices.

4. My first job with Wal-Mart was in 1993 as a cashier on the Express Lane during the winter holiday season in Waxahachie, Texas. I was hired as a seasonal employee and worked approximately four months from October 1993 through January 1994. I worked under a female Store Manager, Wendy [last name unknown], and two female Assistant Managers, whose names I no longer remember. I was impressed that the store was run by three female managers and formed the impression that women could advance at Wal-Mart.

5. In approximately March 1996, I submitted a written application for employment with Wal-Mart. At that time, I was going to school and I had been working a variety of jobs through a temporary service. I had also earned my Certification as a Pharmacy Technician but had been unable to find work in this field. I decided to apply to Wal-Mart because I wanted a permanent job with a company that would offer stability and promotional opportunities. Wal-Mart also had a pharmacy.

6. The Personnel Manager of the Riverside store called me regarding an open position in the Photo Lab. I had three years of training in photography so I thought this might be an interesting opportunity. I was hired as a cashier in the Photo Lab after interviewing with the Photo Department Manager, Milford Pyles. I started out part-time on April 2, 1996 at the rate of $5.50 an hour. Wal-Mart defines full-time status as working twenty-eight hours

a week. In July 1996, I received a "standard" ninety-day evaluation and a 30-cent raise, which brought my pay rate to $5.80 an hour.

7. I was excited to begin my career at Wal-Mart. I learned everything I could about the Photo Lab and soon was able handle all aspects of photo processing. This proved to be a liability rather than an asset as I found myself working 12-hour shifts without a single break. I would complain to Mr. Pyles but staffing of the Photo Lab, especially on the weekends, continued to be a problem. I did not receive overtime pay when I worked these long shifts because I was still on part-time status.

8. On one of my shifts in October 1996, I began having chest pains. I asked Department Manager Pyles if I could be released from work to go to the hospital. Mr. Pyles refused to let me go because there were only two of us working the department that day. When I finished my shift, I went straight to the hospital where I was admitted and given nitroglycerin. My doctor then placed me on the medication Ativan and a two month medical leave. When I returned, I requested a transfer to a different department. I was interested in a nighttime stocking position because this would leave me free to continue my education during the days.

9. While I was working in the Photo Lab, I repeatedly asked Mr. Pyles and other Assistant Managers at the Riverside store for training on the Telzon machine, a hand-held computer that scans Wal-Mart merchandise for pricing and inventory purposes. It indicates what products have been reordered, which ones are discontinued, and what an automatic turnaround time will be from the warehouse. I wanted this training because I thought it

would help me advance in the company. My requests for Telzon training were denied. Eventually, I taught myself how to use the Telzon.

10. In February 1997, I was transferred to a stocker position on the night shift after interviewing with the Overnight Manager, Steve Martin. Mr. Martin told me that he had observed my work and he felt that I would be an asset to his shift. My hours during the winter were from 11 p.m. to 7 a.m. and during the summer from 12 a.m. to 8 a.m. In April 1997, I received my first annual evaluation. I was again ranked "standard" and received another 30-cent raise. I was then earning $6.10 an hour.

11. While working the nigh shift, I learned through the grapevine that male stockers were being paid more than female stockers. I also observed that men were most frequently assigned to the receiver position, which pays more than the stocker position. For example, a male co-worker on the night shift, David Williams, told me he was being paid $8.50 an hour. This was more $2.00 more an hour than I was being paid.

12. During the two years I worked on the overnight shift, Mr. Martin encouraged me to apply for Department Manager positions. He knew I wanted to excel with the company and he had told me that the way to get into management was by first becoming a Department Manager or a Support Manager.

13. I had also talked to District Manager Nick Fiello about my desire to become a manager and run a store some day. District Manager Fiello would joke with me during his store tours and once told me that maybe I would end up working in Bentonville, which is where Wal-Mart's corporate headquarters is located. He also told me that I needed to become a De-

partment Manager first and then bid on openings for higher positions as they became available.

14. While I was at the Riverside store, I applied three times for a Department Manager position in the Pets Department. I was very qualified for this position because I had been breeding and raising show dogs since I was a young woman. I had also worked in a pet store in approximately 1983. The first time I applied for the position, it was not posted. Overnight Manager Martin told me that it was becoming available and that it would be a perfect opportunity for me to begin my management training. I went to the Assistant Manager over the Pets Department, John [last name unknown] to express my interest in the position. He interviewed me and indicated that he was impressed with my experience. I did not receive the position. The second and third time that the Pets Department position became available, it was not posted either. I only learned it would be available when I heard from other associates that the current manager was stepping down.

15. At that time, there was no formal application process at the Riverside store. An employee applied by telling a specific manager that you were interested in the position. Despite having told Assistant Manager John [last name unknown] each time the job opened that I was interested and that I had many years experience breeding and raising animals as well as managing businesses, I was passed over three times; twice in favor of men, including Brandon Rapallo and another male whose name I have forgotten. None of these managers remained in the position for very long. Each time I was denied the position, I complained to Overnight Manager Martin and Store Manager Tracey O'Neal. Although Mr. Martin

supported me, Store Manager O'Neal simply told me that all applicants had been given a fair opportunity and that more experienced employees were selected. I believe the short length of time these candidates served in the position indicated their lack of experience and qualifications.

16. In March 1998, I received my yearly evaluation. I received a "standard" ranking. None of the Riverside associates received a raise that year because in February 1998, Store Manager O'Neal informed us that he would be implementing a store-wide cost of living adjustment. As a result, my pay rate was increased 30 cents to $6.40 an hour.

17. In May 1998, I requested a transfer to the Perris store. I was interested in moving closer to my home and returning to the day shift. I was also still interested in moving up in the company and feeling that there was no place for me to move to in the Riverside store. I told Mr. Martin that I would be willing to go to any of the nearby stores: Fontana, Moreno Valley, Perris. He said he would keep his eyes open for a position for me and later told me there were openings available in the TLE Specialty Division. I told him I was interested in the TLE and later the TLE Managers from both the Perris and Moreno Valley stores contacted me. Both Managers offered me a position in their TLE Departments. I accepted the position at the Perris store because it was closer to my home and because I knew the TLE Manager, John McCann, who had trained the year before at the Riverside store. Mr. McCann offered me a customer service/cashier position on the day shift at $7.00 an hour. My hours were 7 a.m. to 3:30 p.m.

18. When I began working in the TLE area of the Perris store, there was no Support Manager on the day shift. I quickly learned my own duties and those of a Support Manager as well. I learned what the specific duties of a Support Manager were from the TLE Night Support Manager, Beverly [last name unknown], and from TLE Manager McCann. These duties included setting up the register, counting the money, writing up orders, checking inventory and placing orders on the computers, assisting the TLE District Manager during store visits and TLE meetings, and servicing the customers. At some point, I asked Mr. McCann about whether there would be a day shift Support Manager position and expressed interest in it. He told me that he was trying to get a day Support Manager position and that I could fill it whenever TLE District Manager Mickey Anderson authorized it.

19. During the summer of 1998, TLE Manager McCann made some sexually explicit comments to me that upset me very much. I complained to Store Manager Kathy Bishop who initially was furious at Mr. McCann. However, during the meeting she arranged between TLE Manager McCann, TLE District Manager Mickey Anderson, her, and me, Mr. Anderson brushed off my claim of sexual harassment as a "misunderstanding." No disciplinary action was taken against TLE Manager McCann.

20. During the fall of 1998, TLE Manager McCann asked me to train a male associate, Dwayne Stockman, regarding the Support Manager's duties. I told Mr. McCann that I had been performing these duties for months without the job title or the pay increase. Mr. McCann again told me he would give me the position when it became available but that he

still wanted me to train Mr. Stockman so that I would have a back up.

21. I proceeded to train Mr. Stockman on writing orders, opening and closing the register, using the computer, and researching inventory. Shortly after that, Mr. Stockman was made the Support Manager on the TLE day shift rather than me. Instead, my hours were cut.

22. Some time later, Mr. Stockman was transferred to TLE Support Manager on the night shift and TLE Manager McCann asked me to train another male associate, Jason Devoe, for the Support Manager position. I reminded both TLE Manager McCann and TLE District Manager Anderson that I had been told that I would be given the Support Manager position. They both reassured me that I would be given the position but that they could not rely on me to be there "24/7" so that I needed to train a back-up assistant. I again did as I was asked and trained Mr. Devoe how to be a TLE Support Manager. Shortly thereafter, I was again denied the Support Manager position when Mr. Devoe was promoted into the job and my hours were cut.

23. Upon being denied the position a second time, I complained to Store Manager Kathy Bishop who told me that I needed to go back to TLE Manager McCann and TLE District Manager Anderson. When I asked Mr. McCann when I would be given the Support Manager position and a pay raise, he told me for the first time that I was not fully qualified for the position. This really angered me because I had asked Mr. McCann for additional training on the computer several times and he had always told me that he was too busy to train me.

24. In March 1999, I received a "standard" evaluation and a 4% raise that brought my hourly rate to $7.50. By now, working conditions in the TLE area of the Perris store had become very unbearable to me. Although Mr. McCann had not made any more sexually offensive comments to me, he had denied me training, denied me two promotions to a Support Manager position, cut my hours, and generally made me feel like there was no future for me in the Perris TLE. I felt I had no choice but to transfer stores again.

25. Fortunately, there was a TLE Management Trainee in the Perris store, Doug Clark, who had witnessed what I was going through and who asked me if I wanted to work in his TLE department once he finished his training. We discussed this several times before he was promoted to TLE Manager at the Lake Elsinore store. Once he transferred, I asked Mr. Clark again whether he was still willing to have me work in his department. He responded positively but said he needed about thirty days to get to know his new store and staff before he would transfer me in.

26. In May 1999, my transfer to the Lake Elsinore TLE Department went through. The Perris TLE Manager, John McCann, told me to my face that he was glad to get rid of me. At the Lake Elsinore store, I worked the swing shift, 3 p.m. to 9 p.m. In addition to the duties I had performed at the Perris store, I was now responsible for replenishing the floor before I went home. This meant walking the floor and refilling any oils or chemicals that were low. Aside from this duty associated with the swing shift, the TLE Department at the Lake Elsinore store operated exactly like the TLE Department at

the Perris store. Indeed, the policies and practices were the same at all four of the Wal-Mart stores I worked: Waxahachie, Texas and Riverside, Perris and Lake Elsinore, California.

27. On June 8, 1999, I was coached for failing to turn in a moneybag the prior evening. I believe this coaching was unfair. On June 7, I was on my way to turn the moneybag in when Assistant Manager Jim [last name unknown] ordered me back to the department to assist a customer. I hid the moneybag in a safe, concealed place under the register and attended to the customer. While I was assisting that customer, several more customers came in and I served them as well before clocking at the end of my shift. I did not remember the moneybag until the next morning when TLE Manager Clark questioned me about it. I apologized for forgetting to turn the moneybag in but no money was missing and it was an honest mistake. Mr. Clark said that he still had to write me up for the incident because TLE District Manager Anderson had ordered him to. This statement caused me concern and made me wonder if Mr. Anderson would continue to retaliate against me for having complained about TLE Manager McCann's sexual harassment of me and his refusal to promote me to the Support Manager position at the Perris store.

28. In approximately late July or August 1999, TLE Manager Clark asked me to train a male associate named "Pai" [last name unknown], of Asian heritage, on the TLE register and regarding other Support Manager duties. Mr. Clark informed me that "Pai" would be closing the TLE area on the nights when I was not working. I trained "Pai" as requested and then my hours were cut, just as had

happened after I trained Dwayne Stockman and Justin Devoe at the Perris store. I was furious and began complaining to Mr. Clark and other Assistant Managers at the Lake Elsinore store that I could not support myself on such reduced hours. In addition to losing wages, my benefits were also at risk of being cut if I did not work enough hours to qualify for coverage.

29. In mid-August 1999, I told TLE Manager Clark that he either had to give me my hours back or I would have to resign. I also called District Manager Anderson to request a meeting with him regarding my hours. At first TLE Manager Clark told me that District Manager Anderson would meet with me. Several days later, TLE Manager Clark informed me that District Manager Anderson was not going to meet with me and that my hours were not going to increase. He also had $800 in cash for me for my exit pay and an exit interview form for me to sign.

30. I believe I was terminated because I complained repeatedly to management when I was passed over for promotions in favor of men who were no more, or less, qualified than me and because I complained when I was sexually harassed by TLE Manager John McCann.

I declare under penalty of perjury of the laws of the United States and State of California that the foregoing is true and correct.

This Declaration was signed by me on April ,23 2003, at Perris, California.

/s/ Deborah Gunter
~~Debra~~ Deborah Gunter,
Declarant

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, KAREN WILLIAMSON, on behalf of themselves and all others similarly situated, Plaintiffs, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF SHEILA HALL IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Sheila Hall, declare:

1. I am a female, former Wal-Mart employee who began working at the Conway, Arkansas store in March 1994, while I was attending school at the University of Central Arkansas. My first position was in the Deli. During the summer, I transferred to the Columbia, Missouri store, where I worked at the Snack Bar. When I returned to school, I once again worked at the Deli in the Conway store. I transferred to Automotive briefly at the beginning of 1995, and moved to Toys in the summer of 1995.

2. The Toy Department was located next to the Hardware Department. I was often required to cover for Hardware when employees took lunches and breaks, and when they were called to the front

end to work as cashiers. For several months, I asked Support Manager Russ Roden if I could transfer from the Toy Department to the Hardware Department. I preferred working in Hardware, and I did not want to work in two different departments. My request was repeatedly denied. I was told by Mr. Roden, "We need you in toys . . . you're a girl, why do you want to be in Hardware?" Assistant Managers Joe Austin and Mark Tinney also made similar remarks when I discussed the transfer with them.

3. In the three or four months I spent repeatedly requesting to be transferred, several male employees with no previous Hardware experience, and less Wal-Mart experience than I had, were hired instead of me as sales associates in Hardware. Corey Kellybrew and Phillip Garrett were hired into the position I had been requesting for months.

4. Finally, exasperated by Mr. Roden's refusal to transfer me into the Hardware Department, I confronted him and said, "Just because I don't have a penis between my legs, doesn't mean I can't do the job." He moved me into the Hardware Department in February 1997. I did not work with any other women in the Hardware Department.

5. In the Hardware Department, I faced routine comments directed at my gender and my ability to work in Hardware. A male co-employee, Jeff Eskola, alluded to Hardware being a "man's job," and that women should not be doing a man's job. I used the "Open Door" policy and spoke to Store Manager Denny Ashley about Mr. Eskola's comments, and was basically told to "quit whining." After I complained, male co-workers snubbed me, and I was given more difficult tasks. This treatment lasted for several weeks. I chose not to use the "open door" pol-

icy with the Home Office in Bentonville, because I did not believe it would do any good, and I did not want any more retaliation.

6. In the spring of 1997, I went out of town with a male co-employee named Joel Dean. We both called in and informed our Assistant Manager, Paul Dehart, that we would not return in time for our next scheduled work day. Upon our return, Mr. Dehart met separately with both Mr. Dean and me. I was given a coaching for the incident, but Mr. Dean was not.

7. I received an "above-standard" rating on every annual evaluation given to me between 1994 and 1999, except for one. I received a "standard" rating on the only evaluations that was not "above standard." Assistant Manager Paul Dehart gave me a merit raise in 1996.

8. I was aware of men who had less experience at Wal-Mart, but were paid more than me. For example, Jo Jo Riggs started in 1996, but was paid significantly more than me. I know this because Mr. Riggs bragged about how much he made. Nick Engi, who started in 1995 was also paid more than me. On several occasions as late as 1999, Support Manager Mark Tinney said to me, "If you would wear lower cut shirts, you would probably get more pay." Mr. Tinney was eventually fired for sexual harassment after many years with Wal-Mart. He made these comments in front of other Managers, so I did not complain at the time because the managers knew and no one responded. I did not want to risk future retaliation.

9. In 1997, I finished school, and received my Bachelor's Degree in Communications from the University of Central Arkansas. I told my male Depart-

ment Manager, Chris Harrison, Assistant Managers Evelyn Dean and John Nichols, and Store Manager Denny Ashley, that I wanted to be a manager. Mr. Harrison and Mr. Nichols told me to talk to Mr. Ashley. Ms. Dean told me that Mr. Ashley "would never go for it."

10. When I approached Store Manager Ashley and asked him if I could join the Management Training Program, he laughed at me and said he did not think that I was the type of person who would work out well in management. When I asked what, specifically, I could do to increase my chances of becoming a manager, Mr. Ashley told me that I would have to get his recommendation to enter the Management Training Program, and that would not happen. Even though I had worked at Wal-Mart almost five years and had an excellent employment record, as reflected in my many "above standard" evaluations, Mr. Ashley told me I needed more experience.

11. In 1998, I was recruited by Lowe's Home Improvement store, which is a competitor of Wal-Mart. I commented at a grass roots meeting that Wal-Mart's competitors were paying significantly more, and Store Manager Ashley, said, "The way I see it, a whore for a quarter is a whore for a quarter." I used the "Open Door" policy and spoke with Evelyn Dean, a female Assistant Manager, about this comment. Shortly thereafter Mr. Ashley called me into his office and asked me if I was going to call the Home Office. In hopes of improved treatment, and for fear of retaliation, I told him that I would not.

12. During my Wal-Mart career, I applied for promotions such as Department Manager and Support Manager at least five times. I was passed over every time. For example, in early 1999, Tony De-

laney, an associate from the Lawn and Garden Department, was promoted to Support Manager, the same position for which I had applied.

13. I terminated my employment with Wal-Mart on October 15, 1999, which was the same day I was passed over for the Support Manager position. On this last occasion, a woman, Christy Gunter was promoted instead of me. Ms. Gunter was dating a Support Manager, Tony Delaney at the time of her promotion. Mr. Delaney is a male employee who had been promoted to the very same Support Manager position for which I had applied earlier in 1999. Store Manager Ashely called me at home to ask me why I quit, and to offer me a non-management position at another store. I declined.

14. I had worked at Wal-Mart for more than five years without a promotion, despite my exemplary work history. I quit because, based on my experience, I believed that I would continue to be denied opportunities for advancement in favor of male employees.

I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Arkansas that the foregoing is true and correct.

This Declaration was signed by me on April 14, 2003, In the City of Little Rock, State of Arkansas.

/s/ Sheila S. Hall

Sheila Hall

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, KAREN WILLIAMSON, on behalf of themselves and all others similarly situated, Plaintiffs vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF TAMMY HALL IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Tammy Hall, declare:

1. I make this statement on the basis of my personal knowledge and, if called as a witness, could and would testify competently to the facts herein.

2. While employed by Wal-Mart, I have also used the names Tammy Holloway and Tammy Hill. Prior to my employment with Wal-Mart I worked briefly for a vocational school. I graduated from a vocational technical school in 1984 and received a degree in business education. I was 19 years old when I started working full-time for Wal-Mart in 1986. In June 2001, I resigned from Wal-Mart because I no longer believed that I had the management support to be given a fair opportunity to be promoted to a store manager position.

3. I began work at a Wal-Mart Store in Cullman, Alabama in 1986, setting up the store and then as a cashier making $3.35 an hour. Almost immediately I expressed an interest in advancing in my career at Wal-Mart. In the "Career Goals" section of my six-month evaluation, I wrote that I wanted to "learn more about service desk and layaway and maybe one day be a CSM." Attached hereto as Exhibit A is a true and correct copy of my Associate Evaluation Form dated June 14, 1986. In another evaluation, I wrote that I "would like a chance to become a department manager." Attached hereto as Exhibit B is a true and correct copy of this undated Associate Evaluation Form from the same Cullman, Alabama Wal-Mart (although it is undated, I believe that it covered the 1986 to 1991 time period).

4. Between 1986 and 1991, I held several hourly positions at the Cullman, Alabama Wal-Mart Store, including Courtesy Desk Associate, Customer Service Manager, Department Manager of Foods, Department Manager of Health and Beauty Aids and Cosmetics, and Personnel Manager.

5. In my experience at Wal-Mart, I have heard several comments that I felt indicated negative attitudes towards women in management. While I was personnel manager at the Cullman, Alabama store in approximately 1990 or 1991, I overheard Store Manager David Christian telling another male assistant manager that all women should be "at home with a bun in the oven" and "barefoot and pregnant."

6. Whenever I expressed an interest in advancing in my Wal-Mart career, I was always told that in order to enter into the management training program, I would be required to relocate. I was told that I would have to be willing to go wherever Wal-

Mart needed me. Accordingly, as early as 1988, I expressed a willingness to relocate when I wrote that my career goals included "to travel and set up different Wal-Mart stores." Attached hereto as Exhibit C is a true and correct copy of my Associate Evaluation Form dated March 28, 1988. Despite my comments, no one raised with me the possibility of moving into a management position.

7. In 1989, I initiated discussions with Store Manager Gary Martin about moving up into management. I spoke with him during evaluations as well as privately in his office. He told me I needed experience in the Cash Office and on the floor. By the time he told me this, I already had extensive Cash Office and floor experience. In my 1989 evaluation, I re-emphasized my interest by writing that my career goals were "[t]o go as far in the company as I can." Attached hereto as Exhibit D is a true and correct copy of my Associate Evaluation Form dated September 26, 1989.

8. Three years later, in 1992, I still had not been promoted. I spoke with District Manager Bob Sandlin about my interest in management training. He told me that willingness to relocate was a requirement for the management training program. I agreed to relocate. In my 1992 evaluation, I wrote that my career goals included becoming an "Assistant Manager for Wal-Mart." Attached hereto as Exhibit E is a true and correct copy of my Associate Evaluation Form dated March 24, 1992. I also continued to speak with Store Manager Martin about my interest in becoming a management trainee. He remained noncommittal and did not give me any specific information about ways in which I could improve my chances of promotion.

9. In October 1992, Mr. Sandlin told me I could enter the management training program if I relocated to a Wal-Mart Store in Boaz, Alabama. I agreed to relocate to this store and accepted a longer commute because I understood this was the only way I could advance into management.

10. In 1993, after I completed the training program, Personnel Trainer Coleman Taylor offered me an Assistant Manager position in a Wal-Mart Store in Birmingham, Alabama. This was considered a difficult store to manage because it was located in a high-crime area but I understood that I had no choice but to accept the position to which I was assigned. If I did not, I understood that I would not be offered a second chance. I relocated to Birmingham.

11. As early as 1993, I began expressing an interest in advancing into a store manager position. In my 1993 annual evaluation, I wrote that my career goals included "work[ing] toward becoming a store manager." Attached hereto as Exhibit F is a true and correct copy of my Management Performance Appraisal and Commitment to Success dated September 25, 1993.

12. In approximately 1993, when I was an assistant manager in Birmingham, Alabama, I was present during a conversation between Store Manager Dennis Hathaway and an individual [name unknown] out of the Bentonville, Arkansas home office about an Assistant Manager Larry [last name unknown] who had used the open door. I heard Mr. Hathaway laughing about this assistant manager contacting home office and Mr. Hathaway said he would "get [this assistant manager] reigned in." This incident made clear to me that the Open Door Policy

was not an option available to me, and, in fact, might make me the subject of ridicule and retaliation.

13. In 1994, I re-emphasized my career aspirations by writing that I wanted "[t]o gain all the knowledge and skills of running the store to help me to further my career in Wal Mart." I also wrote about my specific aspirations "to become a Store Manager. Maybe someday in the near future work in Operations or the People division at home office." In this evaluation, Store Manager Karen Brandenburg wrote, "I would like to see her be one of our future store managers." Attached hereto as Exhibit G is a true and correct copy of my Management Performance Appraisal and Commitment to Success dated February 17, 1994.

14. In 1994, I voluntarily transferred to an assistant manager position in a Wal-Mart in Anchorage, Alaska. Wal-Mart was opening new stores in Alaska and I believed that being involved with this challenge would assist in my efforts to get promoted to a store manager position. This was a lateral move. By moving to Alaska, my husband and I left behind everything that was familiar to us, including close family, friends, and community.

15. While in Alaska, I continued to express an interest in becoming a store manager, as well as in participating in training that may have assisted me in gaining skills to advance in my career. In my 1995 evaluation, I wrote that my "[o]nward goal is to be a store manager—would like to be able to complete leadership classes—MDS classes." Attached hereto as Exhibit H is a true and correct copy of my Store Manager/Assistant Manager Performance Appraisal dated March 1, 1995. In June 1995, two and a half years after becoming an assistant manager, I was

finally allowed to take a leadership class in Bentonville, Arkansas that all assistant managers are supposed to complete within six months of becoming an assistant manager. I had spoken to both Store Manager Brandenburg and Store Manager Mark Divis about why I had not been able to take the class but they were unable to explain the delay. While in Anchorage, I also spoke with Store Manager Divis during my evaluations and informally about my interest in moving up in management.

16. Some time between 1995 and 1996, while I was working in the Anchorage, Alaska Wal-Mart, male Assistant Manager Randy Hardy told me, and a room full of other associates, that the only reason that Wal-Mart needed female assistant managers was to ensure that women associates had someone with whom they could discuss their periods. At first, I was taken aback by these comments but I continued to believe that, with hard work, I could prove that I could take on the challenges of a management position. I did not think that complaining about these incidents would do any good because it had already been made clear to me that the Open Door Policy was not something upon which I could rely.

17. In 1997, while working as an overnight assistant manager in the Anchorage store, Store Manager Divis asked me to become operational assistant manager during the day. This meant additional responsibilities over the offices and training. Even though I would be losing the 6% night differential and I would be taking on extra responsibilities, I believed this would be good for my career advancement, so I accepted.

18. While in the Anchorage Wal-Mart, there were several men who were hired from the outside as

assistant managers who were paid significantly more than I was but whom I had to train. They were John Halpaus, who was recruited from a Safeway grocery store and whom I trained in 1994, and a male assistant manager [name unknown] who was recruited from a Payless drug store and whom I trained in approximately 1998 or 1999.

19. In my 1997 evaluation, I wrote in the "Associate Comments" section that I wanted "[t]o go to the next level in management." Attached hereto as Exhibit I is a true and correct copy of my Store Manager/Assistant Manager Performance Appraisal dated March 28, 1997.

20. Shortly thereafter, still in 1997, District Manager Mark Divis (he had been promoted from Store Manager) asked me to transfer as an assistant manager to the Wasilla, Alaska Wal-Mart Store. Although I was not interested in the transfer or the longer commute, I agreed to this lateral move because Mr. Divis told me it would be a good challenge and would help my Wal-Mart career.

21. In 1998, Mr. Divis asked me to transfer back to an assistant manager in his Anchorage, Alaska, Wal-Mart. Again, I agreed. While there, I continued to speak with District Manager Divis and later, Store Manager Coleman Taylor (he had been promoted from Personnel Trainer) about my interest in moving up in my Wal-Mart career. This same year, a co-manager position was created in the Wasilla, Alaska Wal-Mart for Assistant Manager James Barnes. He told me that he had been transferred from a Hawaii Wal-Mart because he had "people problems." I was not aware of this opening and was not given an opportunity to apply for it. Within a year, Mr. Barnes was transferred and demoted for

what I understood to be the same issues as had arisen in Hawaii.

22. Also, in 1998, I wrote a letter to Stacy [last name unknown], the Regional Personnel Manager over Alaska, Hawaii, and Washington, regarding my career history and career goals with Wal-Mart. Once again, I was very clear about my aspirations to become a store manager and reiterated my willingness to move anywhere to do so. I wrote, "My goal is to become a store manager for this company. I would prefer to remain in Alaska, but [am] willing to relocate elsewhere. This is my next challenge, a challenge [for] which I feel I am ready. To strive to run the store on the beliefs that was founded and instilled in me by Sam Walton . . . I would like to be given the opportunity to run a store like this for the company." Attached hereto as Exhibit J is a true and correct copy of this undated letter written and signed by me.

23. In July 1999, seven years after I had become an assistant manager, District Manager Harvey agreed to promote me to a co-manager position in the Anchorage, Alaska Wal-Mart. Mr. Harvey assured me that that this was only a training position and would last a maximum of 18 months before I would be promoted to store manager. I know of at least three men who were promoted faster than I was. Both Todd Childers and John Halpaus were assistant managers for less time before they were promoted to co-manager positions in an Anchorage Wal-Mart. James Lane was promoted to a store manager position in Ketchikan, Alaska after only a few years as an assistant manager. He was never a co-manager. Randy Hardy was promoted to a co-manager position after a similar amount of time in an assistant manager position but, throughout his

time as an assistant manager in both Anchorage Wal-Marts, it was well known that he was violating the fraternization policy by dating an hourly associate whom he supervised. He was a good fishing and hunting buddy of District Manager Harvey and regularly talked about their hunting and fishing trips.

24. I became co-manager upon returning from maternity leave in 1999 after the birth of my son. As a co-manager, I regularly worked 65-70 hours a week. During inventory, it was not unusual for me to work fourteen 12-hour days in a row. While I was an assistant manager, I regularly worked 55-60 hours a week. I invested these long hours at the sacrifice of time spent with my husband and infant son, because I believed that my hard work and dedication would ensure a successful future with Wal-Mart and stability for my family.

25. During my February 2000 evaluation, I received a rating of "exceeds expectations." Despite this excellent rating, I did not receive the usual annual pay increase. I had always been told that Wal-Mart policy forbids discussing salary issues so I was unable to determine the exact reason why I was not given a raise. I assumed that I had reached the maximum I could earn as a co-manager. The following year, I also did not receive a pay increase. In May 2001, I discovered that I, in fact, had not topped out and there was no reason why I had been denied a raise in both 2000 and 2001. I spoke with Regional Vice President Ron Medrano and he agreed to give me a raise retroactive for three months (to my February 2001 evaluation) but not to my February 2000 evaluation. When I asked why I had not received the proper pay increases, Mr. Medrano claimed he was

not aware that I was supposed to receive a raise to begin with.

26. In October 2000, I applied for the store manager position in Ketchikan, Alaska. District Manager Harvey asked me to write a detailed letter about the salary that I would need to live on the island. Store Manager Taylor and I worked on the letter together and I submitted it to Mr. Harvey. I never heard anything about the position again except that a male, James Lane, got the position.

27. In 2001, I became acting store manager of the Anchorage, Alaska Wal-Mart because Store Manager Coleman Taylor left. At that time, I had been co-manager for two years. Since I was already completing the responsibilities of the store manager, I asked District Manager Harvey for the store manager title and pay. He told me that it was against company policy to be promoted from within the same store. When I informed him that previous store manager, Coleman Taylor, had been co-manager in the same store, Mr. Harvey did not respond.

28. Shortly after I became acting store manager of the Anchorage Wal-Mart, the store experienced a high shrinkage during inventory. High shrink is when the cost of inventory is higher than the amount that has been set by corporate headquarters for that store. Because I had only been acting store manager for a couple of weeks, I was reassured by the auditors at home office in Bentonville, Arkansas, that this high shrinkage was not my responsibility and would be attributed to Store Manager Taylor.

29. In February 2001, I was approached by District Manager Harvey about applying for the position of district manager of shoes and jewelry in Alaska. At this time, I was frustrated by the lack of man-

agement support toward my many efforts to advance in store management positions. I was beginning to believe that I would never be allowed the chance to run a store. When the opportunity arose for me to try a new position, any new position, that would challenge me and help me to prove my capabilities, I seized it. I was not going to receive a raise for this new position and would be receiving the same base pay I had been receiving as a co-manager. After my interview with Regional Manager of Shoes and Jewelry Art Bock in March 2001, he offered me the position and I signed a written contract committing to a two years in the position. Attached hereto as Exhibit K is a true and correct copy of this written contract signed by me on April 3, 2001. As I was preparing for the position, including opening a corporate bank account and receiving a corporate credit card, I was called by Regional Vice President Ron Madreno. He told me that, in order to accommodate the new male Anchorage store manager, Jim Groh, they had offered the district manager of shoes and jewelry position to his wife, Peggy. I told Mr. Madreno that this created a conflict of interest and is against company policy. As District Manager of Shoes and Jewelry, Mrs. Groh would have the ability to influence the inventory and bottom line profits in the Wal-Mart Store that Mr. Groh managed. He ignored me. When I told Mr. Madreno of the contract I had signed and the plans I had been making with home office, he told me that the contract "ain't worth two cents." He said that District Manager Harvey was supposed to have already informed me that the position had been given to the incoming store manager's wife. He then told me he was not giving me the position due to high shrink in the Anchorage Wal-Mart Store. When I reminded him that I had been told that this shrinkage was not my responsibility, he was again unresponsive. Even if I had been responsible for the shrink, which I was not, it should not have interfered with my promotability. I know that when Coleman Taylor was promoted from a co-manager to store manager position in 1996, the store had recently experienced a high shrink. This did not interfere with Mr. Taylor's promotion. Similarly, in 1997, David Shepherd was promoted from co-manager in the Anchorage Wal-Mart to store manager of the Wasilla, Alaska Wal-Mart shortly after the Anchorage store experienced high shrink.

30. I also spoke with District Manager Harvey about my concerns about the district manager of shoes and jewelry position being taken from me. He claimed he was "shocked" and that I had been treated unfairly. I found this somewhat disingenuous, since Mr. Madreno told me Mr. Harvey already knew about the decision and was, in fact, originally slated to tell me about it. I also explained to him that having a husband and wife in these positions was contrary to company policy but he did not seem concerned.

31. When I became a co-manager in 1999, District Manager Harvey had assured me that I would be in this training position for a maximum of 18 months but when I left, I had been co-manager for two and a half years with no end in sight. I know that David Shephard was co-manager of the Anchorage Wal-Mart for only about six months before he was promoted to store manager of the Wasilla Wal-Mart.

32. Throughout my time as an assistant manager, co-manager, and acting store manager, from 1992 to 2001, I never received any coachings. All but

three of my evaluations were rated "Above Average" or "Exceeds Expectations." For those few evaluations that were rated "Meets Expectations," I had been told that, although my performance may have exceeded expectations, my evaluation score had been rated exclusively on store inventory, shrink, and stock numbers. During these evaluations, I complained to District Manager David Carmon, District Manager Harvey, Store Manager Divis and Store Manager Taylor that I believed these evaluations were unfair. I told them that a management performance evaluation should rate the *manager's* performance, not the store's numbers. At one point, District Manager Carmon agreed to complete another evaluation of my performance in six months, rather than a year, so that I could get an evaluation on my actual performance. This never happened.

33. During my Exit Interview, I articulated that I was leaving due to a lack of promotional opportunities. Attached hereto as Exhibit L is a true and correct copy of my Exit Interview dated June 15, 2001.

34. Shortly after I left Wal-Mart in June 2001, I wrote a letter to Wal-Mart CEO Lee Scott chronicling the mistreatment that I had suffered and the problems that I believe Wal-Mart has in retaining good management. Attached hereto as Exhibit M is a true and correct copy of this letter. A few weeks later, Divisional Vice Pres. Kendall Schwindt called me. Despite being in charge of determining who would be placed in district manager positions, he claimed he had no idea that I had been offered the district manager of shoes and jewelry position. He stated that he had had plans to "eventually" promote me to a store manager position. There were no posi-

tions available at that time or in the foreseeable future. I asked him why, if I was qualified to run the Anchorage Wal-Mart as acting store manager, was I not qualified to be the store manager and receive the fair compensation and bonuses attached to the title. Mr. Schwindt told me that it was not policy to promote a co-manager to store manager of the same store. When I reminded him that the previous Anchorage Wal-Mart store manager Coleman Taylor had been promoted from co-manager of the same store, he said something vague about "exceptions being made." I could hear that Mr. Schwindt had placed me on speakerphone and I was uncomfortable about who else might be present so I ended the conversation shortly after that. Mr. Schwindt never offered me a store manager position nor even encouraged me to return to my co-manager position.

35. I started working with Wal-Mart when I was 19 years old and spent almost half my life working there. With all the time I had invested, it was the only career I thought I wanted and the only career I thought I would ever have. When I left, I felt like I had to begin my life over again. I am currently employed full-time with Alaska USA Federal Credit Union as an Operations Officer and I remain hopeful that I will be allowed the opportunity to develop my career there.

I declare under penalty of perjury of the laws of the United States and State of Alaska that the foregoing is true and correct.

This Declaration was signed by me on March 24th, 2003, at Anchorage, Alaska.

/s/

Tammy Hall

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, KAREN WILLIAMSON, on behalf of themselves and all others similarly situated, Plaintiffs, v. WAL-MART STORES, INC. Defendant.	CASE NO. C-01-2252 MJJ **DECLARATION OF RENE HARKINS IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Rene Harkins, declare:

1. I am a 39 year old female living in Old Fort, North Carolina. I worked at Wal-Mart Stores, Inc.'s Sam's Club store in Asheville, North Carolina from June 20, 1998 until June 1, 2002, when I resigned from my job. I have been subjected to gender discrimination by Wal-Mart with regard to promotions. I have also experienced differential treatment from Wal-Mart because of my involvement in this lawsuit.

2. I joined Sam's Club initially as an Associate Cake Decorator in the Bakery Department at a starting wage of $7.50 per hour. After working as a Cake Decorator for approximately one year, I applied for a position as, and was hired for, a Team Leader posi-

tion in the Bakery Department in approximately June, 1999.

3. In February or March, 2000, I met with David Prince, the Fresh Merchandise Manager, and told him that I was very interested in becoming the Bakery Manager. Mr. Prince responded that I would have to prove myself to get the position. I also told Larry Miller, the Regional Manager, and Elliot Neilan, the Store Manager, of my interest in the Bakery Manager position. Mr. Miller and Mr. Neilan ignored my requests.

4. After working as a Bakery Team Leader for approximately one year, Sam's Club transferred the Bakery Manager to another store. Because there was a vacancy in the Bakery Manager position, Sam's Club assigned me to perform the Bakery Manager's duties as well as the Bakery Team Leader duties in the summer of 2000. Sam's Club did not formally promote me into the Bakery Manager position or even give me a merit raise for the extra work that was required of me. I still only made my hourly wage, which at that point in 2000 was approximately $9.00 per hour.

5. I worked two jobs as the Bakery Team Leader and filling in for the Bakery Manager job without any training for approximately six months. Finally, in the early part of 2001, Tangela Griffin, the Merchandise Manager, trained me for the Bakery Manager position for approximately seven months. Ms. Griffin told me that I would officially become the Bakery Manager and join the salaried management team at Sam's Club. During the seven months that Ms. Griffin trained me for the Bakery Manager position, she repeatedly told me that I was

doing a great job and that I would become the Bakery Manager once I had completed the training.

6. To my great surprise, however, in approximately December, 2001 or January, 2002, Sam's Club decided to promote Randy Peek, a male employee who had been working as a Produce Team Leader, into the Bakery Manager position. Mr. Peek had no experience in the Bakery Department and certainly had no experience in bakery management.

7. David Prince, the Fresh Merchandise Manager, and Larry Miller, the Regional Manager, made the decision to promote Mr. Peek over me to the Bakery Manager's job. These men never interviewed me for the Bakery Manager's job, even though they were aware that I was being trained for the position in question and was doing a good job. I consistently received performance reviews and evaluations that were rated four or higher on a one-to-five scale, with five being the highest rating.

8. For about 10 weeks following Mr. Peek's promotion, I was tasked with the humiliating job of training him into the Bakery Manager's position – the job I had been told was going to be mine. I feel that I was not given a fair chance to be promoted to the Bakery Manager job and that Mr. Peek received the job simply because he was a man.

9. I have also been subjected to differential treatment by Sam's Club as a result of my involvement in this lawsuit. In approximately March or April, 2002, I sustained a fracture to my foot that was unrelated to my job, and my doctor placed a walking boot cast on my foot. My doctor gave me a medical release to return to work, but when I showed up for work after receiving medical treatment, Ms. Griffin, the Merchandise Manager, refused to allow

me to work until my cast was taken off. Sam's Club treated my foot injury differently than they treated other people's similar injuries – including Donna Justice, a female Receiving Manager, who was allowed to work while using crutches – and a similar injury that I previously sustained. I believe that Sam's Club mis-applied their policies in an effort to further discriminate against me. Moreover, Sam's Club also completely failed to process my disability paperwork for my 2002 foot injury. In fact, to this day I have not received any disability payments for the time Sam's Club refused to allow me to work.

10. I resigned from Sam's Club on June 1, 2002. I had lost hope that I would ever be promoted into a salaried management job at Sam's Club when I saw the company decide to promote Mr. Peek to the Bakery Manager job around me. Since that time, Sam's Club made it clear to me that I was not wanted as an employee and used differential treatment to make my work environment unpleasant.

11. Sam's Club continued to retaliate against me even after I had resigned. Sam's Club repeatedly failed to provide information to my new employer concerning my dates of employment, which resulted in a delay in the commencement of my work at my new job. It was not until I complained to Kevin James, a Wal-Mart Vice-President, that Sam's Club provided this information to my new employer.

I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of North Carolina that the foregoing is true and correct.

This Declaration was signed by me on April 1, 2003, at Old Fort, North Carolina.

/s/ René L. Harkins

Rene Harkins

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, KAREN WILLIAMSON, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF CECILIA HARRISON IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Cecilia Harrison, declare:

1. I am a 41 year old African-American female who lives in Tooele, Utah. I began working for Wal-Mart at the Home Office in 1992. I entered the Management Training Program in 1997 and became an Assistant Manager. Becoming Store Manager of my own Wal-Mart store was my goal at Wal-Mart. I applied for over ten Co-Manager positions, the step between Assistant Manager and Store Manager, but Wal-Mart never promoted me. After four years of observing Wal-Mart promote male Assistant Managers to Co-Managers and observing Wal-Mart recruit males from outside the company for Co-Manager positions, I felt that because I was the wrong gender, Wal-Mart was not going to give me the opportunity to advance past my Assistant Manager position. In

2000, I terminated my employment with Wal-Mart due to the lack of career advancement opportunities for me, as a female.

2. Before I began my employment at Wal-Mart I had over 10 years of experience in the import merchandise field. In 1992, my husband and I relocated to Rogers, Arkansas. I applied for a position at the Wal-Mart home office in Bentonville, Arkansas. I was hired in the import section of the international merchandising department.

3. My first job was in a clerical position. Within a month, Wal-Mart promoted me to an Import Analyst/Customs Coordinator position. In this position I was responsible for reviewing Wal-Mart's importation quotes from its broker and finding any discrepancies or errors within the broker's U.S. Custom's filings.

4. Within six months of beginning my Wal-Mart employment, I recovered for Wal-Mart a large sum in overpaid import taxes. I was rewarded with the "Yes We Can Sam" award and I was soon chosen to work with Wal-Mart executives on Wal-Mart's Foreign Trade Zone logistics team, which entailed that I travel with executives to Buckeye, Arizona and help develop the Foreign Trade Zone's warehouse. I was a member of this team during 1993 and 1994.

5. I received my first annual performance evaluation in September 1993 and was rated as "exceeds expectations." I communicated my career goals with Wal-Mart on the evaluation. I wrote: "Goals: . . . work towards a management position with in Wal-Mart." See Cecilia Harrison's September 1993 Performance Evaluation, a true and correct copy attached hereto as Exhibit A.

6. While at the Home Office I decided to grasp as much knowledge as I could about as many facets of the company as possible, so that I would be attractive to Wal-Mart for a salaried management position. I requested and received a transfer to a Merchandise Assistant position in 1994. In that position, I learned Wal-Mart's company-wide merchandising practices and policies and I assisted Clifford Young, buyer for Department 82, impulse merchandising. I worked on merchandise projects that trickled down to every Wal-Mart store. For example, I fully developed and designed Wal-Mart's Balloon Program, creating the standards for balloon display and sales procedure implemented in all Wal-Mart stores.

7. In 1995 I moved into a Modular Planner position to learn another aspect of Wal-Mart operations. I became Modular Planner for department 82, impulse merchandise. A modular is a store product display area. The smallest detail of each product's layout at each Wal-Mart store is designed and controlled by Modular Planners at the Home Office. As Modular Planner for department 82, I controlled the merchandise layouts for food, checkouts, clip strips, and the tobacco products for the entire chain of Wal-Mart stores.

8. While I was an employee at the Home Office I saw that the Home Office controls every aspect of a store. Guidelines are created in the Home Office, including the guidelines governing merchandise selection and displays, as well as personnel policies.

9. In 1997, after I had been with Wal-Mart almost five years, my husband reported to Georgia for army training. I approached J.R. Campbell, who was the Senior Vice-President over my department, and expressed interest in transferring to a Wal-Mart

store. I told Mr. Campbell that I did not want to give up my employment with Wal-Mart and that I wanted to become a member of salaried management on the store level. Mr. Campbell provided me a written recommendation supporting my entry into the Management Training Program.

10. I was accepted into an accelerated Management Training Program at the Martinez, Georgia Wal-Mart store. When I completed the program, I received an "above average" rating on my training program evaluation. While in the Management Training Program, I let Store Manager John Vail and Co-Manager Tom White know that I wanted to work my way into a Co-Manager position and then eventually manage my own store.

11. About the time I finished the Management Training Program my husband was stationed in California. Therefore, I asked to be transferred to an Assistant Manager position in California. I transferred to the Wal-Mart store in Paso Robles, California in September 1997.

12. I informed Paso Robles Store Manager Nick Sigala and District Manager Ron Smoot that I was interested in being promoted in January 1998, during my first annual evaluation as an Assistant Manager. I wrote on my evaluation that I wanted to take the next step, to Co-Manager. See Cecilia Harrison's January 1998 performance evaluation, a true and correct copy hereto attached as Exhibit B.

13. Nick Sigala remained the Store Manager at the Paso Robles store for approximately my first year as Assistant Manager there. During that time Nick Sigala treated female Assistant Managers differently than male Assistant Managers. If a problem occurred at the store he yelled at the female Assistant Manag-

ers, which included Lissa Remington, Sherrie Logan and me. However, he never yelled at the male Assistant Managers, Greg French and Kenny Johnson. Mr. Sigala ranted and raved at the females on a daily basis, unless he was asking us to do extra work for him, such as preparing his presentations for district meetings. I never observed him treating the male Assistant Managers rudely. He chose the male Assistant Managers to be his buddies. He golfed with them. He even tried to get Mr. French and Mr. Johnson a transfer to his new store, when he transferred. Store Manager Sigala did not befriend any female Assistant Managers.

14. After two years as Assistant Manager in the Paso Robles store, I transferred to a Wal-Mart in Orem, Utah, because my husband was hired by a company in Utah.

15. Once my family was in Utah, my husband and I had a discussion about my future at Wal-Mart. We talked about how I wanted to become a Wal-Mart Co-Manager and then a Store Manager. My husband had been honorably discharged from the army, so the army no longer dictated our residence. My husband and I agreed that from that point on, where our family lived would be dictated by my career with Wal-Mart. We knew that many promotions were out of state and we were willing to move anywhere.

16. I started working at the Orem Wal-Mart store in March 1999. I was assigned to be Assistant Manager of soft lines and front end. Within six months I was promoted to the Lead Assistant Manager of the store. As Lead Assistant Manager I was charged with the additional responsibility of creating the Assistant Manager schedules and running Store

Manager and Co-Manager reports when those managers were busy or unavailable.

17. My Store Manager, John Reynolds, also chose me to be the Orem Wal-Mart's closing Assistant Manager. This means that I was the regularly scheduled Assistant Manager on the 2 p.m. to closing shift. Within six months I made such an impact on the Orem's store operations and the employees' morale, including dramatically improving the store's readiness for the morning crew, that the District Manager, Jim Curtis, requested that I give a presentation to all Utah Store Managers.

18. Throughout my employment in the Orem store, I let District Manager Jim Curtis and Store Manager John Reynolds know I was always looking for the next step in my career, to become a Co-Manager.

19. John Reynolds completed my first evaluation in the Orem Wal-Mart in February of 2000. He rated me as "exceeds expectations." Jim Curtis was present during this evaluation. As I had done consistently during my year at the Orem store, I discussed with Mr. Curtis and Mr. Reynolds my desire to be promoted. I also wrote in the personal goals sections of the evaluation that I wanted to become a Specialty Division Manager or Division 1 Co-Manager. See Cecilia Harrison's February 10, 2000 Management Performance Appraisal, a true and correct copy hereto attached as Exhibit C.

20. I applied for numerous Co-Manager positions while I was in the Orem Wal-Mart. Each position was posted over the Pipeline, Wal-Mart's computerized communication network. Each position listed specific requirements . . . e.g. the store was seeking a Co-Manager with X amount of years as As-

sistant Manager and X or above on the applicant's last performance evaluation. After applying for a position over the Pipeline, the applicant's District Manager, in my case, Jim Curtis, had to recommend that individual in order to be considered for the Co-Manager position.

21. I read the requirements for each position for which I applied. I always made sure I had the requisite evaluation rating and experience before I applied for the position. In fact, the computer system would not let you proceed if your responses to the application questions indicated you did not meet the posted requirements. Out of the numerous positions for which I applied, I recall that one was in North Carolina, one was in Michigan and one was in Massachusetts. None of the stores I applied at ever responded to my application. Jim Curtis did not recommend me for the Massachusetts position and I am unaware of any positions for which Mr. Curtis did recommend me.

22. I feel that Jim Curtis did not recommend for a Co-Manager position because I am female. Jim Curtis promoted several males out of the Assistant Manager position into Co-Manager positions or provided them the needed recommendation to receive the promotions outside the district. For example, he promoted Assistant Managers Ted Jones and Jeffrey Robbins from the Riverdale store, Mark Pierson from the Layton store and Pat Keen and Craig Williams from my store in Orem.

23. District Manager Jim Curtis also hired males with no prior Wal-Mart history from outside the company straight into Co-Manager positions. I never saw him hire a female into a Co-Manager position who was from outside the company. I also never

saw him promote a female Assistant Manager during my employment at Wal-Mart.

24. After two years at the Orem Wal-Mart, approximately in the spring of 2001, I was suddenly, and without notice, transferred to the Taylorsville store. The transfer occurred while I was having surgery on emergency sick leave. I never knew of any male Assistant Managers who were transferred without discussion and without prior notice. I asked John Reynolds why I was transferred to the Taylorsville store. He said he did not know and that he was not given prior notice either.

25. Shortly after I was transferred to the Taylorville store, Jim Curtis' district was restructured. Leonard Falcon became my District Manager.

26. Within about four months of my transfer to the Taylorsville store, I had my first meeting with District Manager Leonard Falcon. I told Mr. Falcon that I was seeking a promotion to Co-Manager. I had recently received another "above-standard" rating, I had a visibly good impact on the Taylorsville store and I was now Lead Closing Assistant Manager in my second store in Utah. Leonard Falcon told me "Well, I just came to the district, I really don't know you, so it will take some time before I could promote you to Co-Manager."

27. At first I tried not to be discouraged by Mr. Falcon's alleged desire to get to know me before he promoted me. I continued to apply for Co-Manager positions for my final months at Wal-Mart. I applied for at least six positions when I was in the Taylorville store. Even though I met the qualifications for the position, I was never contacted or interviewed for any of the Co-Manager positions.

28. I did not understand why I was not receiving job offers or even interview opportunities when I had earned the Lead Assistant Manager position in both of my Utah stores. I felt my career advancement was stifled by Mr. Falcon and was previously stifled by Jim Curtis. I was nothing less than mortified when I saw the constant stream of males receiving promotions instead of me.

29. I am familiar with Wal-Mart's Store Manager and Co-Manager bonus program. Co-Manager's receive profit bonuses which are a percentage of the Store Manager's Store Profit Bonus. The higher the profit, the higher the bonus that Co-Manager receives. The Co-Manager's bonus is typically more that $10,000. While I was at Wal-Mart, Assistant Managers received bonuses on the same scale as hourly associates. The highest bonus an Assistant Manager could receive was double the share of an hourly associate, if that Assistant Manager had an above standard evaluation. I was rated "above standard" and in my case I never received more than a $1,500 bonus from Wal-Mart as an Assistant Manager.

30. By the summer of 2000 I was frustrated at being denied Co-Manager positions and frustrated from watching males from outside the company, as well as male Assistant Managers who had never been recognized for benefiting Wal-Mart as I had, placed in these positions. I had never received any coachings while at Wal-Mart and my performance rating, "exceeds expectations," qualified me for promotions to Co-Manager positions. I decided to terminate my employment.

31. I lined up new employment at Cargo Link International, a customs import company, before I

terminated my employment at Wal-Mart so that I would not have a break in employment. I was hired as a part-time employee at Cargo Link International and began working there a couple weeks before my last day at Wal-Mart. Within a month of ending my employment at Wal-Mart, I was working fulltime at Cargo Link International and running my own nail design business on the side.

32. If I could be confident that Wal-Mart would judge me on my merit and not by my gender, I would be willing to return to Wal-Mart as a Co-Manager. I have expressed this to Mr. Falcon and Mr. Curtis since leaving my employment at Wal-Mart.

I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Utah that the foregoing is true and correct.

This Declaration was signed by me on 1st of April, 2003, at Salt Lake City, UT.

/s/ Cecilia Harrison

Cecilia Harrison

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, KAREN WILLIAMSON, on behalf of themselves and all others similarly situated, Plaintiffs, v. WAL-MART STORES, INC.,	CASE NO. C-01-2252 MJJ **DECLARATION OF TERESA HAWKINS IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Teresa Hawkins, declare:

1. I am female and a former employee of Wal-Mart. I reside in Nevada.

2. I worked as an Assistant Manager Trainee and Assistant Manager at a Wal-Mart store in Las Vegas, Nevada, from January 13, 2001, to September 19, 2001. During my employment at Wal-Mart, I learned that several men working the same job as me, at the same store where I worked, were paid more than I was paid. Also, I was passed over for promotion from Assistant Manager to the salaried position of People Manager in favor of a male employee with less experience in human resource matters.

3. Prior to working at Wal-Mart, I had about seven years of management experience working for

two different national home improvement retailers in Nevada and in California. In 2001, my mother had major surgery and I had to leave my job as an Assistant Manager at Lowe's Home Improvement Warehouse in Bakersfield, California, and return to Las Vegas. Upon my return to Las Vegas, I sought a position in management with Wal-Mart.

4. To apply at Wal-Mart, I faxed a cover letter and my resume to Regional Personnel Manager Debbie Moody at the Wal-Mart Home Office in Bentonville, Arkansas. (True and correct copy attached hereto as Hawkins Exhibit A.) Ms. Moody interviewed me in Las Vegas for a position as a Management Trainee. During the interview, Ms. Moody told me that Wal-Mart would soon be adding salaried People Managers to its Supercenters and other high-volume stores. Ms. Moody told me the position was a salaried position for large stores with a lot of employees and/or for stores with "employee morale" problems. I told Ms. Moody that I would be interested in a People Manager position, especially given my previous experience in human resources.

5. I then had a second interview, with District Manager Chuck Salby. Mr. Salby asked me where I saw myself in four years, and I told him I saw myself in a People Manager position. Shortly thereafter, I was offered a position as a Management Trainee, which I accepted.

6. When I started management training, Brenda Belmonte, District Manager Salby's assistant, told me that all Assistant Manager Trainees at the same store earn the same salary. However, I saw payroll records as part of my training in the Personnel Office, and learned that four male management trainees at my store earned substantially higher

salaries than I did. Kenneth Narter, Karl Moser, Vincent Santos, and Ronald Tedesko each earned a monthly base salary of about $2,200, compared to my $1,900 monthly salary. Mr. Narter, Mr. Moser, and Mr. Santos all started management training after I did. Mr. Tedesko started management training less than a month before I did.

7. I used the Open Door to complain about my lower rate of pay to Co-Manager James Eble and to Store Manager Bob Knickerbocker, but I never received a satisfactory response. I do not know any legitimate explanation for the difference in our salaries.

8. While I was a Management Trainee, I observed that the male trainees, including Bill Mikesell, Mr. Moser, and Mr. Santos, received more thorough training than I did. Specifically, I was frequently assigned to work in the Personnel Office or with the Cashiers during my training period. However, I observed male Assistant Managers in training sessions with various Assistant Managers or working through their Assistant Manager training manuals. The male Management Trainees received more training in the merchandising aspects of managing a store, which are essential skills for a Store Manager. I, however, received more limited training. I was also given an Assistant Manager training manual, which had spaces for the Store Manager to initial and indicate my progress. However, Mr. Knickerbocker never initialed my training manual. I observed that the training manuals of the men mentioned above were initialed by Store Manager Knickerbocker. I made several appointments with Mr. Knickerbocker to review my training manual, but he never kept an appointment with me to discuss my training.

9. While I was a Management Trainee, I told Store Manager Knickerbocker that I was interested in the People Manager position, which I had originally learned about from Ms. Moody. I told him that my career goal was to move into a human resources management position, and I described to him my previous experience in human resources. Mr. Knickerbocker told me he would discuss the promotion with District Manager Salby. Soon thereafter, I saw Mr. Salby at a meeting and asked him whether Mr. Knickerbocker had conveyed to him my interest in and qualifications for the People Manager position. Mr. Salby told me to schedule a meeting with Mr. Knickerbocker to review in detail my qualifications for the People Manager position, even though Mr. Salby already had my resume, which listed my previous experience in detail. See Hawkins Exhibit A. Mr. Knickerbocker never responded to my requests to schedule such a meeting. During the same period of time, I searched but could not find a written description of the job on Wal-Mart's internal computer system. I also never saw any open People Manager positions posted in the store or on the computer.

10. I was promoted to Night Receiving Manager on about May 5, 2001. Store Manager Knickerbocker told me I was being assigned to the overnight shift because I had extensive experience in human resources and because that shift had "morale problems." I reminded Mr. Knickerbocker of my interest in the position of People Manager, and he told me I had to spend at least six months as a Night Receiving Manager before I could be considered for a People Manager position. I agreed, reluctantly, although I could not see the connection between the responsibilities of a Night Receiving Manager and a People Manager.

11. While I worked as Night Receiving Manager, night shift employees asked me several times to tell Store Manager Knickerbocker that they wanted to use the Open Door policy to speak with him regarding concerns with their working conditions. The Open Door policy states that employees can make complaints to any manager with the knowledge that they will be listened to and that they will not be retaliated against. When I talked to Mr. Knickerbocker on their behalf, on one occasion he told me to tell them he was "too busy." On another occasion, Mr. Knickerbocker told me he was only willing to talk to the employees as a group. I also informed Mr. Knickerbocker after a female employee, Trina Durham, told me that other employees were sexually harassing her. Mr. Knickerbocker told me that he was not going to investigate her complaint.

12. I personally complained to Mr. Knickerbocker while I was Night Receiving Manager because a male stocker named Mo (last name unknown) had continued to sexually harass me despite having been verbally coached by management for harassing me. Mo wrote me sexually explicit notes, followed me around the store, commented on my mode of dress, and waited for me in the parking lot after my shift. Mr. Knickerbocker told me that he would not investigate my complaint and that I should "sit down with him" myself. I also observed that Mr. Knickerbocker refused to investigate when several female Cashiers complained of sexual harassment by Mo.

13. In late May or early June 2001, District Manager Salby announced at an Assistant Managers' meeting that he had selected Assistant Manager Dennis Talley for promotion to a new People Manager position at our store. The People Manager posi-

tion was not posted, nor was I informed that the position was available. I was astonished that, even though three different managers knew of my interest and qualifications, I was not even given the chance to interview for the People Manager position.

14. The hourly Personnel Manager at our store, Marilyn Wall, later told me that Mr. Talley had no personnel experience. He had previously only worked as a Wal-Mart merchandising manager, whereas I had experience as a human resources manager from my prior employment. I also learned that Mr. Talley never worked six months as Night Receiving Manager, which I had been told was required.

15. I was terminated in September 2001 while on an approved medical leave of absence. I used the Open Door to complain in writing about my termination to District Manager Salby and to Michael Walker in the Bentonville Home Office. I never received a response as to why I had been terminated, which is a violation of the company's Sundown Rule. The Sundown Rule requires managers to respond the same day to any complaint by an employee or customer.

16. I filed a charge of discrimination against Wal-Mart with the State of Nevada Equal Rights Commission in February 2002, charging retaliation and discrimination based on gender and disability. I was later forced to drop the charge because I was in the hospital with a serious illness when the statute of limitations passed.

17. I would consider returning to a management position at Wal-Mart, if I could be sure that my salary would be equal to that of male employees with similar experience working the same job and that my

career opportunities would not be limited by gender-based stereotypes.

18. I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Nevada that the foregoing is true and correct.

This Declaration was signed by me on 04/13/03 (month and day), 2003, at Las Vegas, NV (city and state).

/s/ Teresa Hawkins

Teresa Hawkins

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF TINA HERNDON IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Tina Herndon, declare,

1. I make this declaration on the basis of my personal knowledge and, if called as a witness, could and would testify competently to the facts in it.

2. I began working at Sam's Club in 1988 as an assistant manager when Sam's Club bought out Price Savers where I had worked as an assistant manager for six months. I came to Price Savers with four years of experience as an assistant manager at K-Mart and a bachelor's degree in marketing from the University of Dayton. I worked at ten Sam's Clubs stores in five states (Illinois, Indiana, Kentucky, Ohio and North Carolina) until I left the company in April 2001.

3. After four years as Assistant Manager in five clubs (three in Cincinnati, Ohio; Raleigh, North Carolina; and Florence, Kentucky), I was promoted to co-manager and transferred to the Streamwood, Illinois club in November 1991. In May 1992, I was promoted to general manager and transferred to the Merrillville, Indiana club. I consistently received average and above average reviews and had no coachings during that time. Director of Operations Gary Dawes wrote in my March 1993 evaluation, "I am very comfortable with Tina and feel she will continue to grow with her assignment over the next year . . . Tina has excelled in many areas this past year, and has many fine management qualities." Attached hereto as Exhibit A is a true and correct copy of my March 1993 Management Evaluation Form.

4. In 1994, I was transferred to the Gurnee, Illinois club where I worked as General Manager until 1998. I became pregnant in 1998 and soon after I told District Manager Dale Green (male) that I was pregnant, I was coached for store shrinkage. This was the first coaching I had received in ten years with this company. One week before my scheduled pregnancy leave, I was demoted by District Manager Green to assistant manager for "poor organization skills." I had never been coached or spoken to about my organizational skills prior to this demotion. I was replaced by a male, Bob Miller, who had worked with the company for less time than I had and who did not have a marketing degree. When I returned from my leave of absence, I was told I had been relocated to the North Lake, Illinois club.

5. For the next year and a half, I did all that I could to work my way back up to Co-Manager or General Manager. I repeatedly told District Manager

Green that I was interested in promotion. He told me that if I worked hard and improved in certain areas I would be considered for a promotion. I worked hard to improve and my evaluations reflected that I had addressed the problem areas Green had identified. During that time, eight co-manager positions opened. I was never considered for any of the positions and all but one were filled by men. None of the positions were posted. Two of those positions were offered to Brian [Last Name Unknown] and Orences Christian, both of whom had less experience than me with Sam's Club and who did not have marketing degrees. In fact, Brian [Last Name Unknown] had worked under me as the Front End Area Manager and my assistant when I was the General Manager at the Gurnee club. When I was passed up, I spoke with District Manager Green and he told me that my General Manager, Keith Lowe, had recommended me. Lowe confirmed this, but told me that Regional Vice President Don Hitt made the final decision about whom to promote based on those recommendations and had not chosen me. This process confirmed my understanding that the Regional Vice Presidents met weekly in Bentonville to discuss and select candidates for general manager and co-manager positions. In addition, I wrote in my 1999 evaluation that "I feel ready to be promoted to a Co-Manager or General Manager position. It is very discouraging to see less qualified individuals get promoted over me." Attached hereto as Exhibit B is a true and correct copy of my April 1999 Sam's Club Performance Appraisal for Merchandise Manager. Director of Operations Brian Collins told me to "wait for my time."

6. Finally, in July 1999, I was promoted to Co-Manager at the Northlake club. The opening was not posted but I found out about it when I learned that

the current Co-Manager was being promoted. I told Director of Operations Collins that I was interested in the position and he gave me the promotion.

7. In July 2000, I was transferred to the Evanston, Illinois club. In April 2001, while on maternity leave, I requested extended leave for medical reasons. District Manager Miller told me that I would be terminated if I did not return to work. Because I was denied extended leave and was too sick to return, I felt I had no choice but to resign from the club. After working hard for more than 12 years at Sam's Club, I did not want my records to indicate that I was terminated.

8. I observed in each of the stores I worked in that women were more often assigned to the clothing department and men to the meat department, which pays more. I also observed that more men were assigned to the night shift, which generally pays $1.00 more than the day shift.

I declare under penalty of perjury of the laws of the United States and State of Illinois that the foregoing is true and correct.

This Declaration was signed by me on April 21, 2003 at Waukegan, Illinois.

/s/ Tina L. Herndon

Tina Herndon

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES,
PATRICIA SURGESON,
EDITH ARANA,
DEBORAH GUNTER,
CHRISTINE
KWAPNOSKI, CLEO
PAGE, KAREN
WILLIAMSON, on behalf
of themselves and all
others similarly situated,
Plaintiffs,

v.

WAL-MART STORES,
INC.,
Defendant

CASE NO. C-01-2252
MJJ

DECLARATION OF SUSAN HITCH IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I, Susan Hitch, declare:

1. I am a 39 year old female living in Livermore, Colorado. I worked for Wal-Mart from January 25, 1999 until I resigned from employment on December 29, 2000 out of frustration with the lack of promotional opportunities.

2. During my employment at Wal-Mart, I encountered discrimination based upon my gender with regard to promotions and training opportunities. In addition, I experienced retaliation for voicing my complaints of discrimination to Wal-Mart managers.

3. I started working at Wal-Mart's Longmont, Colorado, store as a Cashier. I also worked as a Layaway Clerk, Customer Service Manager (hourly), Stocker, Safety Team Leader, risk management,

fund raising, Furniture Department Manager and Support Manager.

4. I spoke to Kent McCoy, the Store Manager, on numerous occasions and expressed an interest in being promoted into a salaried management position. I specifically remember one such meeting with Mr. McCoy in approximately September, 1999, when I was a Safety Team Leader. Mr. McCoy falsely told me that I had to be a Department Manager before being promoted into a management job at Wal-Mart. I also spoke to Jim Mohan, the District Manager, about my desire to work in management at Wal-Mart. Mr. Mohan replied that Wal-Mart would train me for an Assistant Manager position. Mr. Mohan led me to believe that the training would commence within two to four weeks. When I was not assigned to the Management Training Program after a couple of weeks, I again inquired of Mr. Mohan and Mr. McCoy why there was a delay in my training. Neither Mr. Mohan nor Mr. McCoy explained why training had not started. For weeks thereafter, I continued to ask these men when my Assistant Manager training would begin, but they only ignored my further inquiries.

5. In March, 2000, I was promoted into an hourly Furniture Department Manager position. During my time in this position, department sales increased by 72% and I was invited to attend a meeting in Arkansas as the representative for the Longmont, Colorado, store.

6. I attended this meeting in Arkansas in the spring or early summer of 2000. I noticed that most of the managers attending the meeting were young males. I saw very few female district or regional managers at this meeting. Coincidentally, during

this meeting, nuns who owned stock in Wal-Mart accused Wal-Mart of discrimination against women.

7. After I attended the meeting in Arkansas, I spoke to Kent McCoy, the Store Manager, and Rick Caputa, the Co-Manager of the store, and again told them that I wanted to be promoted into a salaried management position. I also told them that I felt Wal-Mart discriminated against women. Mr. McCoy told me that he thought I would one day make it into Wal-Mart management.

8. In late June, 2000, after repeatedly asking Mr. McCoy to be promoted, I became a Support Manager, which is an hourly, not salaried, position. After becoming a Support Manager, however, Wal-Mart excluded me from daily store meetings and Wal-Mart management personnel continued to give me the cold shoulder. When I again discussed my desire to be promoted into a salaried Assistant Manager position with Mr. McCoy, he told me that I would have to relocate. I responded immediately that I would be willing to relocate, and Mr. McCoy said he would "look into it." Nothing ever came of my request.

9. I recall discussing my desire to become a salaried manager with Mr. Caputa in his office in the fall of 2000, when I was a Support Manager. During this meeting, Mr. Caputa told me that women were too emotional to be good managers. I did not use Wal-Mart's 1-800 complaint number because I observed that when other employees used this number to complain, the Home Office would call the District Manager; who would call the Store Manager, who would then retaliate against the complaining employee. I feared that if I used this complaint method, or utilized the Open Door Policy, I would be subject to retaliation.

10. I eventually became very discouraged that I would ever be promoted to a salaried management position at Wal-Mart. I had wanted to pursue a career with Wal-Mart, and had worked long and hard hours to try to succeed in achieving my goal of reaching the salaried management level. I had many times told my store management, as well as the District and Regional Managers, of my goal of reaching management and my desire to be placed into the Management Training Program.

11. In my time at Wal-Mart, I only saw two job vacancies posted. Mr. McCoy would usually hire whomever he wanted. I observed that management only approached men to inquire whether they were interested in becoming a member of management, while women were never approached. I felt that, because I was a woman, I could never advance to an Assistant Manager position.

12. I excelled at every job I held at Wal-Mart and poured my heart and soul into my work there. I always received the highest marks ("Exceeds Expectations") on my Performance Appraisals.

13. I observed males with less qualifications than me promoted by Wal-Mart into salaried Assistant Manager positions. In February, 2000, Jim Mohan, the District Manager, promoted Jorge Cobos, a male Stocker from Wal-Mart's Lafayette, Colorado store directly into the Assistant Manager training program at the Longmont, Colorado store after less than seven total months of employment at Wal-Mart. Mr. Cobos completed the training program and became an Assistant Manager at the Longmont store.

14. I was crushed and extremely disappointed when I saw Wal-Mart promote Mr. Cobos to an Assistant Manager job, despite the fact that I was more

qualified than him and had repeatedly made it known that I wanted to become an Assistant Manager. In December, 2000, I resigned from Wal-Mart because I was so fed-up with the discriminatory atmosphere and lack of promotional opportunities for me.

15. After I resigned from Wal-Mart, the store promoted Dustin Turner, a twenty year-old part-time male cashier, into an Assistant Manager position. When I worked as a Stocker in 1999, Mr. Turner had been promoted on a fast track into a Support Manager position despite being disciplined by Wal-Mart at least three times for having romantic affairs with co-workers. I had previously complained to Mr. Caputa about Mr. Turner's unfair promotion, but was told that Mr. Turner was "different."

16. Wal-Mart had been grooming Mr. Turner for a salaried management position. It was clear to me that, because I was a woman, there was no room in Wal-Mart's management for me. The fact that Wal-Mart promoted Mr. Turner to an Assistant Manager position did not surprise me, as I assumed this would be the outcome of Wal-Mart's special treatment of him.

17. If given the opportunity, I would like to return to Wal-Mart if and when the company reforms its policies and practices to ensure a discrimination-free workplace.

I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Colorado that the foregoing is true and correct.

This Declaration was signed by me on April 15, 2003, at Fort Collins, Colorado.

/s/ Susan Hitch

Susan Hitch

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated,

Plaintiff,

vs.

WAL-MART STORES, INC.,

Defendant

Case No. C-01-2252 MJJ

DECLARATION OF DAWN HITTLE IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I, Dawn Hittle, declare:

1. I make this declaration on the basis of my personal knowledge and, if called as a witness, could and would testify competently to the facts in it.

2. I was hired as an assistant manager trainee in the Bloomsburg, Pennsylvania Wal-Mart Store in 1993 after completing my Masters' Degree in Business Administration. I was 26 years old when I joined Wal-Mart. In the seven years that I worked for Wal-Mart Stores, I worked in five stores in three states (Pennsylvania, Massachusetts and Connecticut). My hope in joining Wal-Mart was to be able to use the skills and knowledge I had gained through my Masters' Degree to become a store manager. De-

spite years of hard work and persistence and consistently positive evaluations, that hope was never realized.

3. After six months as an assistant manager training, I was promoted to assistant manager in the Fairhaven, Connecticut store in June 1993. I was hopeful that this promotion was the first step toward becoming a store manager. During my September 1993 evaluation, I told Store Manager Chris Vaden (male) and District Manager Kerry Harmon (male) that I would like to work toward a promotion to store manager. In the career goals section of my evaluation, I wrote: "[i]n the next four to five years, I would like to take on the responsibility of a store manager." Attached hereto as Exhibit A is a true and correct copy of my September 1993 Management Performance Appraisal and Commitment to Success evaluation.

4. In my January 1994 evaluation, I again expressed to Store Manager Vaden and District Manager Harmon my desire to gain the training necessary to eventually become a store manager. I described my long-term goals as wanting to "learn more about the responsibilities of running a store," and I wrote that "I would eventually like to run my own store." Attached hereto as Exhibit B is a true and correct copy of my January 1994 Management Performance Appraisal and Commitment to Success evaluation. Although both Vaden and Harmon were positive about my work in their remarks in my evaluation, no efforts were made to provide me with any training.

5. In May 1994, I asked to be transferred to the new Seekonk, Massachusetts Wal-Mart Store because I believed that the experience of opening a

store would help me in my quest to become a store manager. Store Manager Scott Ahrens and District Manager Tony Nardozi both approved the transfer, but then, abruptly and without explanation, transferred me to the Norwich, Connecticut store. Because I was told of the transfer on such short notice, I had no time to move and had to commute 80 miles each way (a three hour daily commute) for three months until I was able to sell my condominium. After a few weeks at the Norwich store, it became clear to me that the Norwich store was in trouble and Store Manager Becky Foy told me that I was part of a new management team that was to revamp the store.

6. In my October 1995 evaluation, I wrote, "[m]y career goals consist of [moving] from assistant to store manager to district and beyond." Attached hereto as Exhibit C is a true and correct copy of my October 1995 Wal-Mart Store Manager/Assistant Manager Performance Appraisal. Again, I received no real encouragement and no direction in how I could gain the skills and experience to becoming a store manager.

7. In March 1997, I initiated a transfer to the new Wal-Mart Store in Branford, Connecticut, in order to get the experience of opening a new store. I hoped that the skills I gained would assist me in eventually becoming a store manager. While working at this store, I spoke several times with Store Manager Billy "Chip" Boyles about my desire to become a store manager. As I noted in my March 1997 evaluation, "my intention is to run a store soon and if improving in these areas will me get there, that's what I intend to do." Attached hereto as Exhibit D is a true and correct copy of my March 1997 Management Performance Appraisal. Again the next year, I wrote

in my yearly evaluation that I would like to be considered for a store manager position: "I intend to run my own store within a reasonable amount of time." Attached hereto as Exhibit E is a true and correct copy of my February 1998 Management Performance Appraisal.

8. While Assistant Manager in the Branford Wal-Mart Store, I was called in on my day off to help with inventory at another Connecticut Wal-Mart Store. There were about seven managers scheduled to work this inventory, which entailed preparing the inventory throughout the store to be counted. I was one of only two female assistant managers. After several hours, I noticed I was the only one left working in the receiving area. The male managers and associates also assigned to help with inventory were not in the store. Soon after, they came into the store after having spent the last hour playing basketball in the back lot rather than working.

9. During that time, I applied for about ten store manager positions through the Wal-Mart internal computer system, but received only two interviews. Eight times I did not get a call about an interview, or even a call telling me I had not gotten an interview. And the two times I did get an interview, no one ever followed up to tell me whether or not I got the job. All ten jobs were filled by men.

10. I went on maternity leave in June 1999. While on leave, I was promoted to co-manager for the Cromwell, Connecticut store, and began to work in that position when I returned in January 2000. I understood that this position would be a training period. I would work alongside the store manager in order to develop some of the skills needed to run a store. Although I was confident that I had most of

the skills necessary to become a store manager already, I was excited that my interest in becoming a store manager was finally being recognized and I was greatly looking forward to learning whatever other skills Wal-Mart felt I needed in order to advance. However, my hopes were soon crushed. As co-manager, I did not learn any new skills and essentially performed secretarial tasks, such as opening mail and filing. The store manager, Travis McNail, was new to his job and was unable to provide me with any real training on critical management functions.

11. While I was co-manager, I applied twice for open store manager positions, but did not get either position. I also discovered that I was receiving the lowest amount allowed ($43,000) for co-managers. I believed that, with seven years of experience as an assistant manager, I should have been paid more. Frustrated that I was not making any progress within the company, I resigned in May 2000.

I declare under penalty of perjury of the laws of the United States and of the State of Connecticut that the foregoing is true and correct.

This Declaration was signed by me on ____________, 2003, at Clinton, Connecticut.

____

Dawn Hittle

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiffs, vs. WAL-MART STORES, INC., Defendant.	Case No. C-01-2252 MJJ **DECLARATION OF NANCY HOM IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Nancy Hom, declare,

1. I was an Assistant Manager for Sam's Clubs for 10 years, from 1991 until 2001. I am female and live in Concord, California.

2. I had been employed in retail management for nearly 20 years when I was hired by Wal-Mart, Inc. to be an Assistant Manager at Sam's Club. I was originally told that I would be in management training for several months, but after approximately two weeks of training with Sam's Club, I was made an Assistant Manager. I remained as an Assistant Manager for the next 10 years and never received a promotion. I never received any discipline. I was

never given any direction or guidance as to what I needed to do to become a General (or Club) Manager.

3. My first assignment for Sam's Club was in Omaha, Nebraska, where I was an Assistant Manager. The Director of Operations, Bruce Redding, told me that if I worked hard I would be promoted to General Manager. At one point, he spoke to me about transferring to Las Vegas, Nevada, to show the women there that a woman could be a manager. He never transferred me to Las Vegas, and gave no explanation.

4. After about a year in Nebraska, I received a telephone call from the People Division in the Home Office in Bentonville, Arkansas, directing me to transfer to Yuba City, California with a week's notice. I understood when I was hired that I had to be willing to move on short notice to any place requested by Wal-Mart. I moved with my children from Nebraska to Yuba City where I was an Assistant Manager for approximately one year.

5. While at the Yuba City Club in 1993, I asked Director of Operations Marvin Moxley to promote me to the position of General Manager. He responded by asking with a tone of sarcasm why I felt I could be a General Manager. I responded by asking him why he thought I could not be one. He merely laughed in response, and gave me no further information. He did not appear to take my request seriously. At that time, I was not aware of any female General Managers or female Directors of Operations within Sam's Club. There was no application to complete to express my interest in this position.

6. From Yuba City, I was transferred to Oxnard, California to be an Assistant Manager. Again,

at the request of Wal-Mart, Inc., I moved with my children to help open a new club.

7. After about a year in Oxnard, I transferred to Concord, California in 1994 where I remained until I left in October 2001. I left my employment with Sam's Club because I was permanently disabled as a result of a workplace injury.

8. The policies and practices followed at each of these Sam's Clubs in Nebraska and California were the same. When I first began at Sam's Club, there were no handbooks or written guidelines for Sam's Clubs. Instead, we used and relied upon the manual and guidelines used at Wal-Mart Stores. Eventually, a Sam's Club manual was created. Each of the clubs I worked at had a manual in the manager's office which contained the policies and guidelines issued by the Home Office in Bentonville, Arkansas. When a new policy or guideline was issued, it was sent by the Home Office with instructions to insert it in the notebook. The policies and guidelines in the notebook included directives on personnel policies, including hiring and harassment, in addition to sales, inventory and merchandise procedures.

9. When I began working at Sam's Clubs, no job positions were posted. Postings for hourly positions at the Club level began in the late 1990s. However, even when we posted a job as open or available to permit interested employees to sign up for consideration, I observed that the General Managers frequently had already selected the person for the position. I recall, for example, General Manager Alan Oshier at the Concord Sam's Club directed me to post positions when he had already expressed to me his decision on who would be given the job. In particular, I recall that Mr. Oshier had already told me

who he had selected as the new Check Out Supervisor at the same time he was directing me to post the position as available. Mr. Oshier also told me who he had selected as Team Leaders, or hourly supervisors, at the time he was directing me to post the positions.

10. Each day at Sam's Clubs, we received reports from the Home Office in Bentonville, Arkansas. We received regular and frequent reports reflecting financial results and goals, including sales and profits and merchandising information. Over the years, we received additional reports. By the late 1990s, in addition to the reports on sales and profits, we also received reports showing employee turnover rates on a club basis. These reports were modified over time, and later also showed the demographics of club associates. This information was sent to our club on a monthly basis. By examining these "People Profit and Loss" reports, one could see what percentage of associates at our club were female, and what percentage of club management was female. Although we received these reports monthly, I do not recall a single instance when any General Manager or Director of Operations ever mentioned our club demographics or discussed this report at all.

11. Each day we sent to Home Office reports reflecting sales and inventory numbers. In the early 1990s, we made and received these reports by telephone. By 2001, these reports were generally sent through computer communications. However, even when the reports became computer-generated, there were still typically daily telephone calls with the Regional or Home Office.

12. As Assistant Manager, I participated in hiring hourly employees upon occasion. Neither the Yuba City club nor the Oxnard club had opened

when I arrived and so I helped interview many applicants. The final hiring decisions were made by the General Managers. The pay rates were established by the Home Office in Bentonville, Arkansas, but the General Manager at the Club had discretion to pay more to any newly hired individual. I observed General Managers paying newly hired male employees more than they paid newly hired female employees. For example, General Manager Alan Oshier paid John Naslund approximately $15.00 an hour when he was hired in early 2001. I am unaware of any female employee receiving a comparable rate when first hired.

13. In helping to open the Yuba City and the Oxnard Sam's Clubs, part of my responsibilities included ensuring the policies and procedures established by the home office in Bentonville, Arkansas were implemented at the club level. I did this by discussing these Home Office directives with the hourly employees who reported to me. In addition, when I worked at the Concord club, I was responsible for training newly hired employees and orientation. The materials I used for new hire orientation came from Home Office.

14. In 1992, I received in the mail a copy of a letter that was addressed to Helen Walton, the widow of founder Sam Walton, Rob Walton, the founder's son, Bud Walton, the brother of Sam Walton and a number of top executives of the company. This letter indicated that it was from eighty Assistant Managers, General Managers and Directors and I understood that copies were being sent to store level management across the country. The letter was dated September 26, 1992. Attached to it was a second letter, dated July 20, 1992, again addressed

to the Waltons and to company executives. I received these letters at the club where I worked in the usual course of business. The envelopes were addressed to Managers and Assistant Managers. After reading and copying these letters, I gave the originals to the General Manager of the Club. I took copies home with me and have kept them at my home. True and correct copies of these two letters are attached hereto as Hom Exhibits A and B respectively. These letters stated, among other things, that there was a pattern of discrimination against women at Sam's Clubs, and asked for the help and attention of the addressees. The letters also stated that they were prepared on behalf of a large number of managers and highlighted other issues of concern including a fear of retaliation for expressing these concerns. I do not know who wrote these letters, and I was not asked to participate in drafting them. No one in management asked me anything about these letters. I am unaware of any response to these letters.

15. In 1993, I received another letter in the mail at the club where I worked. This letter was addressed to Sam's Assistant Managers, General Managers, and Directors of Operations. It stated that it was from over 100 Sam's Management Members. After reading and copying this letter, I gave the original to my General Manager and took a copy home with me, where I have kept it ever since. A true and correct copy is attached hereto as Hom Exhibit C. This letter stated that women were discriminated against, passed over for promotions, talked down to, and black listed for using the Open Door. I do not know who wrote this letter. I am unaware of any response from Sam's Club or Wal-Mart management as a result of this letter. I was not asked anything about this letter or about the claims asserted in it.

16. In 1993, I was severely injured in a workplace accident. After I transferred to the Concord, California club, I was demoted to an hourly employee. Several weeks after I complained in writing to the Home Office in Bentonville, Arkansas, my title of "Assistant Manager" was restored and I was given the position of "Export Manager." However, my salary was decreased and frozen. In addition, I no longer received Geographical Assistance Pay ("GAP"), which is additional compensation given to Assistant Managers and above to compensate for the increased local costs of living, compared to the base salaries set in Bentonville, Arkansas. GAP at the Concord club at that time was approximately 30% of my annual salary. I protested many times to the Club and Regional management and to the Home Office using the Open Door policy. I explained that Mr. Dave Columb, who had been "Export Manager" before me, had received GAP. Eventually, my GAP pay was restored after a delay of some months. However, I did not receive GAP retroactively for the months in which I waited.

17. As a result of my use of the Open Door, I was told by Regional Personnel Manager Rita Seckington that "We would be watching", and if I did not perform, I would "be coached right out the front door". Director of Operations Phil Goodwin asked me if I realized what I had done, getting the "big boys" involved. I understood these comments to be threats of retaliation for my use of the Open Door.

18. As an Assistant Manager at the Concord club, I worked with and sometimes supervised Christine Kwapnoski, now a named plaintiff in this action. During the years 1994 through 2001, Ms. Kwapnoski often expressed to me her desire to become a man-

ager at Sam's Club. I passed on Ms. Kwapnoski's wish for promotion to Directors of Operations Phil Goodwin, and to the General Managers of the Concord club, including Alan Oshier, Mike Bruegger, Ed Walker, Harley Lowe, and Chet Wayne. Ms. Kwapnoski worked in the receiving and claims area with me. I found her to be an excellent employee and suggested merit raises be awarded to her on more than one occasion.

19. In spring of 2001, the Receiving Area Manager position became vacant. I suggested Ms. Kwapnoski be given the position, based on her experience, work ethic and her potential. She had been qualified for the position for several years, as she had been an excellent receiving and claims area employee, and had been a Team Leader in another area of the club. Nevertheless, she had been repeatedly passed over for this position. Director of Operations Phil Goodwin asked me who I thought should be given the position, and I suggested Ms. Kwapnoski. Mr. Goodwin was adamantly opposed to giving this promotion to her, saying that she had "people issues". Mr. Goodwin was in the Concord store a few times a month. I worked with Ms. Kwapnoski daily and I believed she was qualified for the position. Mr. Goodwin asked if I would cover the Receiving Area Manager position until someone was selected for the job. Shortly thereafter, approximately two weeks after this litigation was filed, Ms. Kwapnoski was finally allowed to be the Receiving Area Manager.

20. Although he blocked Ms. Kwapnoski from being promoted due to unspecified "people issues", Mr. Goodwin did not hold Store Manager Alan Oshier to a similar standard. Mr. Oshier lost his temper with Club associates on a very frequent basis. His

outbursts were loud, often cruelly personal, and common knowledge among most of the employees at the Club. Mr. Oshier told me that Mr. Goodwin had instructed him to take an anger management course. Mr. Goodwin never expressed to me a belief that Mr. Oshier had "people issues" or that he should not be in management because of these outbursts.

21. In my experience, male managers that I worked with over the years, including Mr. Goodwin and Mr. Oshier, had stereotypical images of how women should behave. Ms. Kwapnoski did not always fit this image.

22. Ms. Kwapnoski had previously been passed over for numerous other positions, which I, as Assistant Manager, believed her to be the most qualified. For example, Tyler Whitney, Bryce Sherman, and Joshua Reynolds were all Area Managers long before Ms. Kwapnoski was promoted to that position. In my opinion, none of these men were any more qualified than Ms.Kwapnoski, and none of them had the amount of seniority that Ms.Kwapnoski did.

23. I observed more frequent and larger merit raises and larger annual raises given to men than to women repeatedly at Sam's Clubs throughout my career. At the Concord Sam's Club, General Manager Oshier often gave large raises to men. For example, I recall Ernie Tautalatasi receiving raises totaling approximately $2.00 an hour in 2000, his first year at the Concord Club. The following year, his raises increased his hourly rate by approximately $1.25 an hour. Henry Sargent was hired in approximately the fall of 2000. I recall that within months, he had been given raises totaling approximately $4.00 an hour. Women were not given raises with the same frequency or ease. For example, I was told by General

Manager Mike Bruegger not to come back to him with a request for another raise for Christine Kwapnoski. Another female employee, Cassandra Iman, was not given raises consistent with her performance or in comparison with male associates.

24. I observed disparate treatment of men and women engaged in prohibited personal relationships. For example, Assistant Manager Richard Putnam at a store in the Sacramento area was accused of having an inappropriate personal relationship with a female hourly employee. The female employee was terminated. Only when greater protest was lodged with the Home Office by Mr. Putnam's wife was Mr. Putnam disciplined. He was terminated but rehired three months later in the same position. To my knowledge, the female hourly employee was not rehired.

25. The workplace atmosphere at the Concord Sam's Club was one of hostility towards women in management. For example, when Director of Operations Goodwin telephoned the Club and I answered, he frequently would ask to speak with "a manager". When I would remind him that I was a manager, he would merely respond by asking me to have one of "the guys" return his call. Assistant Manager Richie King told me that the Region was run as a "good old boys' club" and added that he "was not complaining". The male managers socialized together, to the exclusion of the female managers.

26. I have personal knowledge of each and every fact set forth in this Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and California that the foregoing is true and correct.

This Declaration was signed by me on April 17, 2003, at Concord, California.

/s/ Nancy Hom

Nancy Hom

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF ANGELA HORTON IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Angela Horton, declare,

1. I make this declaration on the basis of my personal knowledge and, if called as a witness, could and would testify competently to the facts in it.

2. I was an employee of Sam's Club from October 1996 until I left the company in July of 2000. In my nearly four years at Sam's Club, I worked in six different stores in two states (Minnesota and Wisconsin). Before joining Sam's Club, I was a petroleum lab specialist in the Wisconsin Army National Guard for five years while working in several different jobs, including as a child care provider and health aide.

3. At Sam's Club, my goal was to become a Fresh Area Assistant Manager. Fresh Area Assistant Managers are responsible for maintaining inventory level and product standards in the department, supervising and training workers, and ensuring compliance with sanitation requirements. I encountered repeated roadblocks in achieving this goal, including poor treatment by management, delayed entrance into the Management in Training program, and, once in that program, inadequate training on skills critical to running a Fresh Area department. When I finally obtained the position, I learned that I was paid substantially less than similarly-situated males. I was scapegoated for poor decisions made by the male General Manager. Ultimately, I left Sam's Club because of the poor management practices, which I believed endangered public health.

4. I was hired as a part-time produce/stocker in the Onalaska, Wisconsin club, making $6.00 an hour. After two months, I was promoted to a full-time team leader, where I remained for 16 months. During that time, I asked for forklift training in order to improve my job efficiency, but was told by Tim [Last Name Unknown], who ran the forklift and did the training, that I was too short and would not be able to see over the steering wheel. I protested to Meat Manager Ben Spanjers, who told me "he has a point, Ang."

5. In late Winter 1997, the "Spirit Committee," one of the company-sanctioned, employee-led committees to improve morale, hired a stripper for General Manager Jeff Marmer's birthday. The stripper performed in the store in front of all the employees and managers during the mandatory morning staff meeting, stripping down to her bra and panties while

dancing to music and mixing a cake on his lap. Although I felt the stripper was inappropriate and I was embarrassed by the display, I did not use the Open Door policy to protest this incident because I had overheard Meat Manager Spanjers call the women who did complain about the stripper a "bunch of whiners." I was afraid of being labeled a whiner, facing possible retaliation, and hurting my chances for promotion.

6. At my six-month review in March 1997, I wrote as my goals to "increase overall knowledge and skills within Fresh Department; advance to higher level of responsibility within merchandising or buying within Fresh." Attached hereto as Exhibit A is a true and correct copy of my March 1997 Sam's Club Associate Evaluation Form. Despite my clear request, my manager did not offer me any training. In order to achieve the goals I had laid out in my evaluation, for the next six months I taught myself by reading produce magazines, exploring Sam's Club merchandising reports on the computer and seeking out information from other employees, such as Quality Control Inspector Craig Millie. I also received a "Partner of the Month" award and several commendations for doing a good job increasing sales and putting together demos.

7. Before my one-year review scheduled for September 1997, General Manager Marmer approached me and asked me what my goals were. I told him I was interested in the Management in Training program and wanted more information about it. After explaining the program to me, he told me that I had a good chance of making it into the program. In September 1997, at my one-year review, I again spoke with Meat Manager Spanjers about my

interest in the Management in Training Program so that I could become a Fresh Area Manager. He told me that he supported my goals. In addition, I wrote in the Associate's Career Goals section of my written evaluation, "desire to move up within fresh, receive training in meat, possibly fresh management." Attached hereto as Exhibit B is a true and correct copy of my September 1997 Sam's Club Associate Evaluation Form. General Manager Marmer left the store in late September and no one else spoke to me about my interest in the training program until November 1997.

8. I expressed my interest in the training program to the new General Manager Catie Conneally in November. General Manager Conneally told me that Director of Operations Michael Matheson would interview me the next time he was in the store. When he arrived at the store soon after, he told me that the process had changed. He explained that there was no formal application process. Instead, the general managers at each store would identify associates who should be considered for promotion, and then those associates would take part in a series of interviews in the Twin Cities.

9. I was excited to begin this process. I repeatedly asked General Manager Conneally and Regional Fresh Merchandiser Bruce Burlson about when I would be interviewed for the training program. Finally, I used the Open Door to question the delay, yet I still heard nothing about the interviews or the program. In February 1998, I was finally interviewed for the Management in Training program by Regional Sales Manager Doug Persley, Duluth's General Manager Jim Caeser, Divisional Personnel Director Diana Eldridge, and St. Louis Park's General Man-

ager Tim Kotiranta. I was chosen for the program and began training in Onalaska in March.

10. The Management in Training program for Fresh Managers consisted of being trained by a Fresh Manager for several months and reading self-taught training materials. Meat Managers Spanjers was assigned to train me, but he actually did very little of that training. He had associates Don Witt and Donovan Scott train me on how to cut meat and he spent very little time training me on how to run the department. I had observed three other trainees, Don Lindstrom, Jerry Swanda and Jenny Trombley, go through the program before me and they received more training on how to structure the department, including how to manage staffing, payroll and ordering. Instead Meat Manager Spanjers spent most of his time training Team Leader Chris Forde (male), who was not even a trainee, on how to run the department. Although I recognized the importance of being trained to cut meat, I felt that these management skills were far more important, particularly if I wanted to advance further in the company. Based on his behavior during the training and throughout my time at the Onalaska store, I believe that Meat Manager Spanjers was not truly committed to my training or my success and had chosen to groom the male employees instead. Spanjers specifically told me that, because of my physical size, I would not be able to handle the physical work of the position. Even if this had been true, which it was not, it did not explain why he did not train me on other critical management functions such as ordering and staffing. My belief was reinforced by comments made by Chris Forde and tolerated by Spanjers. He often referred to me as "little woman," and I once overheard him calling Jenny Trombley "broad." I protested these com-

ments to General Manager Conneally and Meat Manager Spanjers, but the behavior did not stop.

11. In June 1998, I was promoted to Fresh Manager for Meat and Produce and was sent to the St. Cloud store to set up the fresh department, which was being added to the club. Because construction had not yet begun on the Meat and Produce department there, I worked in three Twin Cities clubs until construction began on the department in October 1998. While I was working at the three Twin Cities clubs, I trained many of the new Fresh Managers. Even after the Meat and Produce department at the St. Cloud store opened, I continued to have responsibility for training new Fresh Managers even after the St. Cloud store opened. While training them on how to calculate their monthly profit and loss statements, I discovered that many of these individuals, including Don Lindstrom and Doug Thompson, were paid $5000 to $10,000 more than I was for the Fresh Manager position. I protested this discrepancy with General Manager Kevin Shields who spoke with Regional Director Michael Matheson, who in turn spoke with Divisional Director Michael Miller in December 1999. In January 2000, I got a $2000 raise, which management later called a "market adjustment." My salary was still well below the amount that the male Fresh Managers were making, even though I was training them how to do their jobs.

12. Once I began working full-time in the St. Cloud as Meat Manager, I was not allowed to make many decisions about which products to merchandise and promote, and how many workers to hire. Instead, General Manager Kevin Shields told me to stock products that I felt would not sell or be profitable, and told me to hire more employees than I felt

necessary. As a result, my department did not run at a profit. I expressed my concerns about the way the department was being run to General Manager Shields who told me that I would not be held responsible for the loss of profit. I also registered my disagreement with the General Manager's merchandising decisions to Co-General Manager Neil Gwynne and Director of Operations Matheson, who told me to follow General Manager Shield's orders. Finally, I raised my concern with Fresh Merchandiser Carl Kramer. Although Fresh Merchandiser Kramer agreed with me, I did not see any follow up from these complaints.

13. After Kramer left the company, his replacement, Fresh Merchandiser Jim Hancock, held a meeting with me, General Manager Shields and itinerant Fresh Merchandiser Spanjers to discuss the department's lack of profit. At that meeting, Shields told Hancock that I was running the department according to his direction. Hancock and Spanjers told me to cut staff and product. Shields still did not express agreement with Hancock on how to run the department. Confused about whose direction to follow, I cut some product, but for the most part continued to follow General Manager Shields' orders. At my six month evaluation in September, I got a standard score despite the fact that my department had lost nearly $80,000 dollars.

14. Six months later, five days before my one year evaluation, I got a verbal coaching from Merchandise Manager Ralph [Last Name Unknown] about the lack of profitability in my department. Johnson and Shields were present for this coaching. When I explained to Merchandise Manager Ralph [Last Name Unknown] that I was running the de-

partment at Shields' direction, Shields became upset, saying loudly, "don't try to turn this back on me now" and slamming a chair under his desk. At my evaluation, I got a substandard score.

15. In May, I noticed that General Manager Shields was flirting with several female associates, Vicki [Last Name Unknown], Jennifer [Last Name Unknown], and Pepper [Last Name Unknown]. I saw that he took them out to lunch and spent a lot of time hanging out with them. Shields often did not return his pages and did not check in with employees in the Meat Department before closing the store. Some of the employees told me that he inadvertently locked the employees in the Meat Department in the store and they had to leave out the receiving dock platform. I spoke with Co-General Manager Johnson and told her that I felt this flirting was interfering with Shields doing his job properly. Johnson told me she had received complaints from several associates. I did not see any changes as a result of these complaints.

16. Two weeks after complaining to Johnson about Shields, I was demoted for "bad leadership," and for running an unprofitable department. In fact, my department had turned a profit in March, April and May 2000. I was replaced by a male, Dave Donnick, who later told me that Divisional Director Miller commended him for the three months of profit that had actually occurred under my leadership.

17. I immediately protested my demotion through the Open Door with Director of Operations Matheson. Matheson told me that he thought my demotion was the right decision and that he had already decided to transfer me back to the Onalaska store. I told him that I did not want to go back to the

Onalaska store so he instead transferred me to the Northside Milwaukee store. In the Northside store, I first noticed sanitation problems in the meat department. I complained to two different assistant managers about the issues. Jeff Lemay, Regional Fresh Merchandiser also overlooked these problems.

18. One month later, I was transferred to the West Allis store to promote their rotisserie program. Over the next few weeks, I observed many sanitation violations at this store as well, and was extremely concerned about the food handling practices. I complained to the West Allis new General Manager Michael Hitz about the sanitation and food handling violations, but nothing was done. Not wanting to take part in serious health code violations and feeling like I was not being taken seriously, I decided to leave the company.

I declare under penalty of perjury of the laws of the United States and of the State of Wisconsin that the foregoing is true and correct.

This declaration was signed by me on April 12th, 2003 at Watertown, Wisconsin.

/s/ Angela Horton

Angela Horton

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF AMY HOUCHINS-POST IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Amy Houchins-Post, declare:

1. I have personal knowledge of the facts contained in this declaration and, if called as a witness, am competent to testify to those facts.

2. I am a female and am 27 years old. I have a Bachelor of Arts degree in Criminal Justice. I am married and I have one daughter.

3. I was employed at a Wal-Mart store in Sioux City, Iowa from April 2001 until I resigned in November 2002. I was hired as Security in Loss Prevention. In April 2001, I was temporarily assigned to the Lincoln, Iowa store to assist with security set-up. While at that store, a male co-manager, Shawn (last name unknown) grabbed me from behind and pro-

ceeded to grind himself against me. When I complained to the Loss Prevention Supervisor, Cindy Bauer, about the harassment she told me that it was just something that I would have to get used to since I was working in a "man's world." While I was at that store, Co-Manager Steve Casley also commented to me that I would make a "good dominatrix."

4. In approximately 2002, after I had been transferred back to the Sioux City Wal-Mart, I applied for the position of hourly support manager. I had previously been told by Store Manager James Hardy that experience in this position was required to get into the management trainee program, which had been my goal from the outset of my employment at Wal-Mart. Attached hereto as Exhibit A is a true and correct copy of my In-Store Performance Appraisal indicating my interest in advancement within Wal-Mart. I was interviewed by Assistant Manager Bruce Schultz but the position was awarded to Chris Wykle, a male co-worker. Wykle had had several coachings and had drug and alcohol problems. I had observed that, when Wykle did poorly in one department, he was simply moved to another department. I was present at one of Wykle's coachings with Co-Manager Darrell Davis; one of my job responsibilities was to sit in on employee coachings.

5. Several days after my interview, I was standing outside the UPC office and heard Co-Manager Darrell Davis state to someone on the phone that he would not hire a "squatter" for the Support Manager position. He then explained "someone who squats to pee", i.e. a woman. This made me upset because just several days earlier at a store-wide meeting, Davis stated that Wal-Mart does not

tolerate sexual harassment or any type of discrimination.

6. In Summer 2002, I approached District Manager James Conrad and expressed my interest in applying for a salaried manager position that had been posted. He told me that I would have to get permission from Store Manager Hardy. When I spoke with Hardy, he told me that I did not have enough floor experience and experience in "Wal-Mart culture" This made me mad because I was familiar with Sam Walton's philosophy, as well as company policies and was often the biggest cheerleader for Wal-Mart. He offered me a position in ISC (Inventory) and led me to believe that this position was required to get the experience that I was supposedly lacking for a store management job. This was very frustrating to me because I had previously worked at a grocery chain where I supervised 100 people. By taking the ISC position, my pay was cut from $10.82 hourly to $8.84 hourly. Attached hereto as Exhibit B is a true and correct copy of my Associate's Commendation form. While this pay cut was very difficult for me to handle, I understood that the sacrifice was necessary in order to achieve my goal of promotion to store management. Soon after, I learned that Daniel Porter, who held the same position in ISC as I did, was making $10.00 per hour. He had been hired after me.

7. Shortly after taking the ICS position, a group of employees from the store were selected to enter the management training program by Store Manager Hardy. I was not selected, although I had repeatedly expressed interest in the position to store management personnel. In fact, there were no women in the group. When I asked Assistant Man-

ager Terry Sadler why I was not selected, he stated that it was because I was not doing a good job in ISC. I had instituted some innovations in the ISC Department to alleviate some of the problems the department faced and, because I did not specifically seek permission to do so, I received a coaching. This was surprising to me because Wal-Mart's management frequently talked about the importance of encouraging associates to be independent and to take on problems creatively. I understand now that this was just talk.

8. By November 2002, I realized that no matter what I did in the store, or how much experience I gained, male store management would not recommend me, nor allow me to enter the management training program. Therefore in November 2002, I decided to resign from Wal-Mart. In my exit interview, I stated that one of my reasons for leaving was lack of career opportunities. Attached hereto as Exhibit C is a true and correct copy of my Exit Interview form.

9. I have personal knowledge of the facts contained in this declaration and, if called as a witness, am competent to testify to those facts. I declare under penalty of perjury under the laws of the State of Iowa that the foregoing is true and correct.

I signed this on March 29, 2003 in Sioux City, Iowa.

/s/ Amy Houchins-Post

Amy Houchins-Post

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES,
PATRICIA SURGESON,
CLEO PAGE,
CHRISTINE
KWAPNOSKI,
DEBORAH GUNTER,
KAREN WILLIAMSON
AND EDITH ARANA, on
behalf of themselves and
all others similarly
situated,

Plaintiff,

vs.

WAL-MART STORES,
INC.,

Defendant

Case No. C-01-2252 MJJ

DECLARATION OF BRENDA HOULE IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

1. I make this statement on the basis of my personal knowledge, and, if called as a witness, could and would testify competently to the facts herein.

2 I was employed by Wal-Mart, Inc., in the Supercenter Store in Hazelton, Pennsylvania from November 6, 1996 until May, 2001. I am female.

3 I was hired by Wal-Mart as a cashier. I was successful at every level of my employment, I never received any write ups or discipline, all of my evaluations were good and I received many awards. The awards I received were Outstanding Performance, August 24, 1999; first place VPI Winner for store 2255 in February 2001; and Third place VPI Winner for District 326 in February 2001. The VPI award is

given for proving your marketing skills by picking the item that had the highest sales for one month. Despite this proven record of success, I was never offered any position higher than Department Manager. I became a Department Manager in 2000 after applying for the job. I was told that I did such a great job in the Seasonal Department that I deserved the promotion.

4. In 1997, while I was working in the Hazelton store, a man named Ed Kelly trained for six weeks there to be a Co-Manager. He sexually propositioned me when I was resetting Register 2. He said he was lonely, and told me he was staying at the Genett's Hotel on Route 93. He told me his room number and said "Let's get together." I did not go to his hotel room. The following day, Co-Manager Kelly came to me and said, "You did not show up last night." I ignored him since he was leaving the store in two weeks at the conclusion of his training.

5. In June 2000, Ed Kelly returned to the Hazelton store as Store Manager. One of the first things he did was ask Traci Davis, the Customer Service Manager on duty, if the "British girl" was still working at the store. Ms. Davis then came to me and told me that Ed Kelly was asking about me. When Mr. Kelly saw me, he made sexual comments and when I did not respond, he verbally abused me. He told me I would not make it into management, that I was not ready. In April 2001, Store Manager Kelly said to me "You know you don't need floor experience to make management, you need willingness." Based on his prior sexual comments to me, I understood that Mr. Kelly would block any promotion for me because I was not willing to submit to his sexual advances.

6. I made a point of telling every manager in my store that my goal was to be promoted to management. District Manager John Donaldson and Assistant Store Manager Ben Kanour promised me in October 2000 that I would be promoted to the Assistant Manager Training Program in January 2001. In January, I asked about my promotion. In a meeting with Robin Ripple, Co-manager, Mr. Donaldson said I was not ready for management training. He said that Ms. Ripple would help me progress towards management. I was devastated. Soon afterwards, Matthew Gaydos, a young male associate from Electronics who had just returned to Wal-Mart in March 2001 after a year of working for another company, was promoted to the Assistant Manager Training Program. Unlike me, he had no previous experience in management. I had management experience as staffing coordinator in charge of the nursing staff at Memorial Hospital in Colorado Springs for one year before moving to Pennsylvania.

7. I reported Mr. Kelley's conduct to District Manager John Donaldson, Assistant Store Manager Ben Kanour and Co-Manager Robin Ripple. Mr. Kanour told me that I needed to change locations because of Mr. Kelly. There was no investigation of which I was aware. No action was taken to change Mr. Kelly's conduct nor was any other action taken to protect me. I am unaware of any response to my use of the Open Door, other than Mr. Kanour's suggestion that I leave.

8. Linda Student, Department Manager of Infants, told me she was also being propositioned by Ed Kelley at the same time he was propositioning me.

9. After being denied the promotion to Assistant Manager, I requested a leave of absence in

March 2001 due to my husband's poor health, but it was denied. I then requested a transfer to the St. Claire, Pennsylvania store to get away from Mr. Kelly. However, the long drive to St. Claire was too much, especially with my husband in failing health. I requested a transfer back to the Hazelton store, but Mr. Kelly told me that there were no openings and that I was not coming back to that store. Consequently, I resigned.

I declare under penalty of perjury of the laws of the United States and of the State of Pennsylvania, that the foregoing is true and correct.

I signed this on April 9, 2003 in White Haven, Pennsylvania.

/s/ Brenda Houle

Brenda Houle

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES,
PATRICIA SURGESON,
EDITH ARANA,
DEBORAH GUNTER,
CHRISTINE
KWAPNOSKI, CLEO
PAGE, KAREN
WILLIAMSON, on behalf of
themselves and all others
similarly situated,

Plaintiffs,

vs.

WAL-MART STORES,
INC.,

Defendant

Case No. C-01-2252
MJJ

DECLARATION OF MELISSA HOWARD IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I, Melissa Howard, declare:

1. I have personal knowledge of the facts contained in this declaration and, if called as a witness, am competent to testify to those facts.

2. I am female and 35 years old. I live in Indianapolis, Indiana with my daughter, Mikaela, who is seven years old.

3. I was hired by Wal-Mart Stores in August 1992. I was placed as a department manager in Electronics in the New Castle, Indiana Wal-Mart store, earning $6.00 per hour. At the time I was hired, I had six years of retail experience with K-Mart, including supervisory experience as department manager and support team manager.

4. I entered Wal-Mart's Assistant Manager training program in June 1993 and was trained at the Muncie, Indiana store. When I started training, I wrote that my long-term goals were to work my way up the ladder to store manager, district manager and ultimately regional manager. Attached hereto as Exhibit A is a true and correct copy of my March 23, 1993 Management Candidate Recommendation.

5. Following my training, I returned as the Third Shift Assistant Manager to the New Castle store, which meant that I worked nights managing, unloading, and stocking. I was transferred to the Watsecka, Illinois store where I was the Assistant Manager for Hardlines. I was the only female in management. Within the year, I was the Lead Assistant Manager, meaning that I was responsible for signatures and reports in the store manager's absence. In February 1994, I received an "exceeds expectations" rating on my performance evaluation. I wrote on my evaluation that I wanted to be a store manager by the time I was 30, and then move up to district manager. Attached hereto as Exhibit B is a true and correct copy of my February 4, 1994 evaluation.

6. I resigned from Wal-Mart in September 1994 because of an incident with Regional Vice President John Waters. In the course of a store tour, Mr. Waters loudly berated me about designating plastic spoons as non-replenishable items. He yelled and belittled me in front of my hourly clerks as well as other management staff and questioned how I could be an assistant manager. The District Manager, John DiPasquale, who was also on the store tour, tried to come to my defense, telling Mr. Waters

that I had in fact acted properly with respect to the plastic spoons. This did not deter Mr. Waters.

7. Later I decided to use the Open Door Policy and spoke with District Manager DiPasquale about the incident. He told me that things would not change with Mr. Waters and that I just needed to "take the shit and let it roll." I did not want to be treated this way in the future so I resigned.

8. Shortly thereafter, I learned that Wal-Mart Divisional Vice President Bill Fields was interested in speaking to former Assistant Managers about their reasons for leaving Wal-Mart. I met with Mr. Fields and explained what had occurred with Mr. Waters. Mr. Fields told me that he had received other complaints from women about Mr. Waters' conduct towards them. Mr. Fields assured me that Mr. Waters was no longer a Regional Vice President and he asked me to return to my position with Wal-Mart. I agreed.

9. I was placed as an Assistant Manager in Plainfield, Indiana in March 1995. My daughter was born in January 1996 and my performance evaluation ranking for the year after she was born was "exceeds expectations."

10. In July 1997, I was promoted to the position of Store Manager in Marysville, Kansas. I drove with my daughter's father, who is African-American, to find a place to live there. When we arrived in town, we were treated hostilely by a clerk in the local Wal-Mart store, the town realtor and by a number of prospective landlords because we were a mixed-race family. At the last rental we visited, the landlord told us that my daughter was not safe and that we needed to be out of town by dark. I knew then that I could not move my family to this place.

11. I called the Regional Personnel Manager Gary Coward, explained what had happened and asked to be placed as a store manager anywhere else. He refused and told me that I would have to go to Marysville as planned or accept a demotion and return as an assistant manager to the 86th Street Store in Indianapolis, a low performing store with high shrink. I took the demotion to assistant manager at the 86th Street Store. This was particularly humiliating because my employees in Plainfield had just thrown me a big going away party to celebrate my promotion.

12. I was placed as a co-manager of the Greenwood, Indiana store in September 1997. The Store Manager, Curt Mace, ran the store like a boys' club. He regularly socialized with a group of male managers and hourly employees – going to lunch together, drinking, playing pool, and going to the race track. I was not invited to participate in these activities but rather was left to run the store. Wal-Mart's anti-fraternization policy prohibits store management from socializing with subordinates outside of work. To my knowledge, Mr. Mace was not coached for his conduct.

13. In June 1998, I posted for a store manager opening in Decatur, Indiana and was selected. The store had a lot of problems when I arrived (i.e. 16 trailers of old merchandise in the back) but I was able, over time, to clean it up. I put the store through a remodel and there was a grand opening in late 1999. Attached hereto as Exhibit C are a number of commendations that I received for the work that I did at Decatur.

14. As the Decatur store manager, I was required to attend regular district meetings in Fort

Wayne, Indiana. I was the only female store manager in the district. The district manager would sometimes hold the lunch meeting at Hooter's restaurant. The waitresses at the restaurant are required to wear tight t-shirts to show off their breasts. During the meeting, I was forced to listen to lots of discussion among the male managers about the waitresses' breasts and butts and which sexual experiences they would like to have with them. While it was humiliating to be there, I was reluctant to complain. I knew from attending the annual company meetings that the male managers often went out together to strip clubs after the meeting. It seemed to me to be an accepted part of the culture.

15. In September 1999, I was assigned as the store manager for the new supercenter slated to open in Bluffton, Indiana. In my experience, Wal-Mart generally staffed new stores with an experienced group of managers. Instead, I was given a team of managers that included two co-managers who were brand new to Wal-Mart. So, in addition to hiring and training 450 new employees, I also had to train the management staff. When other new stores had in the past opened in the Fort Wayne area, they had been staffed with experienced managers. The store managers in those new stores were men. I felt as if I was being set up to fail with this inexperienced management staff.

16. Specifically, district management hired Jerome Rauch (a male) from a local grocery store chain to serve as the co-manager in Bluffton. Rauch had no Wal-Mart experience, management or otherwise. He was paid a guaranteed salary of $65,000 annually -- $15,000 more than I was making although he reported to me. He also received three

weeks' paid vacation from his hire date; I had had to work seven years to accumulate that same benefit. I am aware that another male co-manager, Alia Naghdi, was hired off the street for $10,000 more than I was making.

17. In March 2000, our district manager Kevin Washburn learned he was in trouble because several stores in his district had high shrink; the Bluffton store was not one of them, however. We (the district manager, the store managers and the loss prevention staff) were told to drive to Bentonville to meet with senior management about the problems. We went in two cars, one driven by District Manager Washburn and the other by Phil Harris, Loss Prevention District Manager. I was the only woman in my car and there was another female store manager, Shelly Lehman, in the other. During the approximately 16-hour drive, the male managers talked ceaselessly about sex despite my repeated requests that they stop. We stopped for gas and several of the male managers wanted to go for a drink at the club adjacent to the station. When we entered, I realized that it was a strip club. Although I had never been in a place like this and had no interest in being there, I had no choice but to stay because I did not have my own car. I did not believe that it would have been safe for me to sit in the parking lot in the dark outside the club. I tried to ignore the show, but at one point, I was approached by one of the strippers and District Manager Kevin Washburn proposed that he pay one of the strippers $50 to have a "threesome out back" with me. I refused.

18. In Bentonville, our team was berated and humiliated for the district's bad performance. We were made to stand up in a large group meeting and

be introduced as the group "that just lost us a million dollars." District Manager Washburn and another Store Manager, David Pickle, were demoted. I met privately with the Divisional President Mike Huffaker, who told me that I was a great store manager and that I was only there because the Decatur store (which I had been out of for several months) was among those with high shrink.

19. On the return trip to Indiana, we stopped at two more strip clubs, including the "Pink Cadillac" somewhere in Missouri. The other female manager, Shelly Lehman, and I sat in the back of the club as far away from the stage as possible, while several of the men sat up close and paid for lap dances. We repeatedly asked the male drivers whether we could leave. When we returned to the motel where we were to spend the night, District Manager Washburn and at least one other store manager dropped us off and announced that they were going to a massage parlor, which I understood to mean that they were planning to hire prostitutes.

20. I returned to work at the Bluffton store and District Manager Washburn was replaced briefly by David Tyson, who in turn was replaced by John Waters in May 2000. As noted earlier in my declaration, I had resigned in 1994 because of Mr. Waters' abusive conduct towards me and I knew that he had been demoted at that time from his Regional Manager position. I worried that he might now retaliate against me for these earlier events. I grew more afraid when, at our first meeting, he made a point of telling me, in a less than friendly tone, that he "remembered" me.

21. At our next meeting, two weeks later, my fear increased when District Manager Waters ques-

tioned how it was that I had ever gotten a supercenter store manager position. When I responded that it was because of my strong past performance, he told me that what he had heard that I was a supercenter store manager because I was "Kevin's pet," referring to my former District Manager Kevin Washburn.

22. While my store's performance was on track, Mr. Waters started to look for reasons to criticize me. For example, some of the hourly employees complained to him that one of the female assistant managers (who I played no role in selecting) was "too mean." Based on this, he told me my performance was "unacceptable" and I needed to fix the problem or turn in my keys. Mr. Waters called in a Wal-Mart quality assurance inspector to see if he could find a problem in the grocery area of my store. The inspector found nothing wrong.

23. Two weeks later, on June 16, Mr. Waters telephoned me and asked me to step down. I demanded to meet with him in person and I drove 30 miles to meet him. He told me that a woman should not be running a Wal-Mart store and that I "needed to be home raising my daughter." He instructed me to step down "voluntarily" and to tell my employees at the morning meeting that having this new supercenter was too stressful for a single parent and that I just needed to take a break. In other words, it was not enough for Mr. Waters to just get rid of me. I believe that he also wanted me to send a strong signal to other women that the job was not right for any mother. He told me to step down voluntarily or he would have me out within four to six weeks – he would make my life "hell." I had no choice but to step down.

24. At the time, the Bluffton store – my store – was running in the black and would have made a profit in the first year, which is very unusual for a new store.

25. At that time that I was forced to step down, Mr. Waters had ten stores in his district and I was the only female manager in the district. A male, Bruce Hovey, was assigned as the new store manager of the Bluffton store. Mr. Hovey had previously worked for Mr. Waters and had been fired for altering payroll documents.

26. I sent a letter to the Regional Vice President Arthur Emmanuel complaining about my demotion. In the letter, I specifically raised the question of whether my treatment was a result of my gender. Attached hereto as Exhibit D is a true and correct copy of the letter that I wrote. I subsequently spoke by phone with Mr. Emmanuel and renewed my concerns that Mr. Waters was motivated to act because I am female. Mr. Emmanuel told me that there had not been any complaints about Mr. Waters' treatment of women, a statement that I knew to be false based upon my discussion with Divisional President Bill Fields in 1994.

27. I was transferred as a co-manager in the Columbia City, Indiana store in July 2000. My new district manager, Dave Tyson, told me that I had to be placed in a different district – a 120 mile daily commute – because John Waters refused to have me in his district. He told me to work hard and prove myself and I could again run a store.

28. Shortly thereafter, I received a call from the Regional Personnel Manager, Shantel Jones, who instructed me not to shop in the Bluffton Wal-Mart store. The associates there remained loyal to me and

were not receptive to the man that Mr. Waters had selected to replace me. She felt that my presence in the store undermined his ability to succeed.

29. I assumed that, once I took my demotion and moved out of his district, District Manager Waters would leave me alone. I was wrong. Mr. Waters accused me of violating the anti-fraternization policy – he claimed that I had been involved with a subordinate whom I supervised. There was an investigation, ironically conducted by Jerome Rauch, the Bluffton co-manager hired to report to me but who was paid $15,000 more. I was cleared of any wrongdoing.

30. I knew at that point that I had to leave Wal-Mart. I resigned a few weeks later.

I declare under penalty of perjury under the laws of the State of Indiana that the foregoing is true and correct. Executed this 29th day of March, 2003 at Indianapolis, Indiana.

/s/ Melissa J. Howard

Melissa J. Howard

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF TAMMY HOWARD IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Tammy Howard, declare:

1. I make this statement on the basis of my personal knowledge, and, if called as a witness, could and would testify competently to the facts herein.

2. I am a female and a current employee of Wal-Mart, Inc. I reside in Florida.

3. I was a vocational trainer of mentally handicapped persons before working for Wal-Mart. I decided to leave that field because I wanted a career with better promotional opportunities. My brother, Tracy Stephens, told me that he had begun working at Wal-Mart as a temporary unloader and in less than two years, he had been promoted to an Assistant Manager position. I wanted a job with advancement opportunities. When my brother told me that Wal-Mart was hiring employees for a new Su-

percenter in Sylacauga, Alabama, I applied for a position. In January 1996, I began working at the Sylacauga Supercenter as a night stocker in the Sporting Goods Department. At that time, I aspired to be an Assistant Manager.

4. In July 1996, I saw a posting on a bulletin board in the Sylacauga store for a Zone Manager position in the Domestics and Crafts department. I applied for the Zone Manager position and was offered it without having an interview. No one else had applied for the position by signing the posting, as I had.

5. After approximately nine months of working as a Zone Manager in Domestics and Crafts, Store Manager Fred Twilley told me that I had not had enough training to do the work required of a Zone Manager, and he demoted me to Sporting Goods Department associate. I never received the training that I needed to do the Zone Manager job well. I was not aware, until I was demoted, that Mr. Twilley was not satisfied with my job performance. In fact, in my evaluation of November 1996, my performance was rated as "standard." (Attached hereto as Howard Exhibit A is a true and accurate copy of 1996 Associate Evaluation.)

6. In July 1998, I was transferred to a Milton, Florida store.

7. In October 1998, the Automotive Department Manager position opened. The position was not posted. I told Assistant Manager David Taylor that I was interested in the Automotive Department Manager position. After an interview, I was offered the position, which I accepted.

8. In September 1999, I asked Store Manager Jimmy Cross if I could have some Support Manager

responsibilities in addition to my job as a Department Manager. I was interested in taking on these extra tasks so that I could learn more about Wal-Mart procedures. In addition, I took these responsibilities because I wanted to show Wal-Mart store management that I could handle multiple tasks and responsibilities so that I would be an attractive candidate for promotion in the future.

9. In September 1999, a job opening for Sporting Goods Department Manager was posted in the back of the store. In October 1999, Store Manager Cross told me that I did a very good job as an Automotive Department Manager and asked if I would be interested in the Sporting Goods Department Manager position. He also told me that he had been unable to find qualified candidates for the position. I accepted the position because my goal was to move into salaried management and I saw this as an opportunity to move up with Wal-Mart. When I assumed responsibility for the Sporting Goods Department in October 1999, I remained Automotive Department Manager and part time Support Manager.

10. The evaluation I received for the time that I was the Sporting Goods Department Manager, Automotive Department Manager, and part time Support Manager, indicated that my supervisor, Assistant Manager Ron Scott, was impressed by my performance. My evaluation rated my performance "exceed expectations." (Attached hereto as Howard Exhibit B is a true and accurate copy of 1999 Performance Appraisal.)

11. In June 2000, the Milton store was scheduled to move to a new location in Pace, Florida. The new Pace Supercenter was not going to have an

Automotive Department. The Milton store's Automotive Department was going to be absorbed by the Pace Supercenter's Tire and Lube Express Department ("TLE"), a division that was supervised independently of the other departments in the store, and not by the Supercenter's Manager. In early 2000, I told TLE District Manager James Taylor that I was interested in the TLE Department Manager position in the new Pace Supercenter. I also mentioned my interest in that position to District Manager William Hart, who told me that he would put in a good word for me if I decided that I was interested in that position. When Store Manager Cross became aware that I was interested in taking a TLE Department Manager position, which is not a division that he supervises, he said to me "how dare you even think about going somewhere else." I told Mr. Cross that I wanted to eventually be placed in the Manager Training program. However, I had never seen a posting for this position and the handbook did not explain how to apply for the program. Store Manager Cross told me that if I remained Sporting Goods Department Manager for one more year, he would help me get into the Manager Training program. Based on his promise to promote me to the Manager Training program, I agreed to remain Sporting Goods Department Manager.

12. In June 2000, the Pace Supercenter opened and I began working there as Sporting Goods Department Manager

13. In approximately August 2000, I asked Store Manager Cross how employees who were interested in the Manager Training program got into it. He responded that there is no way to apply for the program. The Store Manager, explained Mr. Cross,

submits a list of employees whom he or she believes should be in the program. The District Manager then decides who will be placed into the program. Store Manager Cross told me that I already knew 90% of what I needed to know to be ready for placement into the program. I understood that Store Manager Cross would soon submit my name to District Manager Hart.

14. In April 2001, nearly a year had passed since Store Manager Cross had agreed to help me get into the Manager Training program. I asked Mr. Cross if there was anything that I should do that would increase my chances of being promoted to the Manager Training program. He assured me that everything was fine and that it was now the District Manager's decision to select me for the program. I then called District Manager Hart to ask him if there was anything that I should do that would increase my chance of promotion to the Manager Training program. He told me that Store Manager Cross had not submitted my name to him and therefore I was not eligible for the promotion. He also stated that he would tell Store Manager Cross to talk to me about why my name had not been submitted.

15. The next day Co Manager Paul Tetanich told me that I did not qualify for the Manager Training program because I had hygiene problems and needed to have my teeth fixed. He added that I needed to work on my people skills and stop reminding store management that I wanted to be promoted. I had been expressing my interested in the program to store management because Mr. Cross and my co-workers, including Department Manager Virginia Canning, had advised me that to be promoted into

the Manager Training program, you had to show interest in it.

16. Co Manager Paul Tetanich's remarks prompted me to use Wal-Mart's open door policy to call Regional Personnel Manager Larry Ezell. I told Mr. Ezell that I was being overlooked for promotion because of my teeth, which I believed was an improper basis for evaluating an employee. He responded that I was drawing at straws. He then suggested that my chances of being promoted might increase if I used Certs breath mints and mouthwash and read "The One Minute Manager" by Kenneth H. Blanchard. Mr. Ezell also suggested that I ask my District Manager and Store Manager for a list of measurable goals, which if met within a certain timeframe, would increase my chances of promotion.

17. A few days after talking to Mr. Ezell, I asked Store Manager Cross for a list of measurable goals. He refused, stating that hygiene was not measurable. Mr. Cross then stated that his decision not to promote me was not based on my gender, although I had not mentioned this motivation.

18. Later that week, District Manager Hart met with me in an office in the back of the store. He suggested that I visit a dentist and asked if I had dental insurance. I told him that I did have insurance but that it would not fully cover the cost of replacing my missing teeth. I had no extra money because I had three children to support and was only paid $10.81 an hour. I told Mr. Hart that I wanted to be judged on my qualifications and performance, not my teeth. He responded that he stood by Store Manager Cross' decision but would expect Mr. Cross to submit my name for the Manager Training program next year.

19. I observed that male employees were promoted faster than I was, with less management experience at Wal-Mart than I had, and with poor hygiene. Watkin Stott, a Night Receiving Clerk, was promoted to Support Manager in June 2001. I became aware that he was being given Assistant Manager training when he approached me with a career goal survey that I had only observed Manager Trainees answering. Mr. Stott was missing teeth, his hair never looked combed, and his clothes fit very loosely giving him an unkempt appearance. In addition, Mr. Stott told me that he had never held a management position during the seven years that he had worked for Wal-Mart before his promotion to Support Manager. In June 2001, Randy Byrd, a male department manager, was placed in the Manager Training Program after working in the store for just over a year. He had been promoted very quickly during his time at Wal-Mart. He was hired as a temporary setup person in April 2000. In August 2000, he was promoted to Pet Department Manager before being selected for the Manager Training program ten months later. When I was finally promoted to Manager Trainee, I had been with Wal-Mart for over 6 years.

20. In June 2001, store management called a meeting. In this meeting, Mr. Cross and the other managers said that they had just found out that Wal-Mart was being sued for gender discrimination. After the meeting, Store Manager Cross and Co Manager Tetanich told me that they would give me extra training like they were giving Mr. Stott.

21. In August 2001, District Manager Hart asked me if I was still interested in management training. I told him that I was. For the next three months, District Manager Hart repeatedly scheduled

interviews with me and then cancelled them or failed to show up. When I saw him in the store, he would explain that he had other things to do and that he wanted to test my patience by making me wait to be interviewed. On October 17, 2001, Mr. Hart finally met with me. I was under the impression that he was going to interview me for the Management Training Program. In our meeting, he told me that he was placing me in the Management Training program without asking me any questions about my qualifications.

22. I began management training in February 2002 in a Pensacola, Florida Supercenter. District Manager Hart told me that I would be transferred to an Assistant Manager position in Brewton, Alabama upon completion of the program. In April 2002, I talked to Brian English, the Store Manager of the Brewton store. He told me that the position had been filled by James Odom, a man who was the son of an Assistant Manager in a Crestview, Florida store.

23. In May 2002, Candy Maddox, District Manager Hart's assistant, told me that Store Manager Cross had requested that I end my training early to fill an Assistant Manager position in the Pace Supercenter. In June 2002, I told District Manager Hart that I was concerned about returning to the Pace Supercenter to work for Store Manager Cross because I thought that he might be angry that I had used Wal-Mart's Open Door policy to complain about his failure to promote me. Mr. Hart assured me that I had nothing to worry about and that Store Manager Cross would not mistreat me because I had used the Open Door.

24. Since July 2002, I have been working as an Assistant Manager in the Pace Supercenter. I believe

that Store Manager Cross has been retaliating against me because I used the open door to complain about him. For example, in March 2003, he questioned individually each of the cashiers that I supervise. When I asked Mr. Cross why he was questioning the cashiers, he responded that he had heard that the cashiers had low morale. Although I had never suggested that he was trying to find out negative information to use against me, he repeatedly stated that he was not trying to get anything on me. I have been working for Wal-Mart for seven years in four different locations and I have never seen a Store Manager, including Mr. Cross, question all of the hourly employees in a department.

I declare under penalty of perjury of the laws of the United States and State of Florida that the foregoing is true and correct.

This Declaration was signed by me April 23, 2003, at Milton, Florida.

/s/ Tammy Howard

Tammy Howard, Declarant

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF FRANCES JACKSON IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Frances Jackson, declare:

1. I make this statement on the basis of my personal knowledge, and, if called as a witness, could and would testify competently to the facts herein.

2. I am female. I have been employed at a Wal-Mart store in Aberdeen, North Carolina for fifteen years, from July 1987 through the present.

3. Wal-Mart hired me as a stock clerk and soon after transferred me to the Electronics Department as a Sales Associate. In 1989, I was promoted to Department Manager of Electronics. Since then, I have also worked in the following departments as a Department Manager: Sporting Goods, Photo, Pets, and Furniture.

4. In 1992, Wal Mart established the position of Zone Manager in my store. The Zone Manager position was an hourly position that took the place of the existing Department Manager positions. I signed up to interview for this position. Instead of formally interviewing me, Assistant Manager Leroy Townsend spoke with me briefly on the floor about the position. Mr. Townsend questioned my ability to do the job because of my husband's health, since he had recently had a heart attack. Although I was already a Department Manager, I was not selected for the Zone Manager position. I learned from Roberta Helin, a Personnel Manager, that Mr. Townsend refused to promote me because of my husband's health. A man named Roger (last name unknown) received the position of Zone Manager for Electronics. Because of the restructuring of positions, I was demoted to a stock clerk until additional Zone Manager openings became available.

5. In 1998, I learned that Julius Ford, a male Sporting Goods Department Manager who I had trained, had received a $3.00 an hour merit increase. I learned this from Tonya Spencer, who had been working in the cash office at the time and had access to payroll information. I spoke with Store Manager Jay Gomez to find out if this was true, and he neither confirmed nor denied it. I then spoke with District Manager David Norman and he told me he would investigate the matter. The next day when I returned to work, I was given a $1.00 an hour merit increase. All of my other merit increases, before and after this occurrence, were increases of $0.50 - $0.75 an hour.

6. In approximately 1996, I began talking to management about my interest in the Management

Training program. I expressed my interest to Store Manager Gomez, who told me there were no openings. Two weeks after my conversation with Mr. Gomez, a man who worked in store security named Al (last name unknown) was selected for the program. Mr. Gomez did not tell me any additional information regarding the Management Training Program.

7. In approximately 1998, I learned that Jamie Jenkins, a male employee who had worked for Wal-Mart as a cart pusher and lay-away runner for one year, had been promoted to Assistant Manager. The Assistant Manager position was not posted and I had no opportunity to apply for the position. Jamie was promoted over the weekend. I asked my Store Manager, John Furner, why a cart pusher and lay-away runner was made Assistant Manager ahead of more qualified associates. He responded by telling me that Mr. Jenkins was the only one qualified for the job and that he needed an Assistant Manager that same day.

8. In 1999, I spoke with my Assistant Manager, Portia Conway, about the Management Training Program. She encouraged me pursue this goal. I later asked Store Manager Brian Barnett about the possibility of entering the Management Training program and staying in the Aberdeen store. Mr. Barnett told me that the option for staying in the store while undergoing training no longer existed as it had for Jamie Jenkins and Al (last name unknown).

9. In 2000, I spoke with my District Manager, Terry Branton (male), about my interest in entering the Management Training Program. Mr. Branton informed me that in order to participate, I would have to relocate to Cheraw, South Carolina. The relocation

policy for Management Training and other management positions has hindered my ability to advance within the Company. Because I am raising my grandchildren and caring for my husband, it is extremely difficult for me to relocate. I am interested in management opportunities but am unable to pursue those that require relocation due to my family situation. I believe the policy is discriminatory toward women because men in my store were allowed to train for management without having to relocate.

10. At my store, the male managers are in a clique. They golf together and socialize in the store during breaks. In contrast, when I began having lunch with Co-Manager Gloria Williams, District Manager Branton told me I was not allowed to socialize with her because it violates the Company's fraternization policy.

11. Within the past year I observed Josh (last name unknown), a male sales associate who only worked for Wal-Mart for one year, get promoted to first to Department Manager and then to Support Manager. Josh was pre-selected for the Support Manager position: he was asked to perform the duties of a Support Manager even before anyone was interviewed. I have worked for Wal-Mart for 15 years and have been unable to advance at this rate because of my managers' discriminatory bias against women.

I declare under penalty of perjury of the laws of the United States and of North Carolina that the foregoing is true and correct. I signed this on the
of April, 2003 in North Carolina.

/s/ Frances Jackson

Frances Jackson

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF JOANNE JASO IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Joanne Jaso, declare:

1. I make this statement on the basis of my personal knowledge, and, if called as a witness, could and would testify competently to the facts herein.

2. I have been employed by Wal-Mart Inc. in California since April 1996. I am female.

3. When I began working for Wal-Mart, my goal was to eventually become an Assistant Manager.

4. I am a single mother. When I first began working for Wal-Mart, I made approximately $11,220 per year and, seven years later, I now make approximately $25,000 per year. It has been very dif-

ficult to support my two children on the salary I make working for Wal-Mart. In February 2001, I could no longer support my family on my salary so I took a second full-time job. This second job provided insurance for my family, as I could not afford Wal-Mart's health insurance and had been uninsured since I began working for Wal-Mart in 1996. In February 2002, I was diagnosed with stress-related illnesses and was forced to quit the second job.

5. From 1998 to 2001, I worked every weekend even though I was an hourly associate. I also worked overnights for that entire period. I thought that Wal-Mart would recognize my commitment to the job if I worked these hours.

6. I have observed a great amount of gender segregation in jobs at the two Wal-Mart stores I have worked in. Women tend to work in Cosmetics and Health and Beauty Aids. The Garden Center employees are almost exclusively male with the exception of the cashiers. In the store where I currently work in Bakersfield, California there are only two women that hold management positions above support manager: Assistant Manager Tina Hernandez, and Assistant Manager Davlin Barrera. Assistant Managers Hernandez and Barrera both transferred into the store. I have never seen a female store manager.

7. I was hired by Wal-Mart as an overnight stocker in a Bakersfield, California store. In approximately December 1996, I transferred to a different Wal-Mart store in Bakersfield, California and took a position as a processor. In February 1997, I became a cashier.

8. In approximately September 1997, Customer Service Manager Carly Griswold asked me if I

wanted her position because she was stepping down. The position was not posted and I did not apply for it. I took the position and held it for three years until 2001. In this position, I supervised cashiers and was responsible for the front end of the store. I was never disciplined and my performance evaluations were always either 'meets expectations' or 'exceeds expectations.' (Attached hereto is a true and accurate copy of 1999 Performance Evaluation as Jaso Exhibit A). I received several merit raises. In April 2000 I was recognized for "above and beyond performance." The commendation stated: "[Joanne] displayed ownership in her area with great leadership." (Attached hereto is a true and accurate copy of Associate's Commendation Form as Jaso Exhibit B).

9. I have applied for at least ten department manager and support manager positions from 1998 to 2002. Store Manager Oscar Cuevas told us in employee meetings that everyone who applies for these positions would be interviewed, yet I have been interviewed for only four or five of these positions.

10. In approximately 1998, I applied for an Electronics Department Manager position. Store Manager Cuevas told me that he already had two men selected for the position because the department carries a lot of responsibility and he did not think I could handle it. He added that the position was a man's job and requires a lot of heavy lifting.

11. In approximately 1998, I applied for a support manager position. I was not interviewed. A man, Charles Bristow, was selected for the position. I asked Store Manager Cuevas why I was not considered for the position. He replied that I did not have enough merchandizing experience to be a Department Manager or Support Manager. At this time I

had been working in the front end for about one year and I believed that I had gained considerable merchandizing experience. Store Manager Cuevas also told me that to be a Support Manager, you had to first be a Department Manager. Before his promotion to Support Manager, Charles Bristow had been a Receiving Manager for approximately one month. Receiving Manager is not a Department Manager position.

12. In approximately 1998, I went on the pipeline, Wal-Mart's intranet, looking for different opportunities that Wal-Mart offered. I saw reference to a Manager Training program. I had never seen a posting for a manager training position. I told Store Manager Cuevas that I was interested in the Manager Training program. He responded that I did not have enough merchandizing experience.

13. In approximately 1998, I applied for a Department Manager of Furniture position. I was not interviewed for that position. It was given to a male cashier that I had supervised.

14. In approximately May 2001, I applied for a support manager position. Robert Morning, who had worked for Wal-Mart as a Receiving Manager for only a few months, was promoted to Support Manager without first holding a department manager position.

15. In approximately 2002, I applied for a furniture department manager position. Several times I asked Assistant Manager Craig Beemer when I would be interviewed. He repeatedly responded that I would be interviewed soon. I was never interviewed for the position and when I asked Assistant Manager Beemer why, he responded that he had based his de-

cision on a previous interview. I had not been interviewed in approximately three years.

17. In November 2002, after six years of experience with Wal-Mart, I was finally promoted to Department Manager of Boys Wear. This is an hourly position. I have no confidence that I will ever reach my goal of becoming Assistant Manager.

18. In early 2003, I saw that for the first time in my six years at Wal-Mart, Wal-Mart was offering an opportunity to apply for manager training. However, I was on medical leave for the seven days during which an application could be made. I missed my opportunity and I have not been told if or when Wal-Mart will accept applications for the Manager Training program again. I remain interested in joining the Manager Training program at Wal-Mart and if given the opportunity would readily enter a training program.

I declare under penalty of perjury of the laws of the United States and State of California that the foregoing is true and correct.

This Declaration was signed by me on April 17th, 2003, at Kern County.

/s/ JoAnne Jaso

JOANNE JASO, DECLARANT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF JENNIFER JOHNSON IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Jennifer Johnson, declare:

1. I make this statement on the basis of my personal knowledge, and, if called as a witness, could and would testify competently to the facts herein.

2. Prior to being hired by Wal-Mart in 1986, I graduated high school, completed two years of college, and worked for five years in a variety of retail stores as a sales associate and cashier. I am a female.

3. I was initially hired by Wal-Mart as a cashier in the Ormond Beach, FL store, but after a few months transferred to a sales associate position. A few months later I transferred to the camera/electronics department because I had previously

worked in the camera department for one of my previous employers.

4. During the course of my fifteen year career with Wal-Mart, I was promoted to Department Manager, Support Manager, Assistant Manager and ultimately Co-Manager. However, at each level I had to wait much longer to be promoted than similarly qualified men, as described below.

5. I worked in the Ormond Beach, Cooper City, St. Augustine, Eustis, Palm Coast and Melbourne stores in Florida. In each store that I worked in, the policies for compensation, promotion and other personnel matters were the same. I saw the written policies posted at each store, and the substance was the same in each location I worked.

6. In 1988 or 1989 the Department Manager for cameras/electronics in the Ormond Beach store, a woman named Terri, was leaving, and told me that she had recommended me for the Department Manager position. However, she also told me that the store management had decided to give the job to a male employee, Keith, who had been employed at Wal-Mart less time than me. After Keith died in an accident, I was then promoted to Department Manager.

7. In approximately 1989 or 1990 they had promoted a male from Support Manager to Assistant Manager. This left the Support Manager position open. This position was not posted and I asked Store Manager Guy Pshek to make me a Support Manager. The Support Manager job is the highest level hourly position, and, based on my observation, working as a Support Manager would increase my chances of being promoted to Assistant Manager, which was my goal. I was denied this promotion with the excuse

that it was because I managed a department that required me to be available for customer service. However, the position I sought was given to Scott Schwalback, who also managed a department, small appliances, where the manager had to be available for customer service. After Mr. Schwalback had been promoted, I asked Mr. Pshek about the position again, pointing out that Mr. Schwalback had been permitted to be a Support Manager while working in a service department. I was finally promoted, again later than I should have been and after similarly qualified men.

8. In 1991, Mr. Pshek was promoted to District Manager in a different district. He told me that if I was willing to relocate to a store in his district, that he would promote me to Assistant Manager, a position that I had sought for some time. I agreed, although I knew that Scott Schwalback, Mark Melatesta, and a male named Rick had been promoted to Assistant Manager without having to switch districts. I was transferred to the Eustis, Florida store as an hourly employee. I worked in that store as a Department Manager for approximately five months without receiving the promotion to Assistant Manager that Mr. Pshek had promised. Finally, I spoke with Bob Hart, Regional Vice President, about the situation, and he told me I had to wait another three to fourth months to be promoted to Assistant Manager. I was finally promoted in February 1992. Both Scott Schwalback and Rick (a Department Manager in Furniture) became Department Managers after I had, since I had worked for Wal-Mart for longer, but they were both promoted to Assistant Manager positions before I was. Thus, I worked much longer as a Department Manager before being promoted to Assistant Manager than similarly qualified men had.

9. When I was promoted to Assistant Manager I relocated to Ft. Lauderdale, FL to work in store 1845 in Cooper City, FL.

10. While I was an Assistant Manager I regularly asked Dan Erwin, Store Manager, and later, Brad Bower, Store Manager after Mr. Erwin, about promotion to Co-Manager. Mr. Bower referred me to Steve Leake, District Manager.

11. In 1996 I was told by Anne Morrow, Co-Manager, that if I made a lateral move within the store to the Assistant Manager responsible for the front end, and was able to successfully resolve some problems there, that I would be promoted to Co-Manager. I agreed, and successfully fixed the problems, but was not promoted. Instead I was moved laterally through softlines, store set ups, and then night manager.

12. I was told by District Manager Steve Leake that doing store set ups, which meant working to set up a newly built store instead of working in my regularly assigned store, would lead to a promotion to Co-Manager. When I completed the store set up, which required that a commute of 100 miles round trip for six weeks, I asked Mr. Leake about the promotion to Co-Manager. Mr. Leake said he wanted to place me in a position on the District staff instead. When I said that I really wanted a Co-Manager position, not a lateral move to a staff job, Mr. Leake told my Store Manager, who was also present during this conversation, to "do whatever you want with her." I was then assigned to the night shift, which is the least popular. Although Co-Manager positions were not posted, I heard, through word of mouth, of at least one vacancy for Co-Manager, in the Port Orange store, dur-

ing the time that I was seeking promotion to Co-Manager. I was denied that position.

13. After nine months on the night shift, I spoke to Regional Vice President Arthur Emmanuel in June 1998. Mr. Emmanuel met with me, District Manager Leake and Store Manager Brad Bower. Mr. Emmanuel asked Mr. Leake and Mr. Bower if I was ready for promotion to Co-Manager, and they acknowledged that I was. In July 1998 I was promoted to Co-Manager in the St. Augustine store.

14. All Co-Managers are supposed to be paid the same base salary. However, while I was a co-manager in the St. Augustine store with a salary of $39,254.22, I learned that Mr. Greg Antl, a co-manager in the same store, was being paid a few thousand dollars more.

15. Shortly after I was promoted to Co-Manager, one of the male Assistant Managers who reported to me was disrespectful and avoided doing work I assigned him. I spoke to my Store Manager Kevin Robinson about it. He told me that the man was upset that I had been promoted instead of him, and said "you have two strikes against you: 1) you're a woman; 2) you're black."

16. While I was a Assistant Manager at the Cooper City, Fl, store I recommended three people for promotion to Assistant Manager in training positions, all during the same time period. Two individuals I recommended were men, Clive Provost-Heron and Adrian, and they were promoted immediately. The third person I recommended for promotion was a woman, Pat, (I think her last name was Jennings), and she was not promoted until a year later.

I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Florida that the foregoing is true and correct.

This Declaration was signed by me on March 26th 2003, at Daytona Beach, Florida.

/s/ Jennifer K. Johnson

Jennifer Johnson

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, KAREN WILLIAMSON, on behalf of themselves and all others similarly situated, Plaintiffs, v. WAL-MART STORES, INC. Defendant.	CASE NO. C-01-2252 MJJ **DECLARATION OF KATHERYN JOHNSON IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Katheryn Johnson, declare:

1. I make this statement on the basis of my personal knowledge, and, if called as a witness, could and would testify competently to the facts herein.

2. I am female, and I am twenty-five years of age.

3. I was hired at Wal-Mart Store #723 in Troy, Alabama, on March 23, 1999. At the time, I was twenty-one years of age and attending Troy State University in Troy, Alabama, studying for my Bachelor of Science degree in Sports Management with a minor in Business Administration. I resigned when it became apparent that Wal-Mart would not permit me to receive management training because I am a woman.

4. I was initially hired as a part-time sales associate (hourly employee) in the Infants and Little Girls Department of the Troy, Alabama, Wal-Mart Store, and worked until October 13, 1999, when I had to stop working because of scheduling conflicts with my position as a student worker (and, later, intern) with Troy State University, and because of inefficient scheduling within the store.

5. When my scheduling conflicts were resolved, I was rehired at Wal-Mart Store #723 on April 3, 2000, part-time as an hourly associate. I went full-time in January of 2001 and ultimately resigned on April 13, 2001, because of gender discrimination by the District Manager, James Pike.

6. During the Fall of 2000, the new store manager, Mr. Bobby Brackenridge, asked me if I was interested in a course Wal-Mart had for college students who wanted to become a Wal-Mart manager. I told him I was not eligible because I would soon graduate. However, several days later, I told him I was interested in applying for the management training program. Mr. Brackenridge told me to submit an application with a resume, which I did. He did not inform me that I first needed to perform other jobs within the store.

7. Also, in approximately September of 2000, I expressed to Ms. Jina Jordan, the Store Co-Manager who had approximately fifteen years of employment with Wal-Mart, my interest in the Wal-Mart Assistant Manager Training Program and in working my way up through management in Wal-Mart in order to make my employment with Wal-Mart a career. Ms. Jordan told me that she would support my promotion in any way she could.

8. I had always performed my job as an associate well and had received numerous compliments on my job performance from management, including Mr. Brackenridge. I was never disciplined, and the two performance evaluations I received were "exceeds expectations."

9. I graduated from Troy State University in December of 2000, and in approximately February of 2001, submitted an application for promotion to the Assistant Manager Training Program, with a cover letter and a resume, and Mr. Brackenridge and Ms. Jennifer Keil, the assistant manager who was my supervisor, gave me good references.

10. Assistant Manager Trainee positions were never posted at the store. When I asked Mr. Brackenridge about openings, he indicated that there were openings for Assistant Manager Trainee in three nearby stores but that the District Manager, Mr. James Pike, was "in charge of who goes."

11. Approximately two weeks after I had submitted my application to Mr. Brackenridge, I approached Mr. Brackenridge and asked him if he had given Mr. Pike my application. He replied, "No", and when I asked him why not, he said that Mr. Pike was coming to the store that week and that he would give my application to him at that time.

12. When Mr. Pike came into the store the following week, I encountered him in the store personnel office with Mr. Brackenridge and held out my hand to shake his hand, saying, "Hello, my name is Katheryn Johnson. I have applied for the Wal-Mart training program. Have you received my application?" Mr. Pike saw me extend my hand but did not shake it. He only said, "Oh, it [my application] is in a

file over there somewhere. Bobby [Brackenridge] has it for me, don't you, Bobby?"

13. For the next six weeks, I heard absolutely nothing from Mr. Pike. During that time, I spoke with Mr. Brackenridge and told him that I was going to quit because there had been no response to my application, and I felt that there was no reason for me to stay with Wal-Mart. I had student loans that I needed to pay, and I needed to find a job where I could start a career and make enough money to support myself and my family. Mr. Brackenridge urged me not to quit and told me that "they [Wal-Mart]" needed Assistant Managers in the Enterprise, Alabama, store and that the Supercenter in Montgomery, Alabama, also needed Assistant Managers.

14. When Mr. Pike finally came into the store on March 16, 2001, I approached him in the manager's office and asked him if he had an opportunity to look over my application. He responded by saying, **"Naw, Shug, I sure haven't."** I then said, "When do you think you'll have an opportunity to look it over?" He replied, "I need one month; give me one month." I then said, "One month is all I'm going to give." Mr. Brackenridge was present in the room during this conversation, and when Mr. Pike asked me to give him another month, instead of speaking up and urging Mr. Pike to consider my application, Mr. Brackenridge only nodded his head at me to indicate that I should agree with Mr. Pike's request for an extension. It was obvious to me that Mr. Brackenridge, who had verbally supported my application, was not willing to actually do anything to support my application.

15. That same day, I met with Ms. Jordan and told her my concerns about being denied the oppor-

tunity to become an assistant manager trainee. I told her that I had heard that Mr. Pike didn't hire women, and Ms. Jordan told me, "Just between you and I, some people tend to think he [James Pike] doesn't like to put women into the training program; I believe that, as well." When I asked her what I should do, she told me, "Give him [Mr. Pike] a month, and then if you leave, I will understand."

16. Twenty-seven days passed with no word from Mr. Pike, and he again appeared in the store on April 13, 2001. I approached him and said to him, "I'd like to speak with you before you leave," so I could find out if I was going to be accepted into the management training program. He nodded, "Yes", indicating that he would speak with me before he left the store. However, Mr. Pike left the store that day without making any attempt whatsoever to speak with me.

17. I then wrote a letter of resignation and gave it to Ms. Nancy Hussey, the Assistant to the Personnel Manager, and turned in my badge and smock.

18. I later dialed 1-800-WAL-MART, the telephone number that we had been told to use if we were having problems at the store. I spoke to a young woman in the Ethics Department and related everything that had happened in detail. She indicated to me, "We'll be getting back to you in three days."

19. Three days passed, and I heard nothing from Wal-Mart. I again dialed 1-800-WAL-MART and spoke with a different young woman in the Ethics Department who indicated that she would have someone get in touch with me. At the end of April or the beginning of May, 2001, I finally received a call from the Regional Personnel Manager, Mr. Larry Ezell. I related to him all of the details of what had

happened. He told me that I probably didn't get the job because I wouldn't relocate out-of-state. I told him that Mr. Brackenridge had told me I didn't have to relocate out-of-state until I completed my training. He concluded the conversation by telling me, "If you don't have any hard feelings toward the company, then you can reapply when you're available to move."

20. At the time I resigned my employment with Wal-Mart, I was making $5.70 per hour after two years of employment as a sales associate. If I would have become an Assistant Manager, I would have started with a salary of approximately $31,000.00 per year plus bonuses based upon the store's net profit. Instead, because of the gender discrimination directed toward me, I was unable to find a job until June 5, 2001, and then working as an administrative assistant for O.S.I. Outsourcing Solutions, Inc., in Montgomery, Alabama, earning only $9.50 per hour, or approximately $19,500.00 per year.

21. I subsequently filed a charge of discrimination with the EEOC in Montgomery, Alabama, alleging gender discrimination by Wal-Mart.

I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and the State of Alabama, that the foregoing is true and correct.

This Declaration was signed by me on April 3, 2003, at Hartselle, Alabama.

/s/ Katheryn Johnson

Katheryn Johnson

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF LUCRETIA JOHNSON IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Lucretia Johnson, declare:

1. I am a woman and a current Sam's Club employee.

2. I began working at the Sam's Club in Concord, California in August 1993. Although I consistently expressed interest in being promoted into management, I was not offered a salaried management position until June 2002, a year after this lawsuit was filed and almost nine years after I began working for Sam's Club. At that time, I was promoted to Front End Area Manager, the position I currently hold.

3. Between 1993 and my promotion to Front End Area Manager in June 2002, I held the following

positions: Cashier, Check Out Supervisor, Membership Desk Employee, Outside Sales, Marketing and Membership Team Leader, and Advantage Coordinator. I have always worked in the areas of the store known as "operations" and the "front end". I have never been offered a position in another area of the store, such as receiving or the merchandise areas.

4. In February 1994, I received my six-month evaluation. I wrote on the evaluation that my career goal was "to learn more about the company where it would benefit me to move up in the company. I would like to learn each department to have the knowledge to benefit myself and grow with the company." A true and correct copy of that evaluation is attached hereto as Exhibit A.

5. In July 1994, I received my first annual evaluation. I wrote on the evaluation that I "would like to be trained to advance within our company" and my goal "is to learn as much as I can about the warehouse business to guide me to a management position." A true and correct copy of that evaluation is attached hereto as Exhibit B.

6. In July 1995, I received my second annual evaluation. In the section entitled "career goals," I wrote that I wanted "to be able to grow within the company." A true and correct copy of that evaluation is attached hereto as Exhibit C.

7. In July 1997, I received my fourth annual evaluation. I wrote on the evaluation that my career goal "is to grow within the company as a lead person and to develop my skill." A true and correct copy of that evaluation is attached hereto as Exhibit D.

8. In July 1998, I received my fifth annual evaluation. In the section entitled career goals, my

supervisor, Angela Putnam wrote, "Lucretia would like to master her new current position and then work her way to the next level which is management." A true and correct copy of that evaluation is attached hereto as Exhibit E.

9. In September 2000, I received my seventh annual evaluation. I wrote on the evaluation that I wanted to "enroll in the MIT program for management" and "continue to develop skills that would help me to become an operation manager." A true and correct copy of that evaluation is attached hereto as Exhibit F.

10. In July 2001, I received my eighth annual evaluation. I wrote on the evaluation that I wanted to "develop my skills and job knowledge that would lead me in a management position." A true and correct copy of that evaluation is attached hereto as Exhibit G.

11. Despite my repeated expression of interest in promotion into management, I was never told how I could apply for the Management Training Program. I never saw or heard about any applications. On one occasion, General Manager George Cunningham told me that I would never be promoted into management, but did not tell me why. On other occasions, my managers told me that I needed to get more experience, but did not tell me what experience I needed or give me a timeline. It was very discouraging to continually express interest in a management position, but not get promoted for so many years.

12. While I was working at the Membership Desk, my supervisor was a woman named Angela Putnam. Ms. Putnam promoted me to the position of Marketing and Membership Team Leader. Ms. Putnam was a very good supervisor and mentor who en-

couraged me in my goal of getting promoted. Ms. Putnam referred to Sam's Club as a "boy's club" and told me that, as a woman, she had to fight to get promoted and that I would, too. Ms. Putnam no longer works at the Concord Sam's Club. Apart from Ms. Putnam, I have not received encouragement and mentorship from my supervisors.

13. In June 2002, I was promoted to the position of Front End Area Manager. The position became open when the Front End Area Manager Neville Boston left the Club. I told General Manager Alan Oshier that I was interested in the position. About three or four months after Mr. Boston left, Mr. Oshier told me that I had been selected for the position. I had not applied for the position or been interviewed for the position. I believe that I was promoted only because this lawsuit was filed and Sam's Club wanted to increase the number of women in management at the Concord store.

14. In January 2003, there was a notice posted in the store, soliciting interest in the Management Training Program. I told Director of Operations Ross LaDeaux that I was interested in the Management Training Program. Mr. LaDeaux told me that I did not have to sign up on the posting because he already knew that I was interested and I was being considered. I have not been interviewed or heard anything further.

15. I do not know how long I must work as a Front End Area Manager or whether I have to become Receiving Area Manager in order to get promoted into the Management Training Program. When the Receiving Area Manager position opened up a few months ago, I told General Manager Alan Oshier that I was interested in the position. Mr. Osh-

ier told me that I needed to spend more time as Front End Area Manager. I later spoke to General Manager Theresa Hagensen about what I had to do to get promoted into the Management Training Program. Ms. Hagensen suggested that I transfer to the Receiving Area Manager position. When I received my annual evaluation in February 2003, I asked Director of Operations Russ LaDeaux whether I had to work as Receiving Area Manager in order to be promoted. Mr. LaDeaux told me that I can be promoted without being Receiving Area Manager.

16. I learned that Wal-Mart Stores, Inc. stated, in response to an Interrogatory propounded in this case, that General Manager Alan Oshier and Assistant Manager Brian Lothamer do not believe that I am qualified for the Management Training Program because I have poor people skills. I find that ironic because Mr. Lothamer and Mr. Oshier have poor people skills, but have been allowed to advance into management. When I worked under the supervision of Mr. Lothamer, he routinely yelled at me, belittled me, and put me down in front of other employees. I had similar experiences with Mr. Oshier. Mr. Oshier told me that he was taking anger management classes and thanked me for praying for him.

17. I have worked under class member declarant Nancy Hom's supervision. I never experienced any difficulties working with Ms. Hom. I have worked with Named Plaintiff Christine Kwapnoski. I never had any difficulty working with Ms. Kwapnoski.

18. Neither Mr. Lothamer, nor Mr. Oshier, nor any other Sam's Club manager has ever told me that I am ineligible to advance beyond the position of

Front End Area Manager because of my supposed problems with people skills.

19. I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of California that the foregoing is true and correct.

This Declaration was signed by me on April 16, (month, day), 2003, at San Francisco, CA (city, state).

/s/ Lucretia Johnson

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, KAREN WILLIAMSON, on behalf of themselves and all others similarly situated, Plaintiffs, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF LAVERNE JONES IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Laverne Jones, declare:

1. I began working at Wal-Mart in November 1977, as a Sales Clerk in the Pontotoc, Mississippi, Wal-Mart. From the beginning of my career, I communicated to Wal-Mart management that I was interested in advancement within the company and noted so on many of my annual evaluations under "career goals." I was promoted to Department Manager in July 1978, and remained a Department Manager throughout my career. Because I am a woman, Wal-Mart did not permit me to advance past Department Management for twenty-five (25) years.

2. My job performance was rated as "above standard" or "exceeds expectations" on nearly every annual evaluation that I received in my twenty-five

(25) years at Wal-Mart. I never received a rating less than "standard" or "meets expectations." The last "standard" rating I received was over ten years ago, in 1991.

3. During my career at Wal-Mart, I never received a written or verbal "coaching," nor was ever I ever disciplined in any form by management. Instead, I was consistently praised in my evaluations for my productivity, initiative, judgment, job knowledge, ability to work with others, appearance and attendance. For example, in September 2002, I received my last performance appraisal from my supervisor, David LeSueur. In 25 of 28 categories, I received an "exceeds expectations" rating. My rating was "meets expectations" for the other three categories. See Associate Evaluation Form, Dated 9/10/02, a true and correct copy attached hereto as Exhibit A. In 2002, I was never absent, never late for work and remained 100% current on all of my Computer Based Learning modules ("CBLs"). In fact, in twenty-five (25) years, I missed work only twice: in 1986 when I gave birth to my son and in 1994 when I had lung surgery.

4. I tried to enter the Management Training Program every year for the first fifteen years of my employment and was repeatedly discouraged by management. My desire for advancement with Wal-Mart is documented by my comments in my annual appraisals and conversations with Wal-Mart management. For example, in 1983, I wrote on my evaluation that my career goal was "to move up in the company, such as the asst. mgt." See Associate Evaluation Form, Dated 10/6/83, a true and correct copy attached hereto as Exhibit B. In 1985, I wrote that I "would like to advance with [the] company and

be considered for promotions whenever available," and if "anything [is] available in office or asst. mgmt., I would like to be considered . . . ." See Associate Evaluation Form, Dated 6/7/85 and Associate Evaluation Form, Dated 11/1/85, true and correct copies attached hereto as Exhibits C and D.

5. I spoke with many members of Wal-Mart management about my interest in promotion over the course of my 25 years with the company. The following are typical examples of how my requests for placement in the Management Training Program were received by Wal-Mart management throughout my career:

a. In 1986, District Manager Jim Crowe denied my requests to be placed into the Management Training Program.

b. William "Bill" Wulfers, a former Regional Vice President, told me in 1992 that I did not want to be in management because Assistant Managers are required to move around the country, and I did not want to relocate. However, I told Mr. Wulfers that I was willing to relocate at that time in order to become an Assistant Manager. Furthermore, I was aware of many male trainees who stayed at my store, because my store was known as a "training" store for management, or transferred to stores in the immediate area that were within driving distance. For example, Brad Sullivan, a male who entered the Management Training Program in 1990, was trained at my store, then moved to another location in the area, within driving distance of Pontotoc.

6. Despite my exemplary work history and requests for promotion, less experienced men were continuously chosen for the Management Training Program over me. Adam Worthham worked at my store

for less than one year before becoming Department Manager and after serving just one year in that position, Mr. Worthham joined the Management Training Program in 2001. Mr. Worthham trained in a store within driving distance from Pontotoc, in West Point, Mississippi.

7. In November 2002, Coy Tutor, a male employee who had only five years of experience in my store, was asked to enter the Management Training Program, but declined. At that time, I asked Sammy Sappington, a District Manager who, like me, began working at Wal-Mart in 1977, if I could get into the Management Training Program. District Manager Sappington told me that I did not want to go into management because I had the best job in the store and that I did not want anything else. He also told me that there were only a handful of promotable people in the store. When I asked why Mr. Tutor could join the program, Mr. Sappington replied, "He's a man, he doesn't have a family." That was his only explanation for why Mr. Tutor was promotable, yet I was not.

8. In June 1997, I was part of a group of female Wal-Mart employees, including Brenda Lipsey and Bonnie Ware, who used the "open door" policy by contacting the Home Office with our concerns and complaints of sexual and racial discrimination. Part of our complaint was the fact that men were almost always put on "support teams," where they earned more money through a shift differential of one dollar more per hour, while women were often overlooked for this position. Cheryl Ford, from Wal-Mart personnel, came from the Home Office in Bentonville, Arkansas, to talk to us. She said, "Don't bother using your quarter to call us. I can fire you, without taking

any steps, for using the open door." My experience with Ms. Ford made me reluctant to use the "open door" policy because of the fear of retaliation and further confirmed for me that Wal-Mart was not concerned about discrimination in its stores.

9. After twenty-five years of employment at Wal-Mart, I received only one promotion, and that was six months after I started working at Wal-Mart.

I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Mississippi that the foregoing is true and correct.

This Declaration was signed by me on April 4, 2003, in the City of Pontotoc, State of Mississippi.

/s/ Laverne Jones

Laverne Jones

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, KAREN WILLIAMSON, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF SHEILA JOYCE IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Sheila Joyce, declare:

1. I am a 29 year old female who lives in Salisbury, North Carolina. I began working at Wal-Mart a little over two years ago, in February 2001. I work at the Concord, North Carolina Wal-Mart Supercenter, store # 1027.

2. I feel that Wal-Mart has discriminated against me based on my gender because I am aware that Wal-Mart has paid a male employee more money than me for doing the same work.

3. I began working at Wal-Mart as an overnight stocker in the paper goods and chemicals department, which is on the general merchandise side of the Supercenter. I was evaluated on the first 90 days of performance as an overnight stocker in May

2001. I was rated as "exceeds expectations," the highest possible rating.

4. In November 2001, Earl Easley, a stocker supervisor, requested that I transfer to the grocery department. I said that I would transfer, but because I understood that Wal-Mart paid grocery department stockers more than general merchandise stockers, I first asked co-manager Bill Williams I would get a raise for transferring. Mr. Williams said that I would get a raise for transferring to the grocery department.

5. Once I got to the grocery department, I did not receive my transfer raise. My pay stayed the same, $8.40 per hour. Meanwhile, within days of my move to the grocery department, Wal-Mart hired a new male stocker for the grocery department, Jerry Hamilton. Jerry Hamilton told me personally that he was hired at a rate of 9.00 per hour. About that time, Wal-Mart also hired Richard Gieck, another male grocery department stocker, who also started at a rate of 9.00 per hour. Mr. Hamilton, Mr. Gieck and I worked the same shift in the grocery department, the overnight shift.

6. When I was hired, I was hired at $8.00 per hour. After 10 months of employment with Wal-Mart and after receiving my 90-day pay increase I was making $8.40 per hour. But there I was, working in the grocery department with two new males who were making .60 cents more per hour than me from the moment they set foot in Wal-Mart. When I found out Mr. Hamilton was making more money than me, for doing the same job, I was upset. It certainly did not seem right. I felt like I could not complain about his pay rate, because Wal-Mart has a strict policy

forbidding employees from speaking about pay. Instead, I persisted in trying to get my transfer raise.

7. First, I complained to co-manager Mr. Williams that I should be making more money in the grocery department and requested a transfer raise again. Mr. Williams, who originally told me I would get a raise if I transferred, now told me he could not give me a raise because I was no longer in his section of the store.

8. In January 2002, after two months in the grocery department, I received my first annual performance evaluation. Just like on my 90 day performance evaluation, I was rated as "exceeds expectations," the highest possible rating.

9. In February 2002 I was given a .35 cent merit raise for my performance. But I still did not receive my transfer raise, and at this point I was still making less money than Mr. Gieck and Mr. Hamilton who had only been with Wal-Mart for three months.

10. By March 2002, I took my complaints to Co-Manager Neil White, who was the co-manager over the grocery department. Mr. White that he would check to see if it was policy to give associate's a transfer raise when moving from general merchandise to grocery. Mr. White later told me that it was not standard policy to receive a transfer raise. He did not give me the raise.

11. Within a few days of Mr. White's decision not to make my pay at least comparable with the new, less experienced stockers in the grocery department, I called the home office. I talked to someone in the personnel office. I told them that I be-

lieved Wal-Mart was discriminating against me in my rate of pay because I was female.

12. In April 2002, after having to fight for 5 months, Store Manager Ken Garner, met with me and told me he was going to give me the .50 cent transfer raise. The raise was put into effect at that time. However to this day, I have never received back pay for the five months I worked in the grocery department with men who were hired at a higher rate than me.

13. Four months after I complained to the home office about gender discrimination, I applied for a transfer to a new Wal-Mart opening in Salisbury, North Carolina. A co-manager of the new store, Paul Renn, met with me and told me I had the job. When I later contacted Mr. Renn to find out when I would make the transfer, Mr. Renn pretended like we never met and that he had not given me the job. I did not get the transfer.

14. In January 2003, I saw a posting on the time clock that stated Wal-Mart was accepting applications from employees for the Management Training Program. I met all of the qualifications to apply, so the next night I applied for a management trainee position over the pipeline, Wal-Mart's computerized communication system.

15. I felt like the opportunity to apply over the pipeline for a management trainee position was unique. To my knowledge, since I had been working at the Concord Wal-Mart, management trainee positions had never been posted. In fact, I was never given any information or guidance on how to gain entrance into the Management Training Program before the January 2003 opportunity.

16. Approximately 6 weeks after submitting my application for a management trainee position I still had not gotten a response from Wal-Mart. I saw other employees get interviewed, but I was not interviewed. Then the store manager, Ken Garner, called me into his office and told me that I was not going to get interviewed. He said that too many people had applied and Wal-Mart could not interview all of them. I asked Mr. Garner who decides who would be interviewed out of the applicants. Mr. Garner told me that the home office made the decision.

17. Approximately a week later, on March 11, 2003, I called the home office to find out more information about how to get an interview for the trainee positions. I asked the home office who makes the decisions regarding which employees are interviewed for a position. The home office told me that the store manager, together with the district manager, made those decisions.

18. Neither the home office nor the store manager told me any steps I could take in order to receive an interview.

I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of North Carolina that the foregoing is true and correct.

This Declaration was signed by me on 4/2/03, 2003, at Salisbury, North Carolina.

/s/ Sheila Joyce

Sheila Joyce

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, KAREN WILLIAMSON, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF GAYLE KELLEMS IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Gayle Kellems, declare:

1. I am a female and a former employee of Wal-Mart Stores, Inc. I live in Berryville, Arkansas.

2. I began working for Wal-Mart in July 1980. Twenty-one years later, in July 2001, I resigned from Wal-Mart. I resigned because I believed that Wal-Mart would never promote me to the position of Store Manager.

3. From 1980 until 1989, I was an hourly employee at a Wal-Mart store in Pocahontas, Arkansas. I held the positions of cashier, sales associate, department manager, and support manager. During this period, I always worked hard, performed well, and was never disciplined. For the first seven years of my career with Wal-Mart, no Wal-Mart manager

ever asked me whether I would be interested in a management level job.

4. In approximately 1987, Store Manager Jack Staten asked me whether I was interested in entering the management training program. I declined his offer because, at that time, I had three young children. I did not believe that I could manage to raise my children and work fifty hours per week as an Assistant Manager. At that time, I did accept a position as Support Manager. The Support Manager position is an hourly supervisor position.

5. As a Support Manager, I worked approximately forty-eight hours per week which generally included two nights per week and one weekend every month. Working in the Support Manager position, I realized that I could handle the additional hours and responsibility of management. I enjoyed the work and became excited about the opportunities to build a career as a Wal-Mart manager. As a result, in approximately 1988, I told Store Manager Staten that I wanted to be promoted into the management training program. Approximately one year later, I entered the management training program.

6. In approximately December 1989, I was promoted to the position of Assistant Manager of a Wal-Mart store in Ankeny, Iowa. When I accepted this position, I relocated my family and home from Arkansas to Iowa. I was not given the option of remaining in Arkansas. At the time, I had three school-age children. I would have preferred to remain in Arkansas, but I was willing to make the sacrifice of relocation in order to further my career with Wal-Mart. I aspired to become a Store Manager and then a District Manager. I was willing to work hard and make personal sacrifices to achieve my goal.

7. When I worked at the Ankeny, Iowa Wal-Mart store, District Manager Mark Pistorius told me that I was not earning as much as the other Assistant Managers. I was the only female Assistant Manager in the Ankeny store. Instead of immediately raising my salary to the level of the other Assistant Managers, Mr. Pistorius gave me raises approximately every six months to bring my salary to parity with others.

8. In October 1991, District Manager Mark Pistorius asked me to transfer laterally to a new Wal-Mart store in West Des Moines, Iowa as an Assistant Manager. I agreed to the transfer because the store in West Des Moines was a larger store with a higher volume of sales. As a result, I believed that I would learn more about managing a Wal-Mart store. I believed that accepting this transfer would benefit my career at Wal-Mart and increase my opportunities for advancement within Wal-Mart.

9. I received performance evaluations in approximately the following dates: September 1990, December 1990, June 1991, November 1991, December 1991, March 1992 and October 1992. On each of these evaluations, I wrote that I wanted to be promoted. True and correct copies of these evaluations are attached hereto as Kellems Exhibits A through G, respectively.

10. In September 1992, I was transferred laterally to a Wal-Mart store in Berryville, Arkansas where I worked as an Assistant Manager. When I transferred to Berryville, Arkansas, the store was being converted into a Wal-Mart Supercenter. I believed that I was advancing my career by transferring to a Supercenter because Supercenters are larger than regular Wal-Mart stores and sell grocery

merchandise. When I began working in Berryville, I did not receive any additional training even though I had not previously worked in a Supercenter.

11. On numerous occasions while I worked in Berryville, Arkansas, I told District Manager Steve Furner and Store Manager Larry Philips that I would like to be promoted to either a Co-Manager or a Store Manager position.

12. In February 1994, I received a performance evaluation that is signed by Store Manager Larry Phillips and District Manager Steve Furner. I wrote on the evaluation that my short term career goal was to be Co-Manager in Berryville and my long-term goal was to be director of a small Supercenter or a similar size Division One store. The performance evaluation also has a space for the District Manager to write comments. In that space, the following statement is written: "We will work closely with Gayle to achieve her goal to which can be accomplished by January 1995." A true and correct copy of this evaluation is attached hereto as Kellems Exhibit H.

13. In 1995, I told Regional Personnel Manager Debby Moody that I would like to be promoted to the position of Co-Manager. Ms. Moody responded that she would keep me in mind. Ms. Moody never contacted me about available Co-Manager positions. I was not aware of any postings for Co-Manager positions. Other than speaking to my Store Manager, District Manager, and Regional Personnel Manager as I did, I did not know what else I could do to get promoted to a Co-Manager position.

14. In March 1995, I received a performance evaluation that is signed by Store Manager Larry Phillip and District Manager Steve Furner. Mr.

Furner wrote at the bottom of the evaluation, "is ready for co-mng [Co-Manager] this year 95. Thanks. Steve Furner." A true and correct copy of this evaluation is attached hereto as Kellems Exhibit I.

15. While I was working in the Berryville, Arkansas Supercenter, a Co-Manager named Gary Saporito left his position in the Berryville store. I asked the District Manager whether I would be promoted into the position. He replied that Wal-Mart was not going to replace Gary Saporito.

16. In the spring of 1995 Gary Rains replaced Larry Phillips as the Store Manager in Berryville, Arkansas. At that time, I told Mr. Rains that I wanted to be promoted.

17. In the spring of 1995, Carl Simpson replaced Steve Furner as District Manager over the Berryville, Arkansas Supercenter. The first time that I met Mr. Simpson and many times after that, I told Mr. Simpson that I wanted to be promoted to the position of Co-Manager. On one occasion, Mr. Simpson told me that I would be promoted to the position of Co-Manager the next time that there was an opening in the district. Mr. Simpson did not tell me what I could do, if anything, to ensure that I would be considered for positions outside of his district.

18. A Co-Manager position did open up in the district, but it was not offered to me. A few months after the Co-Manager position vacated by Gary Saporito was eliminated, another Co-Manager position was created in the Berryville, Arkansas Supercenter. The position was not posted. I was not aware of the opening until the position was filled, so I could not apply for it. I was not offered that position. The position was given to a male named Allen Buck. I asked Store Manager Gary Rains why the position

was given to Mr. Buck and not to me. Mr. Rains responded that the store was in a convenient location for Mr. Buck and that Wal-Mart wanted to give Mr. Buck the experience of working in a store.

19. When Mr. Buck left the position of Co-Manager in the Berryville, Arkansas Supercenter, he was not replaced. District Manager Simpson told me that the Co-Manager position was eliminated in that store. Unlike Mr. Buck, I was not allowed to work as a Co-Manager of the Berryville Supercenter in order to get that experience.

20. I continued to ask District Manager Simpson to promote me. While I was working in Berryville, Arkansas, I never spoke about my interest in promoting to a Regional Vice President or anyone else that I would consider to be Mr. Simpson's supervisor. That would have been "career suicide." Despite the open door policy, there is an unspoken rule at Wal-Mart that managers should not go over their immediate supervisor's head.

21. In August 1996, Mr. Simpson offered me a position as Co-Manager of the Harrison, Arkansas Supercenter. At the time that he offered me the position, Mr. Simpson told me that a Co-Manager position was a training position and that after eighteen months I would have to relocate elsewhere. I accepted the position and told Mr. Simpson that I was willing to relocate. I remained as a Co-Manager for five years.

22. When I worked at the Harrison, Arkansas Supercenter, there were two Co-Managers at that store. One was assigned to the "grocery side" of the store, and the other was assigned to the "general merchandise side" of the store. For approximately two years, from August 1996 until 1998, I was as-

signed to the general merchandise side of the Harrison, Arkansas Supercenter. From approximately 1998 until July 2000, I was assigned to the grocery side of the store.

23. In July 2000, District Manager Bill Lovell asked me to transfer as Co-Manager to the Wal-Mart Supercenter in Branson West, Missouri. Mr. Lovell told me that employee morale was low and that the store needed a female manager so that employees would feel that they had someone in whom they could confide. I later learned that Mr. Lovell claimed to have transferred me to Branson West, Missouri Supercenter because a man named Gary Saporito wanted my position in Harrison, Arkansas. A true and correct copy of a statement by Mr. Lovell that Wal-Mart provided to the Equal Employment Opportunity Commission and that Wal-Mart produced in this case is attached hereto as Kellems Exhibit J.

24. I agreed to transfer to the Branson West store because I believed it would lead to a promotion to a Store Manager position. District Manager Bill Lovell promised me that I would be promoted to the position of Store Manager within one year of July 2000. At the time that I resigned, on July 31, 2001, I had not been offered a position as Store Manager.

25. I considered the transfer to Branson West to be a demotion. As a Co-Manager, I earned a base salary and also a bonus that is calculated based on store profits. The Harrison Supercenter is larger and more profitable than the Branson West Supercenter. As a result, the Co-Manager bonus for the Harrison Supercenter is about $5,000 more than the Co-Manager bonus for the Branson West Supercenter. As a condition of my transfer, Wal-Mart agreed to pay my bonus for the year following my transfer

based on the Harrison Supercenter's profits. If I continued working for the Branson West Supercenter, my annual income would have declined about $5,000.

26. Between 1999 and 2001, I applied for eighteen Store Manager positions on the Management Career Selection computer system, including two stores in Arizona, five stores in Texas, four stores in Arkansas, five stores in Missouri, one store in Kentucky, and one store in Oklahoma. I was not offered any of the positions. No Wal-Mart manager ever told me why I was not selected for any of these positions.

27. In selecting which positions to apply for, I selected Supercenters and large Division One stores. All of my experience since 1992 had been in Supercenters and I had the knowledge to manage both general merchandise and food operations. In 1994, District Manager Steve Furner had told me that I would be bored if I was not working in a Supercenter. I enjoy fast-paced work and being challenged in my job. In addition, Store Managers, like Co-Managers, are paid a bonus based on the store's profits. I did not want to take a pay cut by transferring to a small store.

28. No District Manager, Regional Personnel Manager, or Regional Vice President for Wal-Mart ever approached me to offer me a promotion to a particular Store Manager position or asked whether I would be interested in a particular Store Manager position.

29. In late 1999, there was an opening for a Store Manager in the Berryville, Arkansas store. I was very interested because I live in Berryville. I applied for the position, but I was neither interviewed for the position nor offered the position. The position was filled by a man named Tom LaRue.

30. In early 2000, the position of Store Manager at the Berryville, Arkansas Supercenter opened up again. I applied for the position again. Again, it was given to a male, Tim Lehr. I am familiar with Mr. Lehr's career at Wal-Mart because we worked in the same district. In approximately late 1992 or early 1993, Mr. Lehr began working for Wal-Mart at the Berryville, Arkansas Supercenter as an Assistant Manager. Before he became the Store Manager in Berryville, Mr. Lehr worked briefly as Co-Manager of the Supercenter in Bentonville and as Co-Manager of the Berryville Supercenter. Mr. Lehr did not have the many years of experience as a Co-Manager that I had.

31. In early 2001, the Store Manager position in the Branson West Supercenter opened up. I applied, but I was not offered that position. I was qualified for the position. During the time that I had been at Branson West, the store's "shrink" and "unresolved people issues" rating had improved. The "shrink" is measurement of the store's losses through theft or paperwork errors. The "UPI" rating is a measurement of employee morale. The Store Manager position in Branson West was filled by a man named Bill Stark. After working with me in the Branson West Supercenter and observing my skills, Mr. Stark told me that he was not any more qualified for the position that I was.

32. In June 2001, I reminded District Manager Bill Lovell that I had been at the Branson West Supercenter for almost one year and that I had not been promoted to a Store Manager position. Mr. Lovell replied that he thought that I would have been promoted to a Store Manager position by then. Mr. Lovell did not tell me that a store would soon be

available. Mr. Lovell did not tell me that there was anything else that I could do to get promoted, other than to continue to apply for positions on the computer system as I had been doing unsuccessfully. Mr. Lovell did not tell me that he would do anything to help me get promoted to a Store Manager position. This conversation with Mr. Lovell left me with the impression that he was not going to assist me in getting promoted and that I would not be promoted any further.

33. As a result of my conversation in June 2001 with District Manager Lovell, I decided to resign. When I told Mr. Lovell of my decision, he did not try to discourage me. On July 2, 2001, I turned in my resignation notice in which I informed Wal-Mart that my last day of work would be July 31, 2001. I stated on my resignation notice that I was resigning because I felt that I had gone as far with the company as Wal-Mart will allow. Despite the fact that I had worked for Wal-Mart for over twenty years and was only forty-eight years old, no one from District, Regional, or Home Office management staff tried to persuade me not to resign.

34. I took the responsibility of being a Wal-Mart manager very seriously. I felt that I was obligated to give 110 percent to Wal-Mart because Wal-Mart gave me the opportunity to work in management. During the five years that I was a Co-Manager, I missed only three scheduled days of work. I missed two days because I was in the hospital. I missed a third day due to inclement weather. I live in a rural area with narrow, winding roads that often get icy in winter. On particular bad days, my family urged me to stay home from work because they feared that driving was dangerous. I did not

take their advice because I was dedicated to my job at Wal-Mart. As a manager, I was scheduled to work fifty-two hours per week, but I often worked more than sixty hours in a week. I sacrificed holidays, weekends, and monumental occasions with my children. For example, I left my daughter's wedding party early to attend Wal-Mart's annual holiday meeting in Texas. I never hesitated to make these sacrifices because I believed that the opportunities I would have to advance within Wal-Mart would ultimately benefit my family.

35. During the time I worked at Wal-Mart, I consistently received high ratings on my performance evaluations. I was never disciplined. Wal-Mart has a training program for managers who perform poorly. I do not know what the official name of the program is, but it is commonly referred to among managers as "bad boys' school." I was never sent to "bad boys' school."

36. During the entire time that I worked as a manager for Wal-Mart, I do not remember ever hearing any discussions at the store level about the importance of increasing the number of women in management.

37. All of the Store Managers with whom I have worked during my twenty-one years at Wal-Mart have been male. All of the Co-Managers with whom I have worked during my twenty-one years at Wal-Mart have been male. All of the District Managers with whom I worked during my twenty-one years at Wal-Mart have been male.

38. I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Arkansas that the foregoing is true and correct.

This Declaration was signed by me on April 1, 2003, at Berryville, Arkansas.

/s/ Gayle L. Kellems

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF MARTHA KETTLE IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Martha Kettle, declare:

1. I make this statement on the basis of my personal knowledge, and, if called as a witness, could and would testify competently to the facts herein.

2. I was employed by Wal-Mart, Inc. in Newhall, California from October 1997 through April 2000. I am female.

3. I owned and operated my own businesses before working for Wal-Mart. I ran a toy store for six years and a pre school for fourteen years. I applied for a position at Wal-Mart to supplement my income from my preschool business. At the time, I was going through a divorce and needed extra income to care for my twelve-year-old son. I went to Wal-Mart to see

if there were any job openings and Personnel Manager Marina Bruns told me that the only openings were temporary cashier positions. I took a temporary cashier position because Personnel Manager Burns told me that if my performance was good after 90 days, Wal-Mart would hire me permanently and at that time I could negotiate a higher salary.

4. The cashier position paid only $5.65 per hour but I was expecting to earn much more when I became a permanent employee. In December 1997, Customer Service Manager Lori Newman asked me if I was interested in a Customer Service Manager position. The position was never posted, and I was not asked to apply for it. I accepted the Customer Service Manager position in January 1998 and was given a 25 cent per hour pay raise which increased my salary from $5.93 to $6.18 per hour. When I left Wal-Mart in April 2000, two years later, I was still only making $7.75 per hour.

5. During the two and one half years that I worked at the Newhall store, I observed very little opportunity for advancement for women. I never saw a posting for open Department Manager or Support Manager positions. Only a few women in the store rose to a position higher than Support Manager. Most of the employees in store management were men. There was only one female co-manager, Lani Abbott. A woman never held the Store Manager position while I worked there.

6. I also observed that men who performed the same work I did were paid better wages than I was. Gerald Stallworth, a cashier who was hired in 1999, was promoted to Customer Service Manager in 2000. He told me that his salary as a customer service manager was $8.11 per hour, this is 37% more than I

made when I was promoted to Customer Service Manager. Gerald Stallworth told me that he became Customer Service Manager when Co-Manager Jerrald Simpson offered him the position. The position was never posted. Howard Staszower, who was hired as a customer service manager in November 1999, showed me his pay stub and his hourly rate was $9, 52% more than I made when I was promoted to Customer Service Manager. I felt that I was more experienced than Customer Service Manager Staszower because I owned a business for over fourteen years and he had owned his business for only four years. This made me think that my pay rate was not based on my prior work experience, but that I was being paid less than my male co-workers because I am a woman.

7. The male managers at the Newhall store tolerated conduct that I found offensive. Co-Manager Simpson and Store Manager Cimo had statues of persons engaged in sexual acts on their desks. These statues were very offensive to me and I believed that they were inappropriate. In June 2000, I called the 1-800 Wal-Mart number to complain about the statues. I waited until I was no longer employed by Wal-Mart to complain because I was afraid of losing my job. I talked to Regional Manager Jonathan Sims and his assistant. My understanding from others who continued to work at the Newhall store was that minor changes were made after my call. In August 2000, the Store Manager's office was moved to a different location within the store. Store Manager Cimo was transferred to another Wal-Mart store.

8. I left Wal-Mart in April 2000 because of the offensive environment and to find a better paying supplemental job.

9. In September 2000, my former Wal-Mart supervisor, Debbie Eastman, called to ask if I would be interested in working for Wal-Mart part time during the Christmas season. I decided to return to Wal-Mart for that short period. In approximately October 2000, I filled out an application for a Customer Service Manager position. That month I called the store repeatedly to find out when I would be interviewed for the position. One night I was shopping in the Newhall store and Ms. Eastman was working. I told her that my calls to the store were not being returned. Ms. Eastman told me that the Newhall store was short staffed because no one was applying for the open Customer Service Manager position. Ms. Eastman and I walked to the back of the store where she showed me the posting for the Customer Service Manager position. Ms. Eastman introduced me to Store Manager Thomas Lorenzen and told him that she wanted me to come back as a customer service manager. Store Manager Lorenzen told me that the position was open, that he would ask Personnel Manager Elizabeth Chavez to retrieve my application, and he would contact me by the end of the week. Store Manager Lorenzen never called me. I continued to call the store and could never reach Store Manager Lorenzen or Personnel Manager Chavez.

10. I called the Home Office and spoke with the Regional Personnel Manager. The Regional Personnel Manager told me, after looking at my record, that he found no reason that I should not be rehired. He said he would call the Personnel Manager and tell her to rehire me. Despite the Regional Personnel Manager's efforts, I was never interviewed for the open Customer Service Manager position. In November 2000, I called the Newhall store and Personnel

Manager Chavez told me that all positions were filled. I did not believe that the positions were filled because I had seen the job posting for the Customer Service Manager position and Ms. Eastman told me that no one was applying for the position. In addition, Newhall Store Management refused to return my calls even after the Regional Personnel Manager informed me that he would recommend my rehire. Because of this, I felt that I was not being considered for the Customer Service Manager position in retaliation for having used the 1-800 number.

I declare under penalty of perjury of the laws of the United States and State of California that the foregoing is true and correct.

This Declaration was signed by me on April 4, 2003, at Valencia, CA.

/s/ Martha Kettle

Martha Kettle

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiffs, vs. WAL-MART STORES, INC., Defendant.	Case No. C-01-2252 MJJ **DECLARATION OF CHRISTINE KWAPNOSKI IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Christine Kwapnoski, declare:

1. I am a named plaintiff in this action. I have been employed by Wal-Mart, Inc. since 1986 and am currently in management training, having commenced the training in March 2003. I have spent most of my adult life working for Sam's Clubs and was promoted only after this lawsuit was filed. I am female and live in Concord, California.

2. I began my employment with Sam's Club in Grandview, Missouri in 1986 when I was 22 years old. I worked as a cashier, cash office associate and in claims. All of my evaluations while working in Missouri were very good. I expressed my interest in being promoted to management in a number of con-

versations with General Managers and Assistant Managers at the Grandview club, but received no promotions. I was never told what, if anything, I needed to do to become qualified for management training. I was unaware of any way to apply for a promotion or for management training. I observed co-workers, mostly male, suddenly being moved into positions as soon as the positions were opened and before I had an opportunity to express interest.

3. I was recognized by Sam's Club as having "expert" status in the area of claims while I was at the Grandview Club. This meant that associates at other clubs in the area, who had questions, could call me for advice and guidance.

4. In late 1993, I came to Concord, California, to help convert an existing Pace store to a new Sam's Club. There had been a posting in the Missouri club for this opportunity, which I understood was intended to be temporary. This posting was unusual, as I do not recall other job opportunities being posted. I signed up to express my interest, and was selected to go. Part of my responsibilities in helping to convert the club in Concord, California was to help the former Pace employees become Wal-Mart employees. I taught Wal-Mart/Sam's Club policies and practices to these new Wal-Mart employees. These policies and practices that I helped to implement in the new Concord Club were the same policies and practices that I had learned and followed while working in Missouri.

5. While I was working to open the new club, I was approached by the General Manager, Robert Ortega, who asked me to transfer permanently to the Concord club and promised me a $2.00 an hour raise. As a result of this request, I did transfer to the Con-

cord club in March 1994 but did not receive the promised raise.

6. My initial position at the Concord Sam's Club was in claims. Over the next seven years, I held the positions of dock associate, receiving clerk/exports, freezer/cooler associate, center section team lead, and auditing clerk. As a result of holding these positions and my experience in the Missouri club, I was familiar with almost all areas of the club. During these years, I received evaluations annually, which were always good. I received annual raises and merit raises upon occasion.

7. With my experience and good evaluations, I believed I could be a good manager at Sam's Club. I saw management at Sam's as an opportunity to have a career that would be both financially rewarding and satisfying. There was nothing in the handbook nor any other materials available to me to explain how to become a manager. I believed I would be eventually recognized with a promotion. I worked hard, and was available for whatever shifts and positions I was asked to fill. I succeeded at the variety of positions I was assigned. I continued to receive merit raises and good evaluations. I made my desire for promotion known to numerous managers over the years, as described below. However, I watched as men I had trained were selected to go into management training or received promotions above me, as detailed below.

8. When I was working on the dock, I told the dock lead, a man named Clark Holt, that I wanted his position as dock lead when he left it. I wanted this position because, based on my observation, I believed it would increase my chances for promotion and I knew I could do it well. I also expressed my

interest in this promotional opportunity to General Manager Alan Oshier, and to the Assistant Managers. The position became open a number of times in the 1990s. I was the employee with the most experience in that area, and I had expressed interest, but the job was given to a succession of male associates including Dion Denes and Joshua Reynolds. I had more experience in receiving and more tenure with Sam's Clubs than either of these men. None of these men lasted in this position.

9. When I was working as the freezer/cooler associate, I was passed over four times for the promotion to team lead, an hourly supervisor position, in three and a half years. During the mid to late 1990s, Doug Hailey, Mike Montgomery, Serge Orloff and a fourth male employee whose name I cannot recall, were given this position, despite my stronger qualifications.

10. I wanted to become an hourly supervisor, but there was no application process. Neither was there an organized, formal method by which supervisory openings were routinely made known, as they were not always posted. I could only rely upon word of mouth or the club grapevine. The Club's grapevine was more available to male employees, as they spent more time talking and socializing with management employees. I did not apply for the position when I became Center Section Team Lead. The General Manager, Alan Oshier, simply approached me and asked if I wanted the position. A few months later, Mr. Oshier transferred me into the position of Audit Clerk. Again, I had not applied for the position.

11. While I was in the audit position, Mr. Oshier yelled at me upon frequent, almost daily, occa-

sions. I witnessed him scream at other female employees, but seldom did he scream at men. I complained to Director of Operations Phil Goodwin about Mr. Oshier's conduct but received little response. Mr. Oshier told me that he was being demoted and was required to take anger management classes. In fact, he remained as our General Manager without a demotion and his abusive behavior continued.

12. By 2000, I was the longest tenured hourly employee at the Concord Sam's Club, with 14 years of experience. Despite these years of experience, I was paid virtually the same as a male associate with one-half my tenure. This male co-worker, Jon Salomone, had only seven years of experience at Sam's Clubs and did not have the responsibility I did, as he was only an unloader on the dock. When I asked General Manager Oshier why Mr. Salomone received nearly as much as I did, Mr. Oshier responded by saying that "some people make their beds, some people make them better." When I asked Mr. Oshier why he had given a large raise to another male employee, Jose Rivera, Mr. Oshier told me it was because Mr. Rivera had a family to support. John Naslund was hired in 2001 in the position of verifier on the dock and was paid nearly as much as me. Bryan Van Roo was hired in 2001 as a sales associate and was paid approximately $14.00 an hour. I was still not making a wage sufficient to support me in the San Francisco Bay Area. Consequently, throughout most of the years I have worked in Concord, I have also held a second job.

13. I worked hard and continued to get good evaluations and valuable experience but was not selected for a management position or training. My desire for advancement was discussed often at my

annual evaluations, but I was not told how to apply for management training or what, if anything, I needed to do to become a manager. I discussed my interest in going into management at Sam's with General Managers Robert Ortega, Alan Oshier, and Mike Bruegger, and perhaps others. I discussed this interest to join management with Assistant Managers Nancy Horn, Ted McDavitt, and many others.

14. I continued to express interest in getting into a management position. Several times in 2000 and 2001, I approached General Manager Alan Oshier, and asked him what I needed to do to get promoted. I was never told of a process or application procedure and I was unaware of any application process which I could use to enter the Management Training Program. I have never seen or been told of any form to complete to document my interest in promotion (except for the one that was available for approximately one week in January 2003, 18 months after this lawsuit was filed).

15. I was finally promoted to Receiving Area Manager at the end of June 2001, two weeks after this lawsuit was filed and 15 years after I first expressed my interest in management. This is an entry level managerial position. I reported to an Assistant Manager. I was paid a salary which resulted in a decrease in my hourly rate, as I no longer received overtime pay, and I was scheduled to work 48-52 hours a week. Unlike the Assistant Manager positions, Geographical Assistance Pay ("GAP") is not paid for Receiving Area Managers. In Concord, California, GAP results in payment of approximately 50% more of a manager's salary. As a result, my pay was approximately $38,000 as a Receiving Area

Manager while the Assistant Managers at the Concord Club made over $50,000.

16. In late 2001, after I was promoted to Receiving Area Manager, Mr. Oshier told me to "doll up, " to wear some makeup, and to dress a little better. I responded by indicating that high heels on the receiving dock were not appropriate. About a month later, when standing by the time clock and in the presence of another employee, Mr Oshier told me to "blow the cobwebs off my make-up. " I worked in the receiving area of the club at the time, which is a hot and dirty job with little, if any, contact with the public. I never heard Mr. Oshier comment on the physical appearance of male co-workers.

17. When I was given my annual review in the spring of 2002, I was told by General Manager Alan Oshier and by Director of Operations Phil Goodwin that I needed to be in the position of Receiving Area Manager for one year and then I could be considered for the Management Training Program. There is no guideline or written requirement that an employee be a Receiving Area Manager for one year or any time at all before going into Management Training to become an Assistant Manager. During my 17 years with Sam's Clubs, I have seen a large number of male employees begin their career with Sam's Clubs as Management Trainees. In the last year, for example, Joshua Wilson joined Management Training upon completion of college. He had never worked at a Sam's Club before. He is now an Assistant Manager in the Concord Club. I have never known a man to be required to be Receiving Area Manager for one year, or for any time, before being permitted to go into Management Training.

18. During the nearly two years that I have been Receiving Area Manager, I have received good evaluations, but no raises. Mr. Oshier and Mr. Goodwin told me that I would not receive any raises while in this position since I was at the "maximum rate."

19. After being a Receiving Area Manager for a year, I asked General Manager Alan Oshier and Mr. Goodwin when I could go into management training to become an Assistant Manager. They said I should just continue to do what I was doing and suggested I move to the front end to get experience there as an Area Manager. No other Assistant Manager had been required to be an Area Manager at all, let alone an Area Manager in two positions before being promoted.

20.. A new Director of Operations was assigned to supervise our club in approximately December 2002. I approached this man, Ross LaDoux, introduced myself, and asked when I could expect to go into management training. He said we would talk later, but he did not follow-up.

21. In January 2003, Regional Vice President Greg Johnston toured our club. I had known Mr. Johnston when we worked in Missouri together. During the intervening years, I had been promoted to the lowest-level manager with an annual salary of less than $40,000 and no GAP, while my former co-worker had risen to one of the highest positions at Sam's Club. Mr. Johnston remembered me and spoke with me about our days in Missouri and about my current situation. He told me that he respected my work ethic, and knew I was a good employee. Soon after my discussion with Regional Vice President Johnston, Director of Operations LaDoux ap-

proached me and said I could enter the Management Training Program in Vacaville, commuting from my home. I began the training in March 2003.

22. Throughout most of my 17 years at Sam's Club, I have been willing to relocate to advance my goals of obtaining a managerial position. However, in the last year, I have been involved in a family law matter and have not wanted to move my home on short notice and more than once. I explained this to General Manager Oshier, Director of Operations Goodwin, and Director of Operations LaDoux. They each refused to make any accommodation, telling me that I could not go into management training unless I was willing to relocate for the approximate three months of training, and then move again for my first managerial assignment. No manager had ever told me that this was a requirement until after this lawsuit was filed. And, until the summer of 2002, I had no limits on relocating, and would have accepted such terms had they been offered. Once Regional Vice President Johnston became involved in my situation, as described above, this need to relocate no longer existed.

23. I decided to become a named plaintiff in this action because I have been unfairly denied promotional opportunities and equal pay for 17 years. I have observed countless male employees leap frog over me, despite my excellent reviews and persistent requests for advancement. Wal-Mart management has repeatedly and falsely promised pay increases and promotions and held me to non-existent promotional requirements. My primary goals are to ensure that the employment practices at Wal-Mart which hinder the progress of women wishing to enter management be changed, and to ensure fair and equita-

ble treatment of female employees. I understand the responsibilities of a named plaintiff and I am prepared to fulfill my duties to the women in the class.

24. I have personal knowledge of all the foregoing facts and, if called as a witness, could and would testify competently to each. I declare under penalty of perjury that the foregoing is true and correct under the laws of the United States and the State of California.

I declare under penalty of perjury of the laws of the United States and of the State of California that the foregoing is true and correct.

This declaration was signed by me on April 18, 2003 at Concord, California.

/s/ Christine Kwapnoski

Christine Kwapnoski

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF JAIME LANOIS IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Jaime Lanois, declare:

1. I have personal knowledge of the facts contained in this declaration and, if called as a witness, am competent to testify to those facts.

2. I am female and 25 years old. I reside in Republic, Missouri. I am currently a certified audiologist and licensed hearing aid dispenser for a regional health system in Springfield, Missouri and Joplin, Missouri.. I obtained a master's degree in Communication Sciences and Disorders with an emphasis in Audiology from Southwest Missouri State University in Springfield, Missouri.

3. I was first hired by Wal-Mart when I was 15 years old and a sophomore in high school. This

was the first job I ever held. I initially worked for the Springfield, Missouri Wal-Mart from May 1993 through August 1995, until I left for college. At this store, I held the positions of cashier, sales floor associate (experience working in every department), service desk associate, layaway associate, store closing team, Customer Service Manager, and store set-up crew member. The periodic evaluations I was given as an employee regarding my job performance met or exceeded my job duties.

4. In approximately May 1995, a male stock person, Rick Miller, sexually assaulted me on the job. We were both in the back of the store outside the UPC office. As I was reaching in the UPC office window, Mr. Miller forced his hand down the front of my shirt and grabbed my left breast. I was 17 years old at the time.

5. I reported the incident to Store Manager, Randy Epley, who told me that he would speak to Mr. Miller. Mr. Epley later informed me that he had spoken with Mr. Miller regarding the incident, that Miller did not deny the assault, and that he had given Mr. Miller a verbal warning.

6. Shortly thereafter, Mr. Miller confronted me and called me a "cry baby" and a "tattletale." I went directly to Store Manager Epley to inform him of the remarks and to urge that Mr. Miller be given a more severe discipline since he did not seem to appreciate the gravity of his conduct. To my knowledge, no investigation was ever conducted and no further action was taken against Mr. Miller.

7. After attending a year of college out-of-state, I returned to the area to attend college locally and resumed working for Wal-Mart in April 1997 at a different Wal-Mart store in the Springfield area.

Several times, I asked head Customer Service Manager, Barb Carver, to promote me to the position of Customer Service Manager as the openings became available. I informed her that I had been a Customer Service Manager at the other store where I had worked. Ms. Carver stated that she did not believe I had enough experience and that I "was too young" to have been a Customer Service Manager. Instead, she promoted a male cashier, Tony Snavely, who was approximately the same age as myself; to a Customer Service Manager/Service Desk position who had very little experience. Mr. Snavely had been a cashier for a shorter period of time than myself and had only held one particular position in the store as a cashier. I complained about this promotion decision to Store Manager, Beth Runyan, and Personnel Manager, Christy Perryman and was finally promoted to Customer Service Manager/Service Desk Associate several months later, approximately in August 1997.

8. After my promotion, Ms. Carver also promoted another male cashier, Roger [last name unknown] to the Service Desk position despite his lack of qualifications. Roger was newly hired and had little experience as a cashier. I am aware that several female cashiers had also applied for the position and were more qualified than Roger.

9. I was interested in being in upper management and was told by Store Manager Runyan that I had to work my way to the top when I learned that a Support Manager position would be opening soon. I had planned to make Wal-Mart management my career, and even made plans to discontinue college classes upon getting the position on Support Team. However, she did not tell me what the process was or

what steps I had to take to get there, other than "working my way to the top."

10. In approximately March 1998, I applied for a position of Support Team Manager, which was considered a first step towards the management training program. To my knowledge, there were two other applicants for the position beside myself: a male lawn and garden associate (Terry Hood) and a female department manager of foods (Dorothy Girard). I had been at Wal-Mart longer than Mr. Hood and had more experience, especially supervisory experience, than he had. At that time, I had over three years of supervisory experience as a Customer Service Manager. The promotion was given to Terry Hood.

11. I did observe that the promotion and job posting process was very arbitrary. For example, sometimes job vacancies were posted and sometimes they were not. For example, after being denied the support management position, I was placed in a cash office position that was never posted.

12. I resigned my employment with Wal-Mart in August 1998 in part because of my perception that the process for promotion to management was unfair.

I declare under penalty of perjury of the laws of the United States and State of Missouri that the foregoing is true and correct.

This Declaration was signed by me on March 30, 2003, at Republic, Missouri.

/s/ Jaime Lanois

Jaime Lanois

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, KAREN WILLIAMSON, on behalf of themselves and all others similarly situated, Plaintiffs, v. WAL-MART STORES, INC., Defendant.	CASE NO. C-01-2252 MJJ **DECLARATION OF DARLENE LEADINGHAM IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Darlene Leadingham, declare:

1. I am a 56 year old female and live in Lubbock, Texas.

2. During my employment at Wal-Mart, Inc's Sam's Club Division, I encountered discrimination based upon my gender with regard to compensation, promotions, failure to accommodate my medical condition and sexual harassment.

3. I worked at the Odessa, Texas Sam's Club from July 26, 1993 until March 22, 2002. My first job at Sam's Club was as a part-time cashier, where I made $6.00 an hour. During my nearly nine years of service with Sam's Club, I worked in demos, member services, refunds, comparison shopper, fax and pool

backup, marketing backup, shelf maintenance, tire mounting and as a people greeter.

4. My ending hourly wage was $9.10 per hour. This reflects the modest standard increase in wages that resulted from my periodic evaluations and performance reviews, which always averaged at least a "three" on a scale of one to five. At no time during my career with Sam's Club did I ever receive a merit raise, even though I repeatedly requested such raises.

5. I am aware that many male employees with identical or comparable experience at Sam's Club received merit raises or annual raises that exceeded $.50 per hour during the time I worked there, including those described below. I know that Eduardo Ramirez, who worked in maintenance cleaning floors, received approximately a $.70 per hour raise in 1998. This directly contradicts what Curtis Gullett, the General Manager, and Juan Jimenez, the Assistant Merchandising Manager, told me in a meeting in October or November, 2001, when they said that the largest raise they could give anyone was $.50 per hour. I also know that Dustin Hatfield, Marcus Pacheco and Macario Tobar have received annual raises between the years 1999 and 2002 that exceeded the standard annual raises that I received.

6. I have also been discriminated against in being denied promotions to management positions while other male employees with comparable Sam's Club experience were promoted around me. I made it known to Sam's Club management very early in my Sam's Club career that my long-term goal was to become a manager. *See* Evaluation Summary dated 10/24/93 and identified as WMHO 913499, a true and correct copy of which is attached hereto as Exhibit 1.

7. In approximately August, 1995, I complained about the pay inequalities to Chris Cecchine, the General Manager at the time, after I received my annual evaluation in July, 1995. But, as usual, Mr. Cecchine and Sam's Club did nothing to respond to my complaints.

8. Over the years, I applied for several team leader positions, but was never selected. These positions were usually posted and I contacted the manager in charge of the department where the vacancy occurred. Meanwhile, when I applied and interviewed for the Marketing Team Leader position in the fall of 1999, Danny Castro, a male, was given the job even though he had no marketing or customer service experience. My co-workers also submitted my name for Checkout Supervisor ("COS") openings approximately six times, but I was never selected. Four out of these six times Sam's Club selected a man for the job. In approximately 1999, I personally applied for a COS vacancy that was posted on the wall at the store. I informed Connie Martin, the Front End Manager, that I wanted to be considered for the COS position, but I was never interviewed for the job and did not receive the promotion. I was never given a promotion at Sam's Club.

9. In the year 2000 or after, I also know that Brent Ward, who was a male employee working in tire mounting, made a higher hourly wage than I did when I was a comparison shopper, for doing comparable work. Eduardo Ramirez, Maintenance worker, and Mike Byrd, a Sales Associate, Merchandiser and Greeter, both male employees, also made higher hourly wages than me for doing comparable work from at least 1999 through 2002.

10. In approximately September or October, 2001, I approached Mr. Gullett to request a merit raise. I had received a rating of 15 out of a possible 16 on my June, 2001, Performance Evaluation, and felt that I deserved a merit raise for the hard work I did for Wal-Mart. Mr. Gullett said that he never gave merit raises because he would get accused of bias, and then told me to discuss the matter with Mr. Jimenez. When I spoke to Mr. Jimenez about my request, he refused to give me a raise, stating that he thought I was a poor employee. Mr. Jimenez' s comments that I was a poor employee, however, were belied by the excellent rating he gave me on my June, 2001 Performance Evaluation.

11. Eventually, Mr. Gullett, Mr. Jimenez and I had a meeting together to discuss my raise request, but I never received the merit raise I sought. In this meeting, Mr. Gullett appeared to agree with my position that I deserved a raise, but he failed to authorize any change in my hourly wage.

12. In approximately July, 2001, I was also subjected to discrimination in the failure of management to provide me with suitable accommodation for a medical condition I had. I had been ordered in writing by my doctor to restrict my lifting due to my heart condition. But when I brought this subject up with Mr. Jimenez, he told me that I could take unpaid personal leave if I could not do the heavy lifting, and refused to accommodate my condition. I know, however, that Mr. Jimenez had previously given an accommodation to a male employee, Mike Byrd, who had a bad back.

13. I have also been sexually harassed by a fellow Sam's Club employee. Edward Garcia, a co-worker, made offensive remarks to me about my sex

life. I complained about this sexual harassment to management during general club and grass roots meetings, but management failed to promptly address my complaints. Mr. Garcia's penchant for making inappropriate sexual remarks to female employees was a frequent topic at the general club and grass roots meetings. I understood that Mr. Garcia had 32 complaints made against him at Wal-Mart for sexual harassment.

14. In March, 2002, Sam's Club terminated my employment due to a misunderstanding over my purchase of a marked-down item. My termination was not justified, and I feel that Wal-Mart treated me unfairly in terminating my employment.

I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Texas that the foregoing is true and correct.

This Declaration was signed by me on April 2, 2003, at Lubbock, Texas.

/s/ Darlene Leadingham

Darlene Leadingham

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, KAREN WILLIAMSON, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF PHYLLIS LEHMAN IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Phyllis Lehman, declare:

1. I am a 46 year old female from Liberty, Missouri. I began working for Wal-Mart in March of 1991 at store # 234 in Liberty, Missouri as an overnight unloader. The entire time I worked at Wal-Mart I let Wal-Mart know I wanted to move up the ladder into salaried management, but Wal-Mart never gave me the chance to enter the Management Training Program. Instead, Wal-Mart placed a male with less experience than me in the Management Training Program.

2. Within the first few weeks of my employment at Wal-Mart I spoke with either Store Manager Leroy Marvel or Assistant Manager Dean Boyd regarding my interest in entering the Management

Training Program. I was told that in order to be qualified for the program I had to first gain experience as a department manager and as a support manager.

3. I then documented my interest in promotion at Wal-Mart on my 90 day evaluation. I wrote on my evaluation that I wanted to become department manager of foods. See Phyllis Lehman's 90-Day Evaluation, a true and correct copy is attached hereto as Exhibit A. I chose this position because I wanted to gain the department manager experience I was told was necessary to reach the Management Training Program and because I knew there was an opening for department manager in the food department.

4. My first annual-performance evaluation was completed on February 3, 1992. I was rated as an "above standard" employee. I reminded Wal-Mart that I had long term goals with the company and I stated on my evaluation that, "I plan to excel with the Wal-Mart family." See Phyllis Lehman's February 3, 1992 Associate Evaluation Form, a true and correct copy hereto attached as Exhibit B.

5. In the fall of 1992 Wal-Mart promoted me to department manager of food, which I considered a step closer to the Management Training Program. Within approximately six months of my promotion, I received a merit raise for increasing sales in the food department.

6. I remained the department manager of foods for approximately two and half years. During that time, I talked to Assistant Manager Ben Abbott several times about my desire to train for an assistant manger position. I even told him that I felt that if I had been male, that I would have already been

given the opportunity to enter the Management Training Program. Mr. Abbott typically told me to keep up my good performance so that I might be considered for the Management Training Program. He also frequently reminded me that I would have to relocate with my children in order to enter the Management Training Program. I told him that relocating did not deter me from pursuing a position in the Management Training Program.

7. In January 1995, I received another annual performance evaluation. Assistant Manager Ben Abbott rated me as "above standard," the highest rating possible. I let Wal-Mart know that I continued to be interested in gaining increased responsibility. I wrote on my performance evaluation that my goals for the year included cross-training at the service desk and gaining an opportunity to have department 3, the stationary department, added to my duties. See Phyllis Lehman's January 31, 1995 Associate Self Evaluation, a true and correct copy hereto attached as Exhibit C.

8. In late spring or early summer of 1995 I gave my two weeks notice to Wal-Mart because I felt that Wal-Mart was not giving me the chance to advance beyond my current position as department manager. I had been stuck in the department manager position for two and half years despite my good performance evaluations and my repeatedly expressed interest in promotion. Leroy Marvel, the store manager, and Ben Abbott, an assistant manager, spoke with about my reasons for leaving. I told them again that I wanted to be an assistant manager at Wal-Mart but I was going to leave because I had not been given any opportunity to progress. They told me they did not feel that I had enough experi-

ence yet to become an assistant manager, but if I would stay, they would promote me to support manager now, and advance me to assistant manager later. I agreed to those terms and in June 1995 I was promoted to support manager.

9. I was evaluated in my support manager position in January 1996. Once again, I was rated as "above standard." I was still interested in taking on more responsibility so I wrote on this evaluation that I was hoping that my support manager position would "lead to a position in the assistant manager field." See Phyllis Lehman's January 11, 1996 Associate Evaluation, a true and correct copy hereto attached as Exhibit D.

10. In February 1996 I was wrongfully accused of exhibiting inappropriate behavior in the workplace and I was reassigned to a position as a day stocker. Once again though, when I received my next annual performance evaluation, in February 1997, I was rated as "above standard."

11. In the spring of 1997 I took a position in Directs Receiving. Within three or four months I was promoted to the Lead Associate of Directs Receiving.

12. I continued to speak to Mr. Marvel and Mr. Abbott about moving into the Management Training Program. I also told the District Manager Jerome Schneider that I wanted to enter the program. The District Manager told me I would have to relocate if I entered the program and that such a move would be difficult with children. He told me to go home and ask my kids if they thought a move would be okay. I felt like Mr. Schneider's response to my interest was not sincere, but I did go home and talk to my children. About a month later I was finally able to track down Mr. Schneider again and I let him know that

my family was supportive of the move. Again he responded that he thought the move would be hard on my kids. But he said he would see what he could do. I never heard from him again about it. When I continued to approach Mr. Schneider about getting into the program, he told me time and again that he would get back to me, but he never did.

13. In February 1998, I was rated as "outstanding" as Lead Associate in Directs Receiving, the absolute highest evaluation an associate could get. I also received a merit raise in August 1998. I continued to excel in this position and in February 1999, was rated as an "above standard" employee.

14. In July 2000, Fred Hack, a male associate from my store was promoted into the Management Training Program. He had only worked at Wal-Mart for two years, compared to my 8 1/2 years with Wal-Mart. Mr. Hack trained in a nearby store and was placed as an assistant manager in a nearby store. Despite the District Manager's warnings to me that entering the Management Training Program required relocation, Mr. Hack did not have to relocate when Wal-Mart placed him in the program.

15. I was disappointed and frustrated when I saw Mr. Hack's easy track into the Management Training Program. I had experience in the highest position of responsibility before crossing the line into salaried management, the support manager position, and I had been a dedicated employee to Wal-Mart for 8 1/2 years. I felt that I was more qualified than Mr. Hack but I was kept out of the Management Training Program because Wal-Mart preferred to have male assistant managers.

16. In November 2000, I was accused of mishandling merchandise when in fact another associate

had misplaced the merchandise. Wal-Mart gave me a decision day. I was very upset over the unfair treatment. I decided to end my employment with Wal-Mart to pursue a different career opportunity.

I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Missouri that the foregoing is true and correct.

This Declaration was signed by me on April 13, 2003, at Liberty, MO.

/s/ Phyllis Lehman

Phyllis Lehman

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF VAN LE-KOHLER IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Van Le-Kohler, declare:

1. I am female. I first started working at a Wal-Mart store in Kissimmee, Florida, in June of 1998. I always had good evaluations and was never disciplined at work.

2. I worked as a stocker on the third shift for just about a month before my family suddenly had to relocate. I returned to Florida in 1999 and reapplied at Wal-Mart. I was hired as a stocker in girls' wear in an Orlando Wal-Mart store in August 1999. Just a few weeks later, I received a "promotion" to "supervisor" of stocking for all softlines. Ed Tomaselli, Co-Manager in charge of the third shift, told me this was a promotion, and that he had chosen me because I knew the job better than anyone else and knew how to direct others in the job. However, neither my title

(stocker) nor my wage changed; I had seven departments to stock instead of one and was responsible for training and supervising the other stockers and zoners in softlines. I remained in that position for about two years.

3. I applied for a Support Manager position in the Fall of 2000 on the recommendations of Mary [last name unknown], Department Manager in women's clothing and Louise [last name unknown], Department Manager in girls' wear. Mary told me she thought I was in a good position to get the job because I was familiar with most of the relevant departments. I was interviewed by Ed Tomaselli and Larry [last name unknown], Co-Managers. Mr. Tomaselli denied my request for the promotion, saying that I was not a "people person."

4. I was stunned by this, because of what he had told me when he "promoted" me to supervisor of the softlines stockers, and because my supervisors had always indicated that my communication skills and personal interaction skills were some of my major strengths. For example, on my Performance Appraisal dated September 28, 1999, my supervisor, Toni Daniel, wrote: "Very outgoing personality. Ready to take on any situation. Very detail oriented. Works well with others. Great attitude—does whatever is asked with a smile on her face." See true and correct copy attached hereto as Exhibit A.

5. A male employee, Kevin Holmes, was promoted to the Support Manager position. Mr. Holmes had worked at Wal-Mart for about the same amount of time as I had and his only experience was stocking groceries. In my observation, he kept to himself on the job and avoided interacting with customers.

6. On one occasion in early 2001, I was present during an impromptu meeting in the break room involving several associates and the Store Manager. A female associate, Mary Tromboli, had caught another employee stealing and she and several others were discussing this with Peter Schultz, Store Manager. Ms. Tromboli began raising other concerns, including complaining that men were promoted over her. Mr. Schultz said to her, "You will never get promoted because you are female."

7. In the Spring of 2001, I needed to take a medical leave of absence. Ed Tomaselli, Co-Manager, John Sanchez, Co-Manager, and Peter Schultz, Store Manager, all told me I would be able to return to the same job. I completed the necessary paperwork to be able to return to my same job, but on the day shift. The paperwork was "lost" twice. When I returned after only two months, the store managers told me that the job was not available after all and that I had to take a cashier position. At least two men in the store had been allowed to return to their jobs after medical leaves. Joe [last name unknown], Front End Manager, took a leave of absence for a couple of months and was permitted to return to his job upon his return. Hector Munoz, the top meat cutter, had been out on medical leave for eight or nine months and was permitted to return to his job.

8. In 2001, shortly after I returned from leave, I applied for a Support Manager position again. I was interviewed by Ed Tomaselli and Don [last name known], Co-Managers. However, a man, Eddie [last name unknown], with no supervisory or management experience, got the position. He had been with Wal-Mart only a few months as a stocker.

9. None of the managers who interviewed me told me what I needed to do in order to get a promotion. I was given neither guidance nor support in my efforts to advance my career or join the management ranks at Wal-Mart. I was aware of no other routes into a management position. I was never provided any information about management training, and there was never an opportunity to apply for a management training position.

10. After a few months as cashier, during which my hours were reduced, I quit. I was very upset about being denied promotions, not getting my job back after my leave, and the reduction in my hours.

11. I received no encouragement to make a career at Wal-Mart. No manager gave me any indication that I would be promoted or trained for a management position, despite my repeated expressions of interest. The Store Manager's comment to my female co-worker led me to conclude that women could not expect to receive fair opportunities for promotions, and this conclusion was supported when I looked at the management in the store. The Store Manager, the Co-Managers, all but one of the Assistant Managers and all of the Support Mangers were male. I saw that I could not expect a fair chance at promotion at Wal-Mart.

12. In my experience, men at the Wal-Mart store where I worked received higher starting wages and higher raises than women. For example, Kevin Holmes started around the same time that I did in mid-1999 at the Orlando store, and he told me he was making $.50 an hour more than me. My husband, Steve Kohler, started shortly after I did, and his starting wage was $8.00 an hour as a meat cutter, despite the fact that he had no experience in that

job. I had started at $7.00 an hour and was still receiving that wage when my husband was hired at $8.00 an hour.

13. I have personal knowledge of each and every fact set forth in this Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Florida that the foregoing is true and correct.

This Declaration was signed by me on April 11, 2003, at 3:45 pm.

/s/ Van Le-Kohler

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF LORRINA LETTERER IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Lorrina Letterer, declare:

1. I make this statement on the basis of my personal knowledge, and, if called as a witness, could and would testify competently to the facts herein.

2. I am female and a former Wal-Mart Stores, Inc. employee. I worked in the Dekalb, Illinois Wal-Mart from August 2000 to July 2001.

3. Between 1993 and 1996, I had two years of client services experience at a collection agency and had held a cashier position at Filene's Basement for one year.

4. At Wal-Mart, I was employed as a Cashier from August through November 2000, a Customer

Service Manager from November 2000 through July 2001, and a Sales Associate in July 2001.

5. Between 2000 and 2001, my Co-Manager, Dale [last name unknown], actively encouraged me to pursue promotion to management. Co-Manager Dale told me I would excel in a management position; with his encouragement, I decided to pursue the Manager Training Program.

6. While working as a Customer Service Manager, I told my Store Manager, Tom Kehrees, that I was interested in participating in the Manager Training Program. He told me that I needed to gain sales floor experience before being considered for the program. At his recommendation, I left my Customer Service Manager position and took a Sales Associate position in Health and Beauty Aids to gain the suggested experience. In June 2001, I posted an application on Wal-Mart's computer system for the Department Manager position of the Girls and Boys section. When I did not receive an answer to my application after three weeks, I submitted another. I did not receive a response to either application.

7. In 2001, Lee Murray, the husband of a Customer Service Manager, was hired into the Manager Training Program. Mr. Murray had no previous retail or Wal-Mart experience. Also that year, a male Customer Service Manager, Joe [last name unknown], was placed in the Manager Training Program. Joe, like myself, had held a Cashier position prior to working as a Customer Service Manager. However, despite our similar backgrounds, he was able to enter the Manager Training Program without having to gain sales floor experience.

8. I approached my District Manager [name unknown] in July 2001 regarding my frustration try-

ing to gain promotion to management. Several days later, I told Store Manager Kehrees that I had discussed my concerns with the District Manager; Mr. Kehrees grew angry with me for doing so. A few days after my conversation with Mr. Kehrees, I was told that I was to work as an Assistant to the Department Manager of Health and Beauty Aids. Despite our previously good working relationship, Mr. Kehrees did not speak to me again after my reassignment.

9. Of the ten Assistant Managers in the Dekalb Wal-Mart, only three were female. There were no female Co-Managers at the DeKalb store during my employment with Wal-Mart.

10. Disheartened by my inability to advance to management, I decided to leave Wal Mart Stores in July 2001, after only one year with the Company.

I declare under penalty of perjury of the laws of the United States and the State of Illinois that the foregoing is true and correct.

This Declaration was signed by me on April 15, 2003, in Sycamore, Illinois.

/s/ Lorrina A. Letterer

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF GAIL LOVEJOY IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Gail Lovejoy, declare:

1. I am female and reside in Florida. I have been an employee of Wal-Mart, Inc. for over 14 years, have worked at a Wal-Mart store and currently work at a Sam's Club.

2. I first went to work at a Wal-Mart store in Brooksville, Florida, in August 1988. I started out in receiving and helped open this as a new store. Shortly after the opening, I was moved to Claims as a clerk, where I worked for about a year. After some other short-term assignments, I was put in the Cash office where I worked for about six months. By this point I had been with Wal-Mart for about two years.

3. Sometime in 1991, I told Julie [last name unknown], the Store Manager, that I wanted to be an Assistant Manager. She told me that I would have to work as a Department Manager first, but there were no Department Manager positions open at the time. Within a few weeks, I was made Customer Service Manager and, approximately five months later, I was made Department Manager in Toys. By this time, Rick Watkins was the Store Manager.

4. I stayed in that job for about two years but never heard anything further about promotion to Assistant Manager, despite the fact that I continued to indicate my interest in becoming an Assistant Manager. Over a period of approximately six months, in 1991 and early 1992, I reminded Rick Watkins that I was interested in what they then called "the program," which was a management training program that lead to promotion to Assistant Manager. He always told me he would talk with the District Manager about my interest, but I never heard anything further or received any guidance or information about how to pursue promotion. I knew of no other way to express my interest in moving into management as there was no other way to apply for the program. Eventually, I concluded that I would never get a promotion.

5. In 1993, a new Sam's Club opened in New Port Richey, Florida. I requested a transfer, worked in receiving until shortly before the store opened, and have worked in Claims ever since.

6. Sometime in 1995, an overnight supervisor position opened up, and I spoke with Jeff Williams, who I think was an Area Manager at the time, about my interest in that job. He told me that I could not have the job because I had children and because I

would be the only female locked in the store overnight with a male crew.

7. I have always had good evaluations and have never been disciplined at work.

8. At the Sam's Club where I work, almost everyone who works in Crafts, Lingerie, Clothing, Pets and Health and Beauty Aids is female. Almost everyone who works in Automotive, Sporting Goods, and Groceries is male. During the ten years I have been there, all but two of the Team Leaders (hourly supervisors), all but three of the Area Managers, and all but three of the Assistant Managers have been male. In all the years I have worked there, there has never been a female General Manager.

9. When I first started at Wal-Mart in 1988, I was making $4.00 an hour. By the time I transferred to Sam's in 1993, I was making only $7.45 an hour. When I started at Sam's, the General Manager, Allen Ashmore, gave me a $.50 merit raise to $7.95. He told me that brand new employees were starting at $6.00 an hour at that time and that I should be making more than $1.45 more than them with my five years of experience. Today I make $12.65 after nearly fifteen years with the company.

10. In January 2003 I saw a poster for a Manager in Training Program (MIT) to become an Assistant Manager, and I applied. In my 14 years with Wal-Mart, I had never seen a similar posting. There had never been a previous opportunity like this to apply for the management training or for a position of Assistant Manager.

11. On March 10, 2003, I was told that I would have an interview on March 11 with the Director of Operations, Mike Peel, for a position in MIT. Al-

though I was cordially welcomed, his first question to me was whether I was willing to work weekends and holidays. He also asked me, very early in the interview, whether I would be willing to move if a promotion took me more than an hour away from home. He told me that the Assistant Manager job would involve working 55 hours a week for a maximum salary of $31,000 a year. He did not tell me how much I could expect to make as a General Manager of a Sam's Club. He did not talk about the number of Sam's Clubs that are planned to be opened within the next few years and the number of General Managers that will be required for the new clubs and due to attrition. He did not tell me that relocation might not be required, especially with the number of new clubs opening. He did not ask me about the fact that I am currently working towards a college degree, even though I had put that on my application.

12. When I indicated that I thought the salary was too low for the long hours, Mr. Peel asked if I would be interested in an Area Manager position instead. He told me that an Area Manager works only 45 hours a week but that the maximum salary for Area Manager is $29,000 a year. Three days later, two female friends and I were talking with the current Area Manager for receiving, Marley Bunker, and he told us that his current salary is $35,000.

13. On March 14, 2003, Bob Gleghorn, the General Manager, told me that Mr. Peel must have been mistaken about the maximum salary for Area Managers and that he thought it was $35,000.

14. On March 27, 2003, Mr. Peel visited our store and told me that I was not being selected for MIT but that he would keep me in mind for an Area Manager position. He said the reason I was not se-

lected was because I thought the hours were too long for the salary. If he had explained the advancement opportunities to me at the interview, and what I might be able to make if I ever got a General Manager position, I would not have felt so negative about the MIT position.

15. I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Florida that the foregoing is true and correct.

This Declaration was signed by me on April 3rd, 2003, at Hudson Florida.

/s/ Gail Lovejoy

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF KATHLEEN MACDONALD IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Kathleen MacDonald, declare:

1. I am female. I am over 18 years of age, and competent to testify in court. I have personal knowledge of the facts contained herein, and could and would testify to them in a court of law if requested to do so.

2. I currently reside in Aiken, South Carolina, where I have lived for the last twenty years. I have a certificate from vocational school and a high school degree. I also have prior retail and grocery experience. I worked at Kroger from 1988 - 1990 as a sales clerk, stocker and cashier before going to work for Wal-Mart.

3. In 1990, I went to work for Wal-Mart in Aiken, South Carolina because I had heard from some of my husband's friends that Wal-Mart was a good company to work for. I applied for a position as a clerk, cashier or stocker and was hired as a sales clerk for toys. Upon being hired, I was given an associate handbook and told to read it. I did so.

4. During the years I have worked at Wal-Mart, I have worked as an associate in the housewares department; the pets and furniture department; the lawn and garden department; the stationary department; the candy department; and as a checkout clerk. Currently I work as an associate in the candy department.

5. Since joining the candy department as an associate, I have consistently received "exceeds expectations" on my reviews. In addition, I have specifically been praised in my reviews for my honesty. True and correct copies of some of these reviews are attached hereto as Exhibits A and B.

6. At my store, many male associates brag about their pay. It is against Wal-Mart policy to discuss pay, but nevertheless these male employees have done so in my presence. Based upon their statements, in 1999, I became concerned that I was being paid less than the men in the store, because the pay they claimed to receive exceeded mine. The men who have discussed their pay in my presence and stated that they make more than me include "Bobby" (last name unknown), an associate who works in the sporting department, "Wesley" (last name unknown), an associate who works in the frozen foods department, John Cassimisina, who stocks paper goods and chemicals, John Cooper, an associ-

ate who works in the lawn and garden department, and Shane Jackson, a grocery stocker.

7. After hearing these men talk, in 1999 I complained about the pay issue to my Department Manager, Joel Batson. In response to my complaint, he said "women will never make as much money as men." When I asked why, he said "God made Adam first, and so women would always be second to men."

8. After receiving this response from Mr. Batson, I relayed the story to Ms. Queenie Turner, another associate at the store. In response to my story, she told me that she had once complained about her pay as compared to her male counterparts in the bakery department. Ms. Turner informed me that, after presenting her complaint, she was told that men would be paid more because they were the heads of household. Based upon these responses, I decided not to pursue the matter further at the store level.

9. Around that same time, there were several other women at my store who also complained about the fact that it seemed we were making less money than the men at the store, even though we were performing similar jobs and had similar levels of experience. Women who complained include: Ramona Hunt; Leanne Posten; Liz Boyd; Becky Benfield who was a former cashier; Thelma Davis, also a former cashier; and Jerri Jackson, lawn and garden dept manager.

10. Sometime a few months after my conversation with Mr. Batson, but still in 1999, Mary Smith, our Regional Personnel Manager, and Russ Berry, our District Manager, came to the store to visit. At that time, I and several others, including some of the women identified above, raised with the two of them

that we believed the women were being paid less than the men for the same work. They promised they would get back to us within 30 days about this issue. We never heard anything from them again on the matter. Having complained as high as the Regional Personnel Manager about the issue, I did not know whom else to complain to, and thus did not raise the issue again for some time.

11. Two years later, however, we had a new Regional Personnel Manager, Gwen Cannon, who came for a store visit. This was in approximately June of 2001. Once again, I and several other women complained that we believed that we were being paid less than the men in the store. Gwen promised that she would look into the pay issue.

12. After this meeting with Ms. Cannon – and after this lawsuit was filed – I was given an 81 cent raise following an "internal wage analysis." Attached hereto as Exhibit C is a true and correct copy of my Associate's Commendation Form. The internal wage analysis apparently confirmed that I was being paid less than I should have been.

13. I was informed of the $.81 raise by Tim Mallet, who was my store manager at the time. He told me that the 81 cent raise was not a merit raise, nor was it a cost of living allowance raise. When I asked him to explain why I was getting the raise, all he would tell me was that Wal-Mart had determined I was "not at the level I should have been," so I was getting a raise. I was further told by Mr. Torgeson, the District Manager, that I should not tell anyone about the raise, because not everyone would be getting a raise. As a result of this raise, I went from approximately $9.25 to $10.04 an hour. Even after this

raise, however, I still was not making as much as the male grocery stockers were being paid.

I declare under penalty of perjury under the laws of the State of South Carolina that the foregoing is true and correct. Executed this 16 day of April, 2003 at Aiken, South Carolina.

/s/ Kathleen MacDonald

Kathleen MacDonald

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF BARBARA MACK IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Barbara Mack, declare:

1. I make this statement on the basis of my personal knowledge, and, if called as a witness, could and would testify competently to the facts herein.

2. I am a 41 year old African American woman, currently employed as an Assistant Manager at a Wal-Mart store in Sumter, South Carolina. I am a single mother and have primary responsibility for my 12-year-old son. I have been employed by Wal-Mart since January 27, 1987.

3. When I joined the company, I had prior supervisory experience as a shift supervisor with Pizza Hut where I had supervised 10 employees. I applied at the Wal-Mart store in Manning, South Carolina to

get a different type of experience although I was not sure of the specific advancement opportunities available within the company. I initially worked as a cashier and then a year later I was assigned to receiving. From approximately the summer of 1988 to approximately 1992 or 1993, I worked as a sales associate in Stationary and Electronics Department Manager. My performance evaluations were above standard and I was very interested in promotional opportunities in the company.

4. In approximately 1992 or 1993, I was promoted to Support Manager after Store Manager Jane McKeller, who had been promoted recently to Store Manager, offered me the position. In approximately the winter of 1994, Store Manager Danny Oswald transferred to the store. Store Manager Oswald removed me from the position of Support Manager after informing me that the position no longer existed. I called the Home Office and District Manager Mike LNU and both confirmed that the position no longer existed. I returned to my former position as Department Manager of Electronics and continued to express interest in promotion to Store Manager Danny Oswald.

5. In December 1996, I was transferred to the Loss Prevention department. I continued to work in the Manning, South Carolina store but my job responsibilities required me to travel to various stores to investigate security, fraud and shrink issues.

6. In May 1998, I asked District Manager Jerry Cole for the opportunity to participate in the Assistant Manager Training Program after I decided that I wanted a chance to go into management. My Loss Prevention District Manager, Jake McNeal,

supported me in the process and I began my training in the Sumter, South Carolina store in June 1998.

7. I trained for ten weeks in the Sumter store. After my training was completed in September, I was assigned to work at a store in Columbia, South Carolina, an hour and 20 minutes from my home. Store Manager Charles Kenny told me that I had been assigned to this store because Assistant Managers could not train and work in the same store. However, I observed that male Assistant Manager Trainees James Primus and Joe Thompson were permitted to train and work in the Sumter store.

8. I worked very hard at the Columbia store and the Store Managers Ed Mason and Jim Crosland frequently would assign me to the most difficult areas in the store to clean them up. I was at the store for a year and a half, and finally, was assigned to the worst area of the store, Domestics, which I managed to organize.

9. I asked District Manager Cole for a transfer to a store closer to home on a number of occasions because I am a single mother. In January 2000, I was transferred to the Sumter, South Carolina store.

10. By the time of my transfer back to the Sumter store, I felt that I could run a store. I, consequently, expressed interest in a promotion to Store Manager Gary Ulmer. In February 2001, Store Manager Ulmer and I discussed my moving up in the company after Co-Manager Ann McClam was promoted to store manager. Store Manager Ulmer informed me that he thought I could perform the job responsibilities of a co-manager. Based on this and other discussions, I fully expected to be promoted to the position. However, a couple of weeks later, Store Manager Ulmer informed me that a man, Patrick

Ryan, had been selected to work as co-manager because he had food experience and that I would be ready for promotion in a few months.

11. Co-Manager Ryan had only been an employee of Wal-Mart for a short period of time when he transferred to the Sumter store in April 2001. Because of his limited experience with Wal-Mart, Store Manager Ulmer asked me to train him. As a result, I worked closely with Mr. Ryan. Almost immediately, Co-Manager Ryan started to touch me in an offensive way. He would, frequently, touch me including brushing up against me, touching my butt and massaging my shoulders. He would also make inappropriate remarks. For example, at one point he asked that I join him in his hotel room to watch television despite the fact that we were not friends and had no relationship beside a working relationship within the store. Although I did not tell Store Manager Ulmer of each of these incidents, I did tell him that I did not like to work with Co-Manager Ryan and, eventually, had my schedule changed so that I would work with Co-Manager Ryan as little as possible. I did not tell Store Manager Ulmer the details of what occurred because I feared that I would lose my opportunity for promotion to co-manager.

12. On a Saturday in August 2001, Co-Manager Ryan came into the administrative office where I was working typing the Back to School plan for the store for District Manager Patsy Williams. Co-Manager Ryan came into the office and while my back was turned raised my shirt up as if he was attempting to take it off. I turned to stop him and pushed him against the wall. I told him that I was going to tell Store Manager Ulmer about the incident and told him to take his hands off of me. I then left the room

humiliated and embarrassed by the experience. The next day Store Manager Ulmer, who was off, called in to check on the store. I answered his questions and told him about Co-Manager Ryan raising my shirt. Store Manager Ulmer assured me that he would take care of it the next day.

13. However, Store Manager Ulmer did not raise the matter the next day. Two days after the incident, Gary Ulmer called me from his cell phone to tell me had spoken to Co-Manager Ryan and that he, Co-Manager Ryan and I would sit down and talk about it. He also told me that he would do an investigation. Approximately a week later, I had not heard anything and I went to talk to District Manager Williams whose office was in the Sumter store. I told District Manager Williams what had happened and that Co-Manager Ryan liked to touch me. She told me that she would investigate it but then left town to attend the annual company meeting in Dallas.

14. During this period, I was still required to work with Co-Manager Ryan although I was uncomfortable doing so. Weeks after District Manager Williams and Store Manager Ulmer returned from the Dallas meeting neither had spoken to me about my complaint and I called the Home Office for assistance. I spoke to a woman named Melissa in the Home Office about what had happened and she told me that she would get back in touch with me. A short time later, Melissa called to tell me that she had spoken to District Manager Williams and that Ms. Williams would follow up. Approximately, a week and a half later I spoke to District Manager Williams who told me that after an investigation she had concluded that something had happened but that I had exaggerated. I denied that I had exaggerated and

told her that Co-Manager Ryan had raised my shirt. At no time did District Manager Williams talk to me about Co-Manager Ryan's conduct toward me as part of her investigation. She then told me that she had disciplined Co-Manager Ryan but that she could not be specific about how he had been disciplined because it was confidential. District Manager Williams told me that she wanted me to go downstairs, continue to work with Co-Manager Ryan and perform for her the way I had always done. Because I believed I had no other choice but to continue to work with Co-Manager in order to keep my job, I did as District Manager Williams directed and continued to work with Co-Manager Ryan despite the discomfort I felt.

15. After I complained about Co-Manager Ryan's behavior, Store Manager Ulmer and District Manager Williams changed in their attitude toward me. Store Manager Ulmer no longer discussed the possibility of my promotion to co-manager. Rather, he began to tell me that I had people issues and that I needed to work on my "deliverance." He also complained to me about the fact that I had gone over his head to complain about Co-Manager Ryan. District Manager Williams no longer requested that I assist her in completing STAR Reports at various stores. She also no longer requested that I assist her in putting together plans for the store. Before I complained she would include me in both of these activities. I saw these as opportunities for me to get to know District Manager Williams better since she would influence whether or not I got a promotion or not.

16. I knew that my chances for promotion were doomed when I received an evaluation in 2002 that included input concerning my strengths and areas of

improvement from Co-Manager Ryan, the very person against whom I had made my complaint. I raised my concern about Co-Manager Ryan's providing input and informed Store Manager Ulmer and District Manager Williams that I believed that I was being treated differently because of my gender. Exhibit A. However, both ignored my concern.

17. Co-Manager Ryan transferred out of the Sumter store in October 2002. He was replaced by another male, Chris Hanson who has less experience than I have as an Assistant Manager. I had not been given the chance to apply and I was not interviewed for the position. Instead, I have been told that I need to work on people issues. I believe that this is retaliation for my complaining about sexual harassment and gender discrimination because I have observed that male associates, Jim Crosland and Bobbie Green, were terminated for sexual harassment or other people issues and were then rehired and promoted to store manager and Rising Star, respectively.

18. Store Manager Ulmer has recently continued to retaliate against me by attempting to transfer me to a store in Florence, South Carolina without discussing it with me. I was not transferred after I spoke to District Manager Williams about the issue. However, Store Manager Ulmer does not allow me to fully do my job and insists that I go to Co-Manager Chris Hanson before I do anything. I find this to be particularly insulting since I have more experience than he has and am qualified to perform my job with little or no supervision.

19. Each of the stores in which I have worked and that I visited while I worked in Loss Prevention operated in the same manner. I was not required to

receive any additional training to work in any of the stores in which I worked. Currently, I am working with a team of associates from the Sumter store to set up a new Supercenter that is opening in Sumter, South Carolina in May 2003. I have not received any additional training to set up the store and am not expected to go through any additional training to work at the store.

20. I declare under penalty of perjury of the laws of the United States and State of ________ that the foregoing is true and correct.

This Declaration was signed by me on April 23, 2003, at 3:50 p.m.

/s/ Barbara Mack

Barbara Mack, Declarant

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, KAREN WILLIAMSON, on behalf of themselves and all others similarly situated, Plaintiffs, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF SANDRA MARSHALL IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Sandra Marshall, declare:

1. I am a female, former employee of Sam's Club. I quit after 13 years because believed that the male management at Sam's Club retaliated against me when I demanded to be paid at the same rate as a male employee.

2. I began working at the Houston, Texas Sam's Club in November 1984. I applied for a cashier position, but was asked to work in the "Center Section," which includes Health and Beauty, Candy and Office Supplies. Within six months, I was promoted to "Team Lead", an hourly supervisory role, of the Center Section. In November 1985, I requested and received a transfer to the Sam's Club in San Antonio, Texas.

3. As an hourly employee between 1984 and 1991, I received an "exceeds expectation' or the equivalent on each and every evaluation, and was selected as "employee of the month" at least four or five times, I never used a single "personal" or "sick" day, and as a result, forfeited over 140 hours of paid leave when I was promoted to a salaried position in 1991.

4. In 1991, my supervisor Larry Thibeaux at the San Antonio store asked me if I was interested in joining the Management Training Program. I was required by Sam's Club to transfer to the Austin, Texas store in order to receive management training. After three months in Austin, I completed the program, and was promoted to Assistant Manager. I stayed in Austin for almost year and a half.

5. I never refused to transfer to other locations when requested by Sam's Club. I transferred, at the request of Sam's Club, to Arlington, Texas in April 1992. Within several months of arriving at the Arlington store, I was asked if I would transfer to a "Pace" store in order to assist in its conversion to a Sam's Club. I was given a. choice of three locations, and chose to transfer to Albuquerque, New Mexico.

6. Once the Albuquerque conversion was completed, I requested and received a transfer to Fort Worth, Texas, where I continued my employment as a salaried Assistant Manager. At the Fort Worth store, a female employee in the TLE department complained to me of foul language used by other male employees. I wrote a note summarizing the complaint and gave it to District Manager Carlton Walls. General Manager Bob Arnold told me that the female employee would "get over it." Shortly after a

submitted the complaint, District Manager Walls transferred me to Grand Prairie, Texas.

7. As an Assistant Manager, I was required to work 55 hours per week. In addition, I spent extra hours working when necessary so that I could complete special projects. My evaluations for the six years that I was a salaried Assistant Manager were, like my evaluations as an hourly employee, exemplary.

8. When my brother became terminally ill in 1996, I wanted to reduce the number of hours that I was required to work. I asked my General Manager, Mike Wanzer to transfer me to a position as an hourly Assistant Manager, where I would be required to work only 40 hours per week. He deferred me to his supervisor, Director of Operations Craig Winstat. Mr. Winstat told me that if I transferred, my hourly wage would be reduced to $10.00 per hour.

9. I contested the reduction with Mr. Winstat, and informed him that a male hourly Assistant Manager, John Johnson, did not receive such a drastic reduction when he transferred from a salaried position. I knew this because Mr. Johnson and I worked together as Assistant Managers in the Fort Worth and Grand Prairie stores, and we discussed his transfer to an hourly position. Mr. Winstat told me that Mr. Johnson was paid more because he was better qualified than me. To my knowledge, Mr. Winstat was new to Sam's Club, and never worked with Mr. Johnson. After several days of dispute, my salary was reduced to $13.00 per hour, and I was transferred at Mr. Winstat's direction to the Richmond Hills, Texas Sam's Club.

10. My General Manager in Richmond Hills was Byron Lindemann, with whom I had worked at

the Grand Prairie store. Mr. Johnson followed Mr. Lindemann to the Richmond Hills store shortly before I received my transfer there. Assistant Manager Rick Burris, worked with me and Byron Lindemann at the Grand Prairie store, and transferred to Richmond Hills after Mr. Lindemann. Mr. Burris was a Team Lead at Grand Prairie, and I had been his immediate supervisor. Craig Winstat was still my Director of Operations.

11. Upon assuming an hourly position in Richmond Hills, I was treated differently that Mr. Johnson, who was also hourly. Mr. Lindemann was aware of the salary reduction dispute with Mr. Winstat, and informed that me that he would expect more from me because I was getting paid more. In contrast, Mr. Johnson was treated much more leniently, and not required to take on as much responsibility, even though we received comparable pay.

12. I wrote a letter complaining of mistreatment to Regional Vice President Brad Link. Shortly after I wrote the letter to Mr. Link, Assistant Manager Rick Burris called me into his office and informed me that I was stocking incorrectly. He directed me to pull down fewer products in the Candy Department. For the next week, I stocked the candy section as instructed by Mr. Burris. About a week later, Mr. Burris called me into his office again, and informed me that the stocking procedure, which he had shown me, was incorrect. He told me that I was not pulling enough product down to stock, and he gave me a written coaching.

13. The night I received the coaching was the last night I worked at Sam's Club. I found another job. I returned to Sam's Club about two weeks later and filled out an exit interview, where stated that I

left for another job, even though the primary reason that I left was because of retaliation from my male supervisors. I told this to Assistant Manager Lloyed Lyons, who did not write it on my exit interview.

14. During my career at Sam's Club, spanning 13 years and seven 7 stores, I did not work for any female District or Regional Managers. I received outstanding performance reviews until was placed under the management of Byron Lindemann. I believe that the male managers, including Rick Burris, Byron Lindemann, and John Johnson at my store formed a male "clique" which excluded, and discriminated against women.

15. I contacted the EEOC and made a written complaint for discrimination against Sam' Club in October 1997, shortly after I terminated my employment.

I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Texas that the foregoing is true and correct.

This Declaration was signed by me on April 13, 2003, in the City of Glenn Heights, State of Texas.

/s/ Sandra Marshall

Sandra Marshall

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF NANCY MARTIN IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Nancy Martin, declare that:

1. I make this statement on the basis of my personal knowledge and, if called as a witness, could and would testify competently to the facts herein.

2. I began working full-time for a Wal-Mart Store in Janesville, Wisconsin in May 1989 as a customer service manager making $3.50 an hour. In my application, I wrote that I was applying for a management trainee position. Attached hereto as Exhibit A is a true and correct copy of my Wal-Mart Application for Employment. In the resume that I submitted with my application, I specifically noted that my objective was "retail management trainee position with opportunity for advancement. Willing

to relocate." I had also had experience as General Manager of a floral and craft supply store. Attached hereto as Exhibit B is a true and correct copy of the resume I submitted along with my Wal-Mart Application for Employment.

3. Upon being hired, I immediately and persistently spoke with both Store Manager Bob Morey and District Manager Jeff Kraus about my interest in moving into a management position. I spoke with them casually, as well as during my evaluations and in individual meetings with each of them to discuss my career goals. Each told me that, in order for me to enter the management training program, I would be required to relocate. I asked Mr. Kraus if he might make an exception for me because I wished to stay with my family in Janesville, but he refused.

4. In 1991, I had a meeting with Mr. Morey and he told me I could join the management training program but that I would be required to relocate to the Whitewater, Wisconsin Wal-Mart Store, which I did. A few months later, after training, I voluntarily relocated again in order to become an assistant manager position in a new Wal-Mart Store in Ashland, Wisconsin.

5. In 1995, I transferred to an assistant manager position in a Wal-Mart Store in Anchorage, Alaska. While I was working in Anchorage, Alaska, a new male assistant manager, John Halpaus, was hired. I learned that he was making $6,000 more than I was. At the time, I had been an Assistant Manager for four years longer than he had been. I had always been told I would be fired for discussing salary issues so I never discussed this pay difference with anyone for fear that I might lose my job.

6. In the Summer of 1995, I initiated the development of a new scheduling program in the Anchorage, Alaska Wal-Mart. I had a meeting with District Manager David Carmen about the program. In that meeting, Mr. Carmen criticized the work I had been doing with the scheduling program but he did not give me any ideas about ways I could improve. He then told me I had been assigned a "problem" store and that I was never going to go anywhere in my career at Wal-Mart. I was surprised by these statements and, during the conversation, I got the feeling that Mr. Carmen did not like me and did not want me in my position. I then spoke with Store Manager Mark Divis about my meeting with Mr. Carmen and he told me not to worry about it and to just get the scheduling done. He also did not give me any information about ways in which I could get assistance developing this program. Finally, I decided to contact customer service managers in several Wal-Mart Stores in the lower 48 stores in order to get the guidance and support that I needed to develop and implement what eventually became a successful scheduling program.

7. In 1998, I was still interested in advancing in my career at Wal-Mart. In May 1998 I agreed to transfer as an assistant manager to another Anchorage, Alaska Wal-Mart Store because District Manager Mark Divis (recently promoted from Store Manager) told me it would improve my chances of promotion.

8. That same month, I also had a meeting with the store manager in my new store, Gary Harvey, about my career goals. I told him I was still interested in advancing in my Wal-Mart career. Mr. Harvey told me that I was not yet ready to move into co-

manager position in part because I had come from a "bad" store. He did not elaborate on what that meant. He told me he wanted to "see what happens" in the future but he would make no commitments towards my future advancement or me.

9. In October 1998, I transferred to a Wal-Mart Store in Richland Center, Wisconsin in order to care for my ill mother. In August 2000, while an assistant manager in Richland Center, Wisconsin, I noticed a posting on the manager's computer system (The Manager's Workbench) for an assistant manager position in Anchorage, Alaska. I called Alaska District Manager (he had since been promoted from Store Manager) Gary Harvey to discuss the possibility of moving up in my career at Wal-Mart Stores in Alaska. Mr. Harvey was non-committal, only stating that he didn't know of anyone who had moved back into an Alaska Wal-Mart after having moved out and he wasn't sure if it was even possible. This statement led me to believe he was not interested in helping me advance in my Wal-Mart career in Alaska and I felt he was trying to discourage me from even trying. By this time, I had talked with at least five different managers over a period of nine years and not a single one had encouraged my interest.

10. Despite Mr. Harvey's discouraging words, I decided to apply for this lateral move. I had an interview with a female Regional Personnel Manager Stacey Simon. Within a week, she told me I was qualified and had gotten the position.

11. In September 2000, I asked for meeting with District Manager Harvey to discuss my career advancement at Wal-Mart. Despite having been an assistant manager for ten years and receiving excellent evaluations, Mr. Harvey told me he didn't think

I could "handle" being a store manager and that I would have to wait another three to five years before he might allow me to manage a "small" store. I found this extremely discouraging and demoralizing. At that time, I really started to doubt whether I was ever going to receive the management support necessary for me to successfully advance in my career at Wal-Mart. The following year, a position came open for a store manager in an Alaska Wal-Mart. In order to post for a position, I knew that I needed to have the approval of my district manager. Based on my conversation with Mr. Harvey, I was certain that he would not give his approval so I did not bother to apply.

12. A couple of months after my conversation with Mr. Harvey, I saw Regional Personnel Manager Stacey Simon at a management training about preventing union activity. During a break, I spoke with her about my interest in moving up and whether there she knew anything about available management positions. She told me there was nothing available at the time. She did not give me any information about ways in which I could improve my chances of promotion.

13. In 2001, Co-Manager Allen Manderson and I were in the manager's office in my store discussing whether an associate should be terminated. I disagreed with Mr. Manderson's opinion that the associate should be terminated and he responded, "You need to grow some balls." I felt this was a highly inappropriate, sexist, and offensive comment. At the time, I was afraid to tell my current Store Manager Todd Childers because he was a buddy of Mr. Manderson's.

14. By late 2001, it became abundantly clear to me that I was not going to be allowed to move up in my career at Wal-Mart and that I was not getting the support I needed from management and I began looking for other positions. In January, 2002, I left my employment with Wal-Mart for a position as a Branch Manager at Alaska USA Federal Credit Union. I felt that I needed to find a workplace where I would be encouraged to succeed. On my Exit Interview, I noted that I was leaving due to a lack of promotional opportunities. Attached hereto as Exhibit C is a true and correct copy of my Exit Interview.

I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Alaska that the foregoing is true and correct.

This Declaration was signed by me on March 17, 2003, at Anchorage, Alaska.

/s/ Nancy Martin

Nancy Martin, Declarant

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES,
PATRICIA SURGESON,
CLEO PAGE,
CHRISTINE
KWAPNOSKI,
DEBORAH GUNTER,
KAREN WILLIAMSON
AND EDITH ARANA, on
behalf of themselves and
all others similarly
situated,

Plaintiff,

vs.

WAL-MART STORES,
INC.,

Defendant

Case No. C-01-2252 MJJ

DECLARATION OF IRMA MATHIS IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I, Irma Mathis, declare:

1. I am a current Wal-Mart employee.

2. I am a forty-three year old, single mother of three daughters, who are ages 15, 17 and 19. I am also helping to raise my grandchild who is three years old. I want to be a role model for daughters so that they will believe that they can get ahead in life. While working at Wal-Mart, I attended college and received a Bachelor of Arts degree from the University of Texas at San Antonio. I have been trying to turn my job at Wal-Mart into a career.

3. I worked for Wal-Mart as an hourly employee from January 1996 until August 2002. During that time, I worked as a cashier, as a sales associate

in the softlines, domestics/bedding, fabrics, sporting goods, electronics, claims, courtesy desk and layaway departments, and as layaway department manager. I worked in Wal-Mart store no. 458 in Aransas Pass, Texas, Wal-Mart store no. 1198 in San Antonio, Texas, and in a Wal-Mart Supercenter no. 2864 in San Antonio, Texas.

3. I have tried to contribute to Wal-Mart in ways that go beyond the requirements of my position. While I was layaway department manager in store no. 1198, I compiled layaway procedures from Wal-Mart's Home Office into a training manual for the layaway employees and made checklists to assist them in learning the material. In Supercenter no. 2864, I volunteered to serve on the hiring committee. During set up of that store, I oversaw two teams and took responsibility for training new employees. For approximately one year, two co-workers and I wrote a newsletter for the employees in Supercenter no. 2864.

4. I received annual performance evaluations while working at Wal-Mart. On each of my annual evaluations, I was rated either "above standard" or "meets expectations." I have not been disciplined for my work performance.

5. I worked at Wal-Mart for more time than many of the other employees at Supercenter no. 2864. Store Manager Mark Antilley repeatedly referred to me and several other female employees as the store's "seasoned associates."

6. In approximately late 2000 or early 2001, I decided that I wanted to enter the First in Line training program. The First in Line program is a management training program for college students. At the time, I was studying at the University of

Texas, so I believed that I would fit into the program well.

7. I had many discussions with Store Manager Mark Antilley about my interest in being promoted into the First in Line program. On one occasion, Mr. Antilley told me that I needed to develop "people skills." I do not know what he meant by that. I had overseen the work of other Wal-Mart employees as layaway department manager and during the store set-up. I was not disciplined or reprimanded for having a problems working with these employees. Mr. Antilley did not tell me what "people skills" I lacked or how I should go about developing "people skills." On another occasion when I spoke to Mr. Antilley about getting promoted into the First in Line program, Mr. Antilley told me that I needed to work as a merchandise department manager. I had already worked as manager of the layaway department. On one occasion, I asked Mr. Antilley for information about the First in Line program. Mr. Antilley told me that he would talk to District Manager Ron Kircher to find out how the program worked and get back to me. Mr. Antilley never got back to me. On an occasion when I approached Mr. Antilley for help getting into the First in Line program, Mr. Antilley told me that he would give a copy of my resume to Regional Personnel Manager Pedro Androtti. I gave Mr. Antilley a copy of my resume, but did not hear anything. After giving him my resume, I followed up with Mr. Antilley. He always told me that he did not have any information for me.

8. In spring 2002 after Plaintiffs' attorneys disclosed my name as a witness in this case, I contacted Regional Vice President Larry Williams by email. Because I was scheduled to graduate from col-

lege in August 2002, I was concerned that I would not be eligible for the First in Line program any longer. In that email message, I told Mr. Williams about the problems that I was having getting into the First in Line Program.

9. In response to my email message to Mr. Williams, a manager from Wal-Mart's People Division named Jill Wesbecher telephoned me. Ms. Wesbecher described the First in Line program to me and gave me some information about Wal-Mart's other Management Training Program. Shortly after my telephone conversation with Ms. Wesbecher, Regional Vice President Pedro Androtti called me. Mr. Androtti told me that he had not received a copy of my resume and asked me to send one to him. In approximately June or July 2002, I was accepted into the First in Line program.

10. After I was promoted, but before I transferred to the store where I was to do my training, Store Manager Mark Antilley spoke to me about the fact that I had contacted Wal-Mart's regional management. Mr. Antilley was visibly upset. He told me that store issues should be kept at the store level. He also told me that I would have to prove my loyalty to my new Store Manager.

11. Other than myself, I am aware of only one female employee who was promoted into one of Wal-Mart's management training programs from Supercenter no. 2864. I am aware of six male employees who were promoted into a management training program from Supercenter no. 2864. Their names are Roland Pacheco, Chad Brooks, Anthony Hall, Frank Gonzalez, Jason Caldwell, and Henry Diaz. As far as I am aware, none of these men had worked for Wal-Mart for as long as I had.

12. Store Manager Mark Antilley told me that women have to be "bitches" to survive in Wal-Mart management. I received a performance evaluation in approximately October 2000. In the section entitled "areas for improvement," I am described as "overbearing." A true and correct copy of this evaluation is attached hereto as Mathis Exhibit A. In approximately November 2002, I had a conversation with an Assistant Manager named David Ash. Mr. Ash told me that I needed to be more assertive.

13. I completed the First in Line program and am currently an Assistant Manager. As my first assignment as an Assistant Manager, I am working the overnight shift at a store that is located forty-six miles from my home. Driving over ninety miles daily and working during the night prevents me from spending as much time with my daughters as I would like. I am making these sacrifices because I want to have a career at Wal-Mart.

14. I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Texas that the foregoing is true and correct.

This Declaration was signed by me on 3-27-03, 2003, at San Antonio, Tx.

/s/ Irma Mathis

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES,
PATRICIA SURGESON,
CLEO PAGE,
CHRISTINE KWAPNOSKI,
DEBORAH GUNTER,
KAREN WILLIAMSON
AND EDITH ARANA, on behalf of themselves and all others similarly situated,

Plaintiff,

vs.

WAL-MART STORES, INC.,

Defendant

Case No. C-01-2252 MJJ

DECLARATION OF LORI B. MCCARTHY IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I, Lori B. McCarthy, declare:

1. I make this statement on the basis of my personal knowledge and, if called as a witness, could and would testify competently to the facts herein.

2. I am female. I graduated from Florida State University in April 1991 with a degree in clothing and textiles.

3. Prior to working for Wal-Mart Stores, I held positions as Intern for Neiman Marcus, Assistant Manager for Strawberry Fields, and Salesperson for Publix Supermarket, Coles Meat Wine & Cheese Shop, and Jordan Marsh.

4. Following my graduation from college, I had a ten-year career with Wal-Mart Stores from May 20, 1991 through August 31, 2001.

5. Throughout my tenure at Wal-Mart, I consistently received high ratings on my performance evaluations. I was asked to relocate eight times during my career; I did so because I believed it would increase my chances of being promoted to Store Manager. Nevertheless, between 1999 and 2001, my eighteen applications for Store Manager positions all were denied.

6. I entered the Manager Training Program in 1991 at the Fort Walton Beach, Florida Wal-Mart. Following my training, my supervisor commented in my performance evaluation that I would make an "excellent member of management." Attached hereto as McCarthy Exhibit A is a true and correct copy of my Management Trainee Ten Week Performance Appraisal and Plan of Action, dated August 19, 1991. I was promoted to Assistant Manager of the Fort Walton Beach Wal-Mart in August 1991.

7. I transferred to the Destin, Florida Wal-Mart in January 1992. My District Manager, Jerry Neal, frequently came into the Destin store to discuss business matters such as finance, budgeting, and profitability with the male Store Manager. He also included male Assistant Manager, Robert Browning, in these conversations. Although I expressed an interest in participating, Mr. Neal excluded me from these discussions.

8. Mr. Neal transferred me to the Sunrise, Florida Wal-Mart in August 1992. As the only female Assistant Manager at the Sunrise store, my two Store Managers, Steve Mastaler and Gary DeCoque, treated me more harshly than the other Assistant

Managers. Mr. DeCoque scheduled me for overnight shifts, criticized the stockroom for which I was responsible, and generally was more abrupt with me than my male colleagues. In 1993, Mr. Mastaler denied my two-week vacation request for my honeymoon. I complained to my District Manager, Steve Daniel, about this because I knew another male employee [name unknown] who had been granted a two-week leave for his vacation. However, Mr. Daniel supported Mr. Mastaler's decision and denied my request for a two-week leave.

9. While at the Sunrise store, Mr. Mastaler commented on my performance evaluation, dated February 11, 1993, that I would be ready for a Co-Manager position in two to three years. Attached hereto as McCarthy Exhibit B is a true and correct copy of my Management Performance Appraisal and Commitment to Success. Similarly, on a performance appraisal dated September 30, 1993, Mr. DeCoque stated that in two years I would be ready for my own store. Attached hereto as McCarthy Exhibit C is a true and correct copy of my Management Performance Appraisal and Commitment to Success. Mr. DeCoque later noted on my performance appraisal dated February 17, 1994, that I had a good future with the company and was "an asset to the store." Attached hereto as McCarthy Exhibit D is a true and correct copy of my Management Performance Appraisal and Commitment to Success.

10. In April 1994, Mr. DeCoque transferred me to the Pompano Beach, Florida Wal-Mart. Eight months later, I requested a relocation to the Florence, South Carolina Wal-Mart. I believed moving to South Carolina would help me get promoted to Store Manager because two of my former colleagues, then

District Manager Ron Cook and Store Manager Robert Browning, were located there. I felt that their familiarity with my previous work would increase my chances for a promotion to Store Manager in the near future.

11. I was not promoted during the sixteen months I spent at the Florence store. In January 1996, I told my new District Manager, Jerry Cole, and my Regional Personnel Manager [name unknown] that I wished to transfer back to Florida. Five months later, after I consistently was told there were no available positions, I contacted District Manager Steve Mastaler in Florida directly. Mr. Mastaler said there was an open position and I transferred to the Port St. Lucie, Florida store in May 1996.

12. I was promoted to Co-Manager of the Port St. Lucie store in November 1997, after six years as Assistant Manager. My Store Manager, Jeff Smith, and I spoke a number of times about my interest in promotion. On my Management Performance Appraisal dated March 1, 1997, Mr. Smith stated that I was "ready to be Co-Manager [and I have] the capacity to be a Store Manager, or higher, with Wal-Mart." Attached hereto as McCarthy Exhibit E is a true and correct copy of my Management Performance Appraisal. During a regional team visit in 1997, Mr. Smith recommended to Mr. Mastaler and the Regional Vice President, Arthur Emanuel, that I be promoted to Co-Manager. I witnessed Mr. Mastaler shake his head vehemently against this suggestion. Mr. Smith also submitted a letter on my behalf that stated my "training was 100% up to date, [I] had participated in three store set ups, [I was] involved in store activities, [I] show that [I] care for the associ-

ates, and [I] participate in the community." Attached hereto as McCarthy Exhibit F is a true and correct copy of this letter. Mr. Emmanuel approved my promotion.

13. After I received my March 31, 1998 evaluation, Mr. Smith told me that Mr. Mastaler had instructed him to lower my performance score because the score that Mr. Smith initially gave me was too high. Mr. Smith gave me a copy of the evaluation he originally prepared, which had a performance rating of 4.23. In the copy that I received from Mr. Mastaler, my rating dropped to 3.68. Attached hereto as McCarthy Exhibit G are true and correct copies of the Management Performance Appraisal Mr. Smith gave me and the Management Performance Appraisal Mr. Mastaler gave me.

14. In August 1998, Mr. Mastaler transferred me to the Stuart, Florida store. By early 1999, I felt I was ready to manage my own store. I asked Mr. Mastaler about what I needed to do to be promoted to Store Manager. He responded that I should "lower my voice because it sounded too high." He did not elaborate when I asked for further clarification.

15. By April 1998, I had posted sixteen applications for Store Manager on Wal-Mart's Management Career Selection system. In the spring of 1999, my Regional Personnel Manager, Ethan Minkel, contacted me regarding my recent applications for promotion to Store Manager. While he did not offer me my own store, he told me accepting the Co-Manager position at the Florida City store would be good move forward for my career at Wal-Mart. He stated that the position in Florida City would enable me to learn more about the process of opening a new store as well as give me the opportunity to work in a Super-

center, which would improve my chances of promotion.

16. Heeding the advice of my Regional Personnel Manager, I accepted the Co-Manager position in the Florida City, Florida store in July 1999. Wal-Mart sent me to the Home Office for three days to learn basic information about opening a store; however, I received no formal training when I arrived in the Florida City store.

17. My Store Manager at the Florida City store was Monte Marshall. Mr. Marshall often left me out of business discussions that he had with the other male Co-Managers in the store, Steve Pugh, Victor [last name unknown], and Mike Williams. Similarly, District Manager Dave Chmura ignored me and only discussed business issues with the Store Manager and the male Co-Managers. I voiced my concern about this lack of attention to Mr. Chmura in 2000, but he did not change his behavior.

18. Unbeknownst to me, Mr. Chmura administered Associate Opinion Surveys on two separate occasions to associates in the Florida City store. Only 36 of the roughly 213 employees I supervised offered feedback. Despite the lack of associate response, Mr. Chmura told me that I had received poor ratings from those who I supervised and that someone with my scores should receive a demotion. His actions shocked me because this was the first coaching I had received after nearly ten years at Wal-Mart Stores and because I previously had been praised for my strong people skills. Although I was not demoted, I felt he treated me unfairly because he was not following Wal-Mart's disciplinary procedures. Attached hereto as McCarthy Exhibit A, Exhibit E, Exhibit H,

Exhibit I, and Exhibit J are true and correct copies of my Management Performance Appraisals.

19. After my coaching with Mr. Chmura, I met with my Regional Vice President, Rose Reza, to discuss my concerns. Ms. Reza confided in me that there were obstacles to overcome working with men at Wal-Mart and there was little I could do to change my situation. She recommended that I learn how to work within the system.

20. In January 2001, my District Manager, Freddie Miller, asked me to go to the Miramar, Florida store to assist with hiring new associates. Although the Miramar store was significantly farther away from my home, almost 70 miles, I agreed to help temporarily.

21. In 2001, I expressed to District Manager Miller my desire to run my own store. Mr. Miller responded that he would not promote me because he did not know me well enough. He also stated that he probably would promote Mike Williams, a Co-Manager with less experience than me, to Store Manager simply because Mr. Miller was better acquainted with Mr. Williams.

22. Despite my previous assertion to Mr. Miller that I did not want to transfer permanently to the Miramar store, he transferred me without my knowledge. I learned of this when I went online to apply for the Store Manager position at the Florida City store and discovered that I was not listed as a Florida City store employee. When I approached Mr. Miller about this, he informed me that he no longer needed three Co-Managers at the Florida City store. I told Mr. Miller, as well as my Regional Personnel Manager at the time, that I wished to be placed at a store closer to home.

23. I remained at the Miramar store from March 2001 through August 2001. My Store Manager at the Miramar store, Roosevelt Jackson, left the store two months after I began working there. I applied for the open Store Manager position, but Mark Kurkin, Co-Manager of the Hialeah, Florida Supercenter, received the position instead. Mr. Kurkin previously had worked closely with Freddie Miller.

24. I resigned from Wal-Mart stores on August 31, 2001. In my resignation letter, I stated that I was "leaving the company for various reasons but the main reason [was] my company's lack of confidence in me to be a Store Manager." Attached hereto as McCarthy Exhibit K is a true and correct copy of my resignation letter.

I declare under penalty of perjury of the laws of the United States and State of Florida that the foregoing is true and correct.

This Declaration was signed by me on April 12, 2003, at Port St Lucie, Florida.

/s/ Lori B. McCarthy

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, KAREN WILLIAMSON, on behalf of themselves and all others similarly situated, Plaintiffs, v. WAL-MART STORES, INC., Defendant.	CASE NO. C-01-2252 MJJ **DECLARATION OF ALIX MCKENNA IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Alix McKenna, declare:

1. I am a 45-year-old female living in Lawrence, Kansas. I worked at three Wal-Mart stores during the following time periods: Manhattan, Kansas, store from April, 1996, until June, 1996; Bonner Springs, Kansas, store from March, 1998, to September, 1998; and Lawrence, Kansas, store from September, 1998, to March, 1999, and from August, 1999, to December 31, 2002.

2. I have been subjected to gender discrimination by Wal-Mart with regard to compensation, promotions and work assignments.

3. During my Wal-Mart career, I almost always received "Exceeds Expectations" ratings on my

Performance Appraisals, but was never promoted to a level higher than a Department Manager position.

4. In August, 1999, I worked as a Sales Associate in the Sporting Goods Department at Wal-Mart's Lawrence, Kansas, store. In approximately October or November, 1999, the Sporting Goods Department Manager, Sal Cugno, transferred departments, which left a vacancy for this position. I applied for this position and was interviewed by Dean [last name unknown], a male Assistant Manager. On the same day that my interview took place, Dean informed me that Brian Garrett, a male Lawn and Garden Sales Associate with less seniority than me and no sporting goods or managerial experience, received the Sporting Goods Department Manager job. I complained to Dean that I was more qualified for the position, but he just said: "You don't want to work with guns." When I explained to Dean that I had been selling and handing guns for the past two months as an Associate in Sporting Goods and had no problem working with them, Dean had no response.

5. As a testament to my superior qualifications for the Sporting Goods Department Manager position, I trained Mr. Garrett in his new position for approximately two months. After training Mr. Garrett in the job, Mr. Garrett admitted to me that during his 90-Day Evaluation, Wal-Mart told him that he had been selected to be promoted into Support Manager and then Assistant Manager positions, but that he needed to be a Department Manager first.

6. In late 1999, I became the Pets Department Manager. I accepted the assignment and received a raise of $.50 per hour. I know that this $.50 per hour

raise was much lower than the raise received by Dennis Lowe, a male, when he was promoted to this same position (as my successor) when I transferred positions. Mr. Lowe confided in me that he received a $1.00 per hour raise when he was promoted from a Sales Associate position in the Sporting Goods Department to the Pets Department Manager. This was the identical job path that I had taken, yet I only received half the raise that Mr. Lowe received.

7. When I assumed responsibility as the Pets Department Manager, the department staff was severely cut and I did not have any assistants to help me, thus making my job very difficult and stressful. I feel that this was discriminatory treatment because the two previous male Pets Department Managers both had sufficient staff and assistants to help them. It was not until I became the Pets Department Manager that staff and assistants were cut. I complained about having no assistants to Dean, the Assistant Manager, John Mercer, the Store Manager, and Tom Cundy, the District Manager, but all of these men ignored my complaints.

8. In approximately April, 2000, I transferred jobs to become a Claims Associate, which Richard Chappelle, the Store Manager, considered a "lateral move." Accordingly, Mr. Chappelle refused to give me a raise. However, Mr. Lowe (the male who succeeded me as Pets Department Manager) told me that when he made a "lateral" move from Pets Department Manager to the Hardware Department Manager, he received another $1.25 per hour raise. I now see how unfair and gender-biased Wal-Mart' s compensation system is when I compare myself directly with Mr. Lowe, who received much higher raises than I did for making comparable job changes.

9. Another male Wal-Mart employee, Jason Culver, a Sporting Goods Department Manager (a job that was comparable to my Claims Associate position), told me that he made a higher hourly wage than I did for doing comparable work.

10. When I was assigned to become an Instock Guarantor I only received a raise of $.50 per hour. I complained to Mr. Chappelle, the Store Manager, that I should receive a higher raise, but he responded that the highest raise he could provide me was $.50 per hour. I later learned from Connie Underwood, the Personnel Manager, that Mr. Chappelle had previously authorized raises higher than $.50 per hour for this position, including a raise for Dennis Lowe, a male.

11. I have utilized the Open Door Policy on numerous occasions, including sending e-mail communications to Lee Scott, Wal-Mart CEO, in August, 2000, and February, 2001, in which I and Dedra Farmer, a former fellow female Wal-Mart employee, addressed our concerns that women were not provided equal pay at Wal-Mart. During my employment at Wal-Mart, the company did not adequately respond to the gender-based pay issues raised by Ms. Farmer and me.

12. Wal-Mart terminated my employment on December 31,2002. Wal-Mart justified my termination by wrongfully concluding that I was guilty of "time theft," claiming that I took too many breaks during my shifts or that the breaks I took were too lengthy. Wal-Mart never provided me with a warning concerning the purported infraction. I used the Open Door Policy and appealed my termination to the Home Office, which investigated the situation and upheld the termination but stated that I was

terminated for clocking in early, not for "time theft." I believe that Wal-Mart' s stated reasons for terminating me are without basis, and that the true reason Wal-Mart terminated me was in retaliation for both my history of complaints about sexual discrimination at Wal-Mart, including my participation as a class member in this lawsuit, and my support during the 2002 holiday season of a fellow female Wal-Mart employee's sexual harassment complaint against Wal-Mart.

13. If Wal-Mart reformed their discriminatory practices, I would consider returning to work at Wal-Mart.

I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Kansas that the foregoing is true and correct.

This Declaration was signed by me on April 13, 2003 at Lawrence, Kansas.

/s/ Alix McKenna

Alix McKenna

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF KIM MCLAMB IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Kim McLamb, declare:

1. I make this statement on the basis of my personal knowledge, and, if called as a witness, could and would testify competently to the facts herein.

2. My maiden name is Kim Gary and I was known by this name during the entire time that I was employed by Wal-Mart, Inc. I am female.

3. I was employed by Wal-Mart from 1991 to 2001. I started at the Gloucester, Virginia Wal-Mart store as a Department Manager, and I had several years of previous retail and supervisory experience elsewhere. I was eventually promoted to Overnight Assistant Manager at the Gloucester store in 1994. Later, between 1997 and 2001, I was an Assistant

Manager at four other Virginia store locations. I almost always received "exceeds expectations" marks on my evaluations.

4. When I was hired in 1991, I started out making about $6.00 per hour. Two other newly-hired male Department Managers, Blake Fullen and Mike Sutherland, were each making about $8.50 an hour. Mr. Fullen told me how much he was making, and I discovered how much Mr. Sutherland was making when I trained as a Personnel Manager and saw his payroll records. As Mr. Fullen and Mr. Sutherland were hired at approximately the same time that I was, and each of us were Department Managers, I know of no legitimate reason that Wal-Mart paid the men more. More generally, during my training as a Personnel Manager, I saw that men were usually making more than women who were in the same jobs.

5. From the beginning of my employment with Wal-Mart, I often spoke with my Store Managers about my interest in being promoted. I spoke to the following Store Managers: Ken Greggs, George Joiner, Wayne Radcliff, Jerry Rand and others. I also spoke to Darryl Gun and Chris Mehler, who were my District Managers. Eventually, I was promoted to Overnight Assistant Manager at the Gloucester store in 1994, but only after agreeing, in writing, to work overnights at that post for a full two-year period. I knew of no male Assistant Manager at that store who was required to make the same written commitment. Each male Assistant Manager who worked at the store only had to rotate through the overnight position on a six-month basis.

6. In 2001, while I was working as an Assistant Manager in Hardlines A & B at the Newport

News, Virginia store, I identified an opportunity to supervise the grocery area as an Assistant Manager, which I understood was a necessary step I needed in order to get promoted to the Co-Manager position. The Grocery Assistant Manager position was not posted, but I learned of it because the current Grocery Assistant Manager, Ed Hausmann, had been promoted to Co-Manager at another store. I told my Store Manager Wayne Radcliff and District Manager Chris Mehler of my interest in the position, and they each told me that I would be given the position. However, the position was ultimately filled by Tommy (last name unknown), who had only recently been promoted from a grocery stocker to Assistant Manager, and who had significantly less experience than me. Tommy had only been an Assistant Manager for three months while I had about six years experience as an Assistant Manager. When I complained to Mr. Mehler, he eventually moved me to grocery, but only after Tommy had left the store after getting another promotion.

7. Several times throughout my career at Wal-Mart, I complained that women working in the same job as men made less than the men. On three such occasions in 1993, while I was the personnel manager, three different male assistant managers -Lee Earle, Adam Harbach, and Dee Taylor -each told me that the reason why men made more than women was that the men "had families to support." No other response to my complaints were ever made.

8. The Open Door policy did not work for me and instead resulted in retaliation from my Store Manager. In April 2001, I and several other female Assistant Managers were working six days a week getting ready for inventory. At that same time, vari-

ous male Assistant Managers were collectively involved in preparing for a triathlon, along with my Store Manager at the time, Wayne Radcliff. The men would bring their bikes to the store, would often leave the store early to train, and would rarely work the weekends. One Sunday, while a number of female Assistant Managers were in the store preparing for inventory, I used the Open Door policy in order to express my concerns about the situation to my District Manager, Chris Mehler. Only two hours later, Mr. Radcliff showed up at the store, in bike shorts, and angrily played back the message Mr. Mehler had left on his cell phone regarding my call. Mr. Radcliff did not address the substance of my complaint, but instead yelled at me in front of the other Assistant Managers, saying that I should not be worried about inventory and that he "couldn't believe" that I called our District Manager to complain. He then left the store without saying or doing anything else. No other response to my complaint was ever made by either District Manager Mehler or Store Manager Radcliff. I realized after this incident that my complaints of gender discrimination would not be taken seriously.

9. I was an Assistant Manager for a total of 7 years, and I was never offered a promotion to a Co-Manager or Store Manager position.

I declare under penalty of perjury of the laws of the United States and of the State of Virginia, that the foregoing is true and correct. I signed this Declaration on April 11, 2003 in Yorktown, Virginia.

/s/ Kim McLamb

Kim McLamb

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF UMI JEAN MINOR IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, UMI JEAN MINOR, declare that,

1. I have personal knowledge of each and every fact set forth in this Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

2. I have been employed by Wal-Mart, Inc. in Alabama since June 4, 1990. I am an African American female.

3. I began my employment with Wal-Mart at a store in Selma, Alabama as a part-time sales clerk on the day shift at a pay rate of $3.85 an hour. At that time two of my four children were still at home and I needed full-time work. Several months later, when Wal-Mart started hiring seasonal help, I learned

through the grapevine about a full-time opening on the night receiving shift. The job was not posted. I got it by talking the night shift supervisor who simply transferred me into the position. After receiving a standard evaluation on my ninety-day review, I received a $0.15 raise to $4.00 an hour.

4. In October 1993, a new Store Manager transferred to the Selma store from the Homewood store. I had recently separated from my husband and wanted to leave Selma. I was also interested in advancing with the Company and had observed that the Assistant and Store Managers at Wal-Mart changed stores frequently so I thought transferring to another store would be viewed favorably. I asked the new Store Manager if there were any openings at the Homewood store and he said he would call the Homewood Store Manager, Gary Jones, to be sure. Later the new Store Manager told me that Store Manager Jones had told him to tell me that there was a night receiving clerk position open and that I should go see him the next morning at 10 a.m. When I went to see Store Manager Jones, he told me I could start that very night at 10 p.m. I transferred to Homewood that very same day and began working the 10 p.m. to 7 a.m. shift. I stayed in a hotel for a few days until I found an apartment to rent. Even though I had now been with the Company for more than three years, my pay rate was only $5.60 an hour.

5. As a single mother, I could not support my family on this wage and was forced to take a second, full-time day job at Food Fair. At the time, I planned to work this second job only until I was able to move to a higher paying position at Wal-Mart. I had no idea that it would take me another seven years to ob-

tain a management position at Wal-Mart and that I would be working two full-time jobs for this entire period.

6. During the almost seven years I was employed by Food Fair, I worked as a cashier and in the Bakery-Deli Department. My job duties included slicing meats, managing the hot food bar, baking and decorating cakes, and serving and ringing up customers.

7. During the time I worked in the Night Receiving Department of the Wal-Mart store in Homewood, I received "above average" performance evaluations. Despite my high quality performance, my annual raises were only in the $0.20 to $0.30 an hour range.

8. In 1995, I moved to the day shift at Wal-Mart and was promoted to Department Manager in the Accessories Department. This was an hourly position. This job was not posted and I did not formally apply for it. Store Manager Jones just told me that was the job I would be transferring to when I asked to move to the day shift. I changed my hours at Food Fair to the evening shift.

9. I worked as a Department Manager until 1998, and continued to receive "above average" performance evaluations. The annual raises I received during this period were still in the $0.20 to $0.35 cent range. After eight years with the Company, my pay rate was still well below $10.00 an hour at $7.32.

10. In late 1997, Wal-Mart converted the Homewood store into a Supercenter. Because of the bakery-deli experience I had gained at my second job at Food Fair, I expressed interest in working in the new Bakery Department. I told Store Manager Jones

that I knew how to decorate cakes and run a bakery because I had learned these skills early in my career at a Piggley-Wiggley store and during my employment with Food Fair. Store Manager Jones told me that he was not the manager in charge of hiring for the Bakery Department.

11. When the new manager over the Bakery Department arrived at the store shortly thereafter, I told him about my past experience running the bakery-deli and my interest in the cake decorator position. He asked me for the phone number of my references and told me that he would get back to me. The job was not posted and I did not officially apply for it. About two days later, the Bakery Manager informed me that I had excellent references and that he would talk about pay with me later. I got the job and my pay rate was increased to $9.00 an hour.

12. The new Bakery Manager did not stay long at the Homewood store. After he left, two Caucasian women, Loretta Wireman and Debra Smith, were transferred in as Bakery Managers. Both of these women left the job and the company after just a few months. After Ms. Smith and Ms. Wireman left, two more males were transferred in to run the Bakery: Mike Blasi and Mike Rodocker. Mr. Rodocker left the Homewood store after about six months. Mr. Blasi stayed on for the next two years or so.

13. Throughout the two years that these various managers tried to run the Homewood Bakery Department, I was interested in becoming the Bakery Manager. I had expressed interest in this position to Store Manager Jones as well as the Food Merchandiser, Steve Mulford. I also told the new Bakery Managers I worked under that I was interested in moving up in the Company. However, even

though my job duties had increased and I was actually performing the duties of a "lead" associate, I was not promoted. Finally, Mr. Blasi acknowledged my hard work and my job title was changed to "Bakery Lead Associate." As with my prior job moves, this position was not posted and I did not apply for the position. My hourly rate increased to $9.83 an hour.

14. In May 1999, I earned a "meets expectations" on my annual evaluation and my hourly rate was raised to $10.22 an hour. In March 2000, I received a 5% merit raise that brought my hourly rate to $10.73. I worked well with Bakery Manager Blasi and he supported me in my desire to become the Bakery Manager.

15. In approximately July 2000, Bakery Manager Blasi told me that he thought I was capable of running the Bakery Department and encouraged me to apply for his job. I understood from this conversation that he would be leaving his position. When I approached District Manager Johnson about applying for the Bakery Manager position, he told me that he was going to send me to the Bessemer store for training. When I told Bakery Manager Blasi that District Manager Johnson wanted me to train at the Bessemer store, he told me that I did not need any additional training to run the Homewood Bakery. I understood from this conversation with Mr. Blasi that if I went to Bessemer, I would not get the promotion to the Bakery Manager position at the Homewood store. Although I was interested in any training the company could provide that would help me perform better and increase my opportunities, I was never provided any training.

16. The District Manager never sent me to the Bessemer store because shortly after my conversa-

tion with Mr. Blasi, Mr. Blasi left the Homewood store and I was finally promoted to the Bakery Manager position in September 2001 without any additional training. As before, this job opening was not posted and I did not formally apply for it. Bakery Manager is a salaried position and I asked for a starting salary of $36,000 a year. They only agreed to pay me $28,500. With this pay increase, I was finally able to quit my second job at Food Fair.

17. As of this date, I remain the Bakery Manager in the Homewood store. Since my promotion, however, there have been three different new male Store Managers in the Homewood store. Aside from on-the-job training, these Store Managers have failed to provide me with the training I requested regarding the paper work associated with running the Bakery. Similarly, no one has provided me the staffing I need to keep the department running smoothly. As a result, I work between 10 to 18 hours a day. When I talk to District Manager Johnson about additional management training, he keeps assuring me that I can rely on Wal-Mart's computer-based programs for everything I need.

18. The Bakery Manager position in a Supercenter is the equivalent of an Assistant Manager position at a regular Wal-Mart. Nonetheless, none of the Homewood Store Managers, or District Manager Johnson, or Food Merchandiser Mulford has ever talked to me about Wal-Mart's Management Training Program or informed me about how to continue my management career at Wal-Mart.

I declare under penalty of perjury of the laws of the United States and State of Alabama that the foregoing is true and correct.

This Declaration was signed by me on April 18, 2003 at Birmingham, Alabama.

/s/ Umi Jean Minor

Umi Jean Minor, Declarant

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, KAREN WILLIAMSON, on behalf of themselves and all others similarly situated, Plaintiffs, v. WAL-MART STORES, INC., Defendant.	Case No. C-01-2252 MJJ **DECLARATION OF MICHELLA MINTON IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Michella Minton, declare:

1. I am a 36-year-old female living in Fuquay Varina, North Carolina. I worked at four Wal-Mart stores in Cary, North Carolina, Raleigh, North Carolina, Palatka, Florida, and St. Augustine, Florida, from October 3, 1995, until I resigned from employment on April 2, 2001.

2. I have been subjected to gender discrimination by Wal-Mart with regard to compensation and work assignments.

3. I started working at the Wal-Mart store in Cary, North Carolina in 1995. I worked as a Pharmacy Technician for approximately two-and-a-half years, with a brief two month assignment at the Ra-

leigh, North Carolina, store in 1996. I then became the Personnel Manager until March, 1999.

4. In March, 1999, I transferred to Wal-Mart's Palatka, Florida, store as a Personnel Manager. After approximately four months, I was then assigned to be a Support Manager. I had sought the Support Manager position, and wanted to progress professionally at Wal-Mart. During the years previous to my employment at Wal-Mart, I had gained extensive retail managerial experience in Store Manager positions at Revco and at a clothing store, and I wanted to pursue management positions at Wal-Mart. Accordingly, I had told my Store Managers and District Managers on numerous occasions that I desired to be promoted to an Assistant Manager position, and noted in the "Comment" section of my May 26, 1999 Evaluation that I wanted to enter the Management Training Program. I always received at least an "Above Standard" rating on my Wal-Mart Performance Appraisals and on at least two occasions received "Outstanding" ratings, the highest rating possible.

5. In May, 2000, I received a promotion to be an Assistant Manager at the St. Augustine, Florida, store. Although I was initially very excited to receive this promotion, soon after I transferred to the St. Augustine, Florida, store I began to experience gender discrimination.

6. My starting salary as Assistant Manager at the St. Augustine, Florida, store was approximately $29,500.00 per year. I am aware, however, that Judah Smith, a male with less managerial experience than me who started at an Assistant Manager position at approximately the same time as me at the Palatka, Florida, store, was paid a higher salary

than me in 2001. I am also aware that male Assistant Managers with managerial experience comparable to mine at the Palatka, Florida, store (Nelson Alvarez, Tod Hunt and Colin Moore) and at the St. Augustine, Florida, store (Phil Joseph) made higher salaries than me for performing the same job duties. When I realized that these male colleagues made a higher salary than me for doing the same work, I became upset and angry that Wal-Mart treated me unfairly just because I was a woman. I used the Open Door Policy to complain to Ralph Kershaw, the District Manager, concerning gender-based pay disparities, but Mr. Kershaw ignored my complaints.

7. During my time as an Assistant Manager at the St. Augustine store, my Store Manager was Walter Lott. Mr. Lott was a gender-biased manager. Mr. Lott treated me and the other two female Assistant Managers much more poorly than the male Assistant Managers in the store. Mr. Lott frequently humiliated me and the other female Assistant Managers in the presence of customers by yelling at us that we could not do our jobs properly, but he rarely displayed this type of behavior toward male Assistant Managers. Mr. Lott also assigned me and the other female Assistant Managers to supervise departments such as cosmetics or softlines rather than high profile departments like Lawn and Garden, which were supervised by male Assistant Managers. Accordingly, because I did not supervise a high profile department, I was unable to realize my potential as a manager and show Wal-Mart what I could do in order to progress professionally. I was not receiving the training in all the departments that is necessary for promotion to a Store Manager position. I felt that Mr. Lott was discriminating in determining our assignments, and holding me and the other two female As-

sistant Managers back from success and further promotional opportunities. I again used the Open Door Policy to speak with Mr. Kershaw, the District Manager, about the way Mr. Lott treated me, but Mr. Kershaw failed to respond to my complaints.

8. Mr. Lott's verbal attacks and abrasive demeanor toward me took its toll on my health. In November, 2000, the effect of Mr. Lott's hostile behavior toward me caused me to take a medical leave of absence from my job when my doctor diagnosed that I suffered from severe work-induced anxiety and depression.

9. By February, 2001, my health had improved and I was interested in returning to work at Wal-Mart, but not at the St. Augustine, Florida, store. I spoke to a Florida District Manager, Bert [last name unknown], regarding my ability to return to a Wal-Mart store as an Assistant Manager. I explained to him that I desired to relocate to a store in North Carolina rather than work at the St. Augustine store for Mr. Lott, the Store Manager who was the primary source of my previous anxiety and depression. The Florida District Manager, however, informed me that I would have to return as an Assistant Manager at the St. Augustine store. I used the Open Door Policy to appeal to Rudy Eckerman, the Regional Personnel Manager, but when I explained my situation to him in numerous phone calls, he was evasive and did nothing to respond to my concerns. Even though my medical leave ended in March, 2001, the company did not assign me to a store. As I could see no reasonable employment options for myself at Wal-Mart, I resigned in early April, 2001.

10. I would be very interested in working for Wal-Mart again in the future, if Wal-Mart could

promise me that my workplace would be free of gender discrimination and that I would be provided fair opportunities for professional advancement.

I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of North Carolina that the foregoing is true and correct.

This Declaration was signed by me on April 14, 2003, at 1:54 pm, North Carolina.

/s/ Michella Minton

Michella Minton

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF ELIZABETH MONROE IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Elizabeth Monroe, declare:

1. I make this statement on the basis of my personal knowledge and, if called as a witness, could and would testify competently to the facts herein.

2. I began working at a Wal-Mart Store in Aberdeen, North Carolina in 1996 as a sales associate in Electronics making $5.75 an hour working full-time. My annual salary was approximately $11,900. Prior to my hire at Wal-Mart, I spent 16 years as the owner and manager of a retail store. I discussed this previous experience during my initial interview with Personnel Manager Vicki Black and Training Coordinator Diana [last name unknown]. I later discovered that certain male cart pushers, some still in

high school, had been hired at over $6.00 an hour. I had been told that I could be fired for discussing salary issues so I did not mention this information to anyone.

3. I have been in the same position in the same store for almost seven years and currently make $10.05. My annual salary is approximately $20,900. My evaluations have consistently been rated either "Meets Expectations" or "Exceeds Expectations" and I have received no disciplinary action in my time as a Wal-Mart employee.

4. In September 2000, my Department Manager Frances Jackson told me she had requested a merit raise for me because of my hard work in Electronics. At that time, Store Manager Brady Rowland agreed that I deserved this raise but I did not receive the increase.

5. In February or March 2001, I still had not received my merit raise and I asked Mr. Rowland about it. He responded that he needed more time to observe my performance. I reminded him that he had previously *approved* the raise when the department manager, who observed my hard work first hand, had recommended it. Store Manager Rowland did not respond.

6. In April 2001, I still had not received my merit raise. Ms. Jackson spoke with Mr. Rowland again and I understood that it would be taken care of. Over the next several months, I also spoke with District Manager Richard Hinkebein, and two Co-Managers about the merit raise but received no response.

7. In June 2001, District Manager Hinkebein was walking the store and Mr. Rowland told him

that I was the person taking care of the whole Electronics Department while the department manager was out on leave. I told both Richard and Mr. Rowland that I would appreciate my merit raise even more than verbal praise. Richard gave me a "good job" pin but not the promised raise. During my June 2001 evaluation, I made it clear that I was still "looking forward [to my] merit (pay) [raise]." Attached hereto as Exhibit A is a true and correct copy of my Performance Appraisal dated June 1, 2001.

8. In July 2001, I was honored at a morning meeting for five years of excellent service at Wal-Mart. I received a plaque and a five-year pin. I still had not received my promised merit raise. I was making $8.64 an hour. At that same meeting, a male employee who had worked at Wal-Mart for only a few months, Joshua Neiber, was honored as Employee of the Month and received *both a bonus and a raise*. At this time, I raised my hand and asked what the qualifications were for this award. Mr. Rowland responded that one must go beyond the call of duty. I then stated that working in a department by myself for over a month with no department manager and no assistance should qualify. Several of my co-workers applauded at that time. Mr. Rowland and Co-Manager Gloria Williams then pulled me aside and Mr. Rowland told me that I was acting inappropriately. Later that day, I was finally given my merit raise beginning in August 2001, almost one year after it was originally promised. The raise was not retroactive.

9. I observed that men and women in my store who were interested in management training were treated differently. I know of at least two women, my sister-in-law Vivian Monroe and Barbara Gant, who

were relocated to Fayetteville, North Carolina to complete management training. On the other hand, I know of at least two men, Jaime Jenkins and Julius Fore, who were hourly employees in the Aberdeen, North Carolina Wal-Mart Store and who were allowed to train and become assistant managers in the same store. In contrast, Frances Jackson and Patricia Monroe were not allowed to train in the Aberdeen Wal-Mart Store. They have remained hourly associates. I also observed that Mr. Jenkins moved from an hourly position to becoming a co-manager within the Aberdeen store in just a couple of years. This was significantly faster than either Vivian Monroe or Barbara Gant.

I declare under penalty of perjury of the laws of the United States and State of North Carolina that the foregoing is true and correct.

This Declaration was signed by me on March 29, 2003, at Marston, North Carolina.

/s/ Elizabeth Monroe

Elizabeth Monroe

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF JOYCE MOODY IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Joyce Moody, declare:

1. My name is Joyce Moody. I am female. I am over 18 years of age and competent to testify in Court. The facts stated herein are based on my personal knowledge, and I could and would testify to these facts in a court of law if asked to do so.

2. I worked for Wal-Mart for over twenty years. I began working at a Wal-Mart store in Ripley, Mississippi in 1977. I worked there until 1978, when I left Wal-Mart for a short time. I then began working at the Wal-Mart in Corinth, Mississippi later that year. I remained at that store until 1984, working in a variety of non-management positions.

3. During the time I worked at the Corinth store, I asked for a promotion from Mr. Boling, the Store Manager; Mr. Reeder, the successor Store Manager; and Roy Flake, the next successor Store Manager. Mr. Reeder was willing to promote me to Department Manager, but no further. Mr. Flake actively discouraged me from seeking further promotions because he believed that I should be home with my son, who had a serious medical condition, rather than working. After my repeated requests, Mr. Flake was willing to promote me into the position of Office Training Supervisor.

4. In 1984, I transferred to a Store Planning Associate position. I remained in this position for six years, until 1990. In this position, my job was to travel from store to store and assist in training the new associates in preparation for store grand openings. While in this position, I traveled to literally dozens of stores in a variety of states throughout the country, working at each store for a period of weeks or months preparing the associates for their jobs before the store opened.

5. While in the Store Planning position, I used the same training format and materials to train all Wal-Mart hourly employees regardless of their location. I referred them to the same associate handbook, taught them the same standardized procedures and human resource policies, and used the same training materials at all of the dozens of stores at which I worked.

6. While in the Store Planning position, I observed that the store opening process and the human resources policies at the stores were communicated to the stores from Bentonville. These policies were not subject to change by individual managers at the

store level. Indeed, it is my understanding that one reason Wal-Mart uses specialized store planning associates that travel from store to store to conduct training is to ensure that standardized training takes place and that standardized policies are communicated and taught to all associates at all stores, regardless of location.

7. In 1990, I decided to leave Store Planning because the constant travel had become difficult. I asked my field manager if there was an Assistant Manager job available in Mississippi where I was from. The Field Manager spoke to the Corinth store's Regional Vice President, Larry Fennell, and he got me a position as an Assistant Manager.

8. The District Manager over me, a Bill Wolfers, treated all the women in his district very poorly, alternately ignoring them and subjecting them to verbal abuse. Other female managers who I observed were treated badly by Mr. Wolfers were Judy Mays and Ada Faye Rucks. Mr. Wolfers was, however, quite friendly with the male managers. Mr. Wolfers, through his treatment of me, made it abundantly clear that he did not appreciate having a female Assistant Manager in his district. He even told me that I should transfer to a district four to five hundred miles north of where I was currently working if I wanted to remain an Assistant Manager. I refused, however, because I did not want to leave the area after so long away.

9. I informed Regional Vice President Fennell about the treatment, but he refused to move me out of the store or take any action against Mr. Wolfers. So, in 1990, I resigned. After my resignation, four women approached me about the possibility of filing an EEOC charge against Wal-Mart as a result of

Wolfers' behavior, but I refused because I still thought they might have a career with the Company and I did not want to jeopardize that for them.

10. Approximately four and one-half months after resigning, unable to find other employment, I applied to work for Wal-Mart's Home Office in Bentonville, Arkansas as a Merchandise Coordinator with the Import Division. In 1992, after less than two years in that position, I was promoted to Merchandise Manager, a salaried position. Approximately one year later, I was told that they were restructuring the department and that my position was to be eliminated. However, my position was not eliminated and was instead given to David Ortiz, a Buyer from the Home Office. I was demoted to a position manning the employee hotline. A few months later, I was promoted to an hourly position as an Assistant to the Buyer in the Shoes and Jewelry department.

11. I remained in that position until 1995, when I again attempted to work in the retail stores, this time as a District Manager over the Shoes and Jewelry departments in Mississippi. Once again, I did not post for this position, but rather merely requested the job and it was given to me.

12. As a District Manager for the Shoes and Jewelry department, I had very little authority to change or deviate from Wal-Mart's human resources policies or practices — which were the same for Shoes and Jewelry as they were for the rest of Wal-Mart stores. For example, I could not hire or fire Department Managers without the approval of the Regional Manager. In addition, nearly all other human resources policies, from vacation policies to promotion and demotion policies, were dictated to me from the Home Office in Bentonville. While in the position

of District Manager for Shoes & Jewelry, I observed that most of the other Shoes and Jewelry Managers were women, and that the salary scale for District Managers for Shoes and Jewelry was lower than that for Store Managers, who made considerably more than Shoes and Jewelry District Managers.

13. After less than one year as a District Manager of Shoes and Jewelry, I was told by my Regional Manager that in order to keep my job I would have to move my residence to a location that was in the center of my district. This move would have required me to move my entire family to an area of Mississippi that I did not feel was safe. To the best of my knowledge, I was the only District Manager who was told that I would have to move. As a result, rather than move, I stepped down from the District Manager position to work as the manager of a Tire, Lube & Express ("TLE") department. After I stepped down, I was replaced by a man — who was not required to move to the center of his district.

14. After stepping down, I began working as the TLE Manager in the Collierville, Mississippi store. In this position, I learned that the human resources policies and materials used in the TLE department are largely identical to those in the Shoes and Jewelry department. Associates in the TLE department are provided and rely upon the same associate handbook, are subject to the same human resources policies, and receive the same human resources training as associates in the shoes and jewelry department.

15. During the time I worked as the Manager for TLE, I worked for Jeff Avant. Mr. Avant routinely told me, rather than any of the male employees whom I outranked, to clean the stockroom, and did so with comments like "the stockroom needs a

woman's touch." Because I found these comments offensive and his treatment of me unfair, I requested and received a transfer to the Wal-Mart New Albany, Mississippi.

16 Following my transfer, my new District Manager was James Harston. Shortly after moving to Mr. Harston's district, he informed me that he would be laying off certain employees in my department, and asked me to take a ride with him in his car to discuss the matter.

17. While we were driving, he asked me about my career and whether I would ever like to be a District Manager again. I replied that I would like to move up but that I believed I needed to reach certain sales numbers in order to do so. He replied that he would help me if I would help him. This comment made me feel uncomfortable because of the way in which it was said to me, although I admit I was not exactly sure what he meant. Therefore, I simply responded that all I needed was support in the business and I would be okay. As soon as I finished my response, without a word Mr. Harston angrily turned the car around and drove me back to the store in silence. This confirmed to me that the comment had been intended as an improper sexual suggestion.

18. Following this incident, Mr. Harston began treating me much worse even than before, singling me out for abusive tirades and mistreatment. It got so bad that I used the Open Door to talk to Scott McCarter, who was Mr. Harston's supervisor. I described what had happened with Mr. Harston in the car and I described how badly Mr. Harston was treating me since the event. Mr. McCarter replied that I "needed to be the bigger person in the situa-

tion" and that I needed to try to communicate better with Mr. Harston.

19. Following this conversation, I was so upset at the lack of response that I told Mr. McCarter that he could "have the store at the end of January." I later tried to rescind my verbal resignation because I needed a job, but Wal-Mart would not let me. I never submitted a formal resignation in writing; Wal-Mart, however, still ended my employment in January of 2001.

I declare under penalty of perjury of the laws of the United States and the State of Georgia that the foregoing is true and correct.

This Declaration was signed by me on April 17, 2003, in Calhoun, Georgia.

/s/ Joyce Moody

Joyce Moody

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, KAREN WILLIAMSON, on behalf of themselves and all others similarly situated, Plaintiffs, vs. WAL-MART STORES, INC.,	CASE NO. C-01-2252 MJJ **DECLARATION OF DENISE MOTT IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Denise Mott, declare:

1. I am female and a former employee of Wal-Mart.

2. I worked at several Wal-Mart stores in Alabama and Florida from November 2, 1992 until January 11, 2002. I successfully completed four years of courses in finance at Troy State University while working at Wal-Mart. Throughout my career at Wal-Mart, I expressed interest in joining the Management Training Program to several different managers, and I even moved my home after I was told that would help my chances to join the Management Training Program. However, I was never promoted. I was told of false prerequisites which I met but which did not apply to men. Meanwhile, I saw men less qualified than me join the Management Training Program.

3. I started working as a Cashier at a store in Dothan, Alabama, soon after I graduated from high school. Shortly thereafter, I began to attend Troy State University part time in the evenings, working towards a degree in finance.

4. In early 1993, I applied for a lateral transfer to the Cash Office. The position was posted by the time clock. I was not interviewed, but I received the transfer.

5. In about 1994, I told the Store Manager, Bill Abercrombie, that I was interested in the Assistant Manager Training Program. Store Manager Abercrombie told me that a four-year degree was required to join the training program. This conversation occurred while Mr. Abercrombie was counting deposits with me in the Cash Office. I also told him during my next annual review that I was still interested in management training. He again told me that I needed a four-year college degree.

6. Store Manager Abercrombie never told me about the First In Line program, which is a company-wide program for college students to complete the Management Training Program while completing their college degrees. Mr. Abercrombie knew I was in college because I told him several times while we were discussing my work schedule and class schedule. I never saw any information about the First In Line program at the store. Had I known that I could receive management training while completing my college degree, I would have been very interested in this program. If applications had been available, I would have applied for the program.

7. In 1997, a new Supercenter opened in Dothan, Alabama. I was interested in working at a larger store in order to increase my promotion oppor-

tunities. I interviewed with Co-Manager Karen Bess and then with Store Manager Paul Lewellen. During my interview, I told Mr. Lewellen that I was interested in management. He told me that I needed experience in other areas of the business besides the Cash Office. He offered me a position in Claims, which I accepted. However, when I arrived at the Supercenter, I was assigned to a position in the Receiving Department. While working at the Dothan Supercenter, I continued to take classes towards my bachelor's degree. Mr. Lewellen knew that I was in college because we discussed my work schedule and class schedule several times. Mr. Lewellen never told me about the First In Line program for college students. The fact that Mr. Lewellen knew of my interest in becoming a manger is reflected on a Commendation Form I received on January 15, 1999, which he signed and which states, "Denise . . . is also cross-training on the front end with the intentions of becoming an assistant manager." (True and correct copy attached hereto as Mott Exhibit A.)

8. During this period of time, I searched on the internal computer system for the Wal-Mart policy requiring management trainees to have a four-year college degree, but I never found one. The internal computer system permits employees at the store level to review policies and guidelines generated by the Home Office in Bentonville, Arkansas. Store Manager Lewellen and employees in the Personnel Office told me that a college degree was required, but I never saw any written guidelines to that effect. I also never saw any written information about the First In Line program on the internal computer system.

9. In approximately October 1998, Robert Adkins was hired into the Dothan Supercenter as a Management Trainee. Mr. Adkins told me that he did not have a college degree, even though both Mr. Abercrombie and Mr. Lewellen had informed me that a college degree was a prerequisite for the Management Training Program. Mr. Adkins was hired into the Management Training Program without prior Wal-Mart experience, even though Mr. Lewellen had told me Wal-Mart experience was necessary.

10. In late 1998 or early 1999, Store Manager Lewellen transferred to a store in Kissimee, Florida. Mr. Lewellen told me that, if I transferred to Kissimee, he would promote me to Support Manager in preparation for joining the Management Training Program. This was the first I had heard that experience as a Support Manager was a prerequisite for the Management Training Program. Mr. Adkins, who was hired directly into the Management Training Program, had not worked as a Support Manager before joining the Management Training program. But, because I was committed to proving myself to the company, and because my husband's recent job transfer made the move convenient, I agreed to transfer to Kissimee. I transferred in spring 1999, with the intention of completing my bachelor's degree in finance at the University of South Florida. Unfortunately, the University's residence requirements made it impractical for me to transfer.

11. Two male employees from the Dothan Supercenter transferred to Kissimee at about the same time I did and both received immediate promotions. Douglas Alexander had been a Night Unloader at the Dothan Supercenter. At the Kissimee store, Mr. Lewellen immediately promoted Mr. Alexander to

Night Receiving Manager. Andrew [last name unknown] had been a Sporting Goods Sales Associate at the Dothan Supercenter. At the Kissimee store, Mr. Lewellen immediately promoted Andrew to Support Manager. Although Mr. Lewellen had assured me a Support Manager job, I did not receive the promotion. Instead, Mr. Lewellen placed me back in the Receiving Department.

12. In June 1999, I saw an advertisement in the Orlando Times indicating that Wal-Mart was seeking to hire Assistant Managers. I was still very interested in a management position, so I submitted my resume and went to an interview at a hotel in the Orlando area. By this time, I had completed four years of college-level finance courses and I had six and a half years' experience at Wal-Mart. Andrew [last name unknown], from the Kissimee store, also attended an interview. I interviewed with a District Manager and with Regional Personnel Manager Ethan Minkel. During the interview, I was asked whether I was able to relocate. I said that I was relocatable, and I pointed out that I had already relocated once – from Dothan, Alabama to Kissimee, Florida – in order to be considered for jobs that would help me towards my goal of joining management. Neither interviewer told me that a college degree was required to join the Management Training Program.

13. Immediately after my interview, Store Manager Lewellen asked me if I had informed the interviewers that I was newly pregnant. I told him I had not informed the interviewers. I told him that I was early enough in my pregnancy that I could complete the training, take pregnancy leave, and then return to work as an Assistant Manager. Mr. Lewel-

len insisted that it would be "better" for me if I waited until after my child was born to join the Management Training Program. Mr. Lewellen then told me he was going to tell the interviewers that I was pregnant. He walked into the interview room, and I could hear him tell the interviewers that I was newly pregnant. I received no further response regarding the Management Training Program from Mr. Minkel or the other interviewer.

14. I worked at Wal-Mart for another two and a half years after that interview, but I was never promoted into the Management Training Program. Andrew was promoted into the Management Training Program shortly after his interview in Orlando. He trained in the Kissimee store, where he had worked as an hourly employee, even though I had been told that management trainees were not allowed to train in the same store where they had worked as hourly employees.

15. In October 1999, I transferred to a store in Prattville, Alabama, when my husband's job location changed. I was never told that I needed to remain at the Kissimee store in order to qualify for a promotion to the Management Training Program. In a telephone interview with Prattville Store Manager Vanessa Withrow and Kissimee Store Manager Lewellen, I told Store Manager Withrow that I was interested in the Management Training Program. Store Manager Withrow told me she had a position available in the Personnel Office. However, when I arrived in Prattville, Store Manager Withrow placed me in the Receiving Department, a department where I had already worked for more than two years.

16. In April 2000, I transferred to a store in Enterprise, Alabama, when my husband's job location

changed again. I talked with Co-Manager Earl Preachers, and I described my eight years of experience and told him that I was interested in a Department Manager position or a Support Manager position. However, when I arrived at the Enterprise store, I was given a position on the inventory team. This position was never described to me as a promotion or as equivalent to a Department Manager position. I did not receive a raise when I started working on the inventory team, and I was not included in the store's regular Department Manager meetings.

17. In fall 2001, I applied for the position of Domestics Department Manager. When I applied for the position, Co-Manager Preachers said to me, "You don't want that job – you don't want to lift furniture – that's a man's job." I was never interviewed. I was denied the promotion in favor of a male employee named Nathan Stewart.

18. I lost hope that Wal-Mart would ever promote me, and I began looking for another job. When I left Wal-Mart after nine years, I was earning about $9 per hour.

19. During my employment with Wal-Mart, I received ten annual evaluations, seven of which were "meets expectations" and three of which were "exceeds expectations." I also received two merit raises. I never received a written coaching. In 2001, I received a verbal coaching for "attendance issues." I had taken several short medical leaves of absence that year because my young son had infant asthma and I needed to care for him. In my previous seven years at Wal-Mart, I had been absent a total of approximately seven days.

20. Other than the interview process in Orlando, which I knew about only because I saw it in

the newspaper. I was unaware of any way to apply directly for management training. Had there been another way to apply for such training, I would have applied. If I was confident that I would be considered on my own merits and given an equal chance to do my best, I would consider returning to work at a managerial level with Wal-Mart.

21. I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Alabama that the foregoing is true and correct.

This Declaration was signed by me on 13 April (month and day), 2003, at Enterprise, AL (city and state).

/s/ Denise L. Mott

Denise Mott

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, KAREN WILLIAMSON, on behalf of themselves and all others similarly situated, Plaintiffs, v. WAL-MART STORES, INC., Defendant.	Case No. C-01-2252 MJJ **DECLARATION OF STEPHANIE ODLE IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Stephanie Odle, declare:

1. I make this statement on the basis of my personal knowledge, and, if called as a witness, could and would testify competently to the facts herein.

2. I am thirty-one years of age, female and I was discriminated against by the male management of Wal-Mart who wrongfully denied me a promotion to Co-Manager, retaliated against me because I complained about gender discrimination and wrongfully discharged me to make available a managerial position for a male manager from another store.

3. On November 21, 1991, I was hired by Wal-Mart as an hourly associate to work at the Sam's Club in Lubbock, Texas.

4. I transferred to the Dallas, Texas, Sam's Club in 1992; to the Yuba City, California, Sam's Club in February 1993; and to the Vacaville, California, Sam's Club in June 1993.

5. When I applied for transfer to the Vacaville store to be closer to my husband who was in the U.S. Marines, stationed at Concord, California, I was told by Mr. David Blackwell, the Operations Assistant Manager for the new store in Vacaville, that he could not offer me a promotion to a full-time Check Out Supervisor (COS) position because I "made too much money." Even though I complained about this discrimination, in order to get the promotion, I was forced to take a $.50 per hour cut in my hourly rate. When I later helped out in the Personnel Department at the Vacaville store, I learned that two men who transferred when I did from the Yuba City store to the Vacaville store to become supervisors like me did not have their pay cut like mine was.

6. In late 1993, I became the Cash Office Lead in the Accounting Office in the Vacaville store. I was promoted into the Assistant Manager training program in September 1994. There was a shortage of managers in Vacaville and nearby stores because Wal-Mart had just acquired a number of PACE stores, and many of the PACE managers had left. Openings for these positions were not posted, so I went to the Operations Assistant Manager and inquired about the opportunity to become a manager. I was referred to Mr. Bob Alderman, Director of Operations. I then met with Mr. Alderman to request a promotion, which Mr. Alderman approved.

7. I relocated to Sacramento, California, to begin my assistant manager training at the Roseville, California, Sam's Club on September 4, 1994. After

receiving only six of the 16 weeks of training. Mr. Alderman told me that he needed an Assistant Manager in the Receiving Department at the store in South Sacramento, California, so I accepted that position.

8. The General Manager at the Sacramento store was Mr. Chris Udderman who told racial and sexually-oriented jokes at managers' meetings. When I attempted to get Mr. Udderman to approve raises for two women in the Claims Department to make their pay equal to the men working in the Receiving Department, Mr. Udderman said, "Those girls don't need any more money; they make enough as it is."

9. I reported Mr. Udderman's discriminatory conduct to Director of Operations Alderman, but apparently no action was taken. I was not interviewed about Mr. Udderman' s conduct, and I was never told of any outcome. His inappropriate comments continued. Because nothing effective was done about Mr. Udderman's behavior, I requested a transfer to the Riverside, California, store and moved there in April 1995.

10. After about a year at the Riverside store, I was asked by the District Director of Operations, Mr. Phil Goodwin, to do a special project relating to clubs with high inventory loss or "shrinkage." In 1996, while I was at the Riverside store, I learned that another male Assistant Manager in my store, Mr. Mario Arenales, was making over $10,000.00 more than me (his W-2 tax form was given to me by an hourly associate who discovered it left in the Receiving Office), yet he had less experience with Wal-Mart than me. I complained about this gender pay disparity to Mr. Goodwin.

11. In response to my complaint, Mr. Goodwin said, "Mario supports his wife and his two kids." I told Mr. Goodwin, "I'm having a baby. I need to support my daughter." Mr. Goodwin then humiliated me by requiring me to provide him with my personal household budget so he could decide whether or not I deserved to receive pay equal to Mr. Arenales. I am unaware of a similar request ever being made of a male Assistant Manager. Nevertheless, I prepared my household budget and gave it to Mr. Goodwin and received a raise of only approximately $40.00 per week. This raise, of course, did not bring my salary anywhere near to parity with Mr. Arenales' salary.

12. In March 1997, I transferred to one of the Sam's Clubs in Las Vegas, Nevada, as the Assistant Manager for the Merchandise Department. Within a few days after arriving in Las Vegas, I was called back to the Riverside store for a meeting with Mr. Carlos Doubleday, Director of Operations; Mr. Carl Brown, Regional Loss Prevention Manager; and Ms. Chris Schilling, an Assistant Manager at the Riverside store, who was present as a "witness." During this meeting, I was wrongfully accused of making incorrect audit entries "understating shrinkage", even though these entries had been approved at the time by Mr. Brown and by Mr. Goodwin. Other male General Managers in the region had made similar entries. At the end of the meeting, Mr. Doubleday asked Mr. Brown and Ms. Schilling to leave the room, and then, Mr. Doubleday told me that he believed that I made the entries because Mr. Brown had told me to, adding, "I'm going to do everything I can to protect you." This later proved to be untrue.

13. In April 1997, I was aggressively questioned by my General Manager in Las Vegas, Mr. Ben Do-

lan, and by the District Director of Operations, Mr. Hank Geerling, about the same audit entries. I was then unfairly given a written "Decision Making Day", the penultimate discipline short of termination, for audit entries that I had been instructed to make by my male supervisors in California. To my knowledge, neither Mr. Brown nor any of the male General Managers who had made similar audit entries were ever disciplined. I feel that the men used me as a scapegoat to cover for their mistakes.

14. After I received this unfair and discriminatory written discipline, I used the Open Door and met with Mr. David Simpson, the Regional Vice President, who did not listen to what I had to say and did nothing but belittle me and treat me in a very condescending manner. Mr. Simpson did nothing whatsoever to remove the unfair discipline from my personnel file. In fact, Mr. Simpson told me, "You no longer have a position in Las Vegas; there is no position for you in Southern California. You do have a position with the company; however, it has to be where there is an opening. We will no longer create a position for you . . . Phil Goodwin has a position, and if I were you, I would take that position." Mr. Goodwin was still the Director of Operations for the Sacramento area, and I had no choice but to accept that position. Before I reported to the Sacramento store in the fall of 1998, I had to take a several-month medical leave of absence because I was emotionally decimated from the demeaning and discriminatory treatment I had endured from my male supervisors.

15. In the fall of 1999, I was transferred to the Sherman, Texas, store. Ms. Stephanie Selinger was the General Manager. After a few months, Mr. Bill

Smithson became the General Manager of the store, and I became Assistant Manager of Merchandise.

16. Before Mr. Smithson had arrived at the store, Ms. Selinger and I had submitted a written proposal to Mr. Larry Alderson, Director of Operations, demonstrating that closing the tire shop earlier, at 7:00 p.m. instead of 8:30 p.m., would save Wal-Mart millions of dollars. Mr. Alderson rejected our proposal. However, after Mr. Smithson took over as General Manager, Mr. Smithson made the identical suggestion to Mr. Alderson who, this time, approved it. When I asked Mr. Smithson how he had convinced Mr. Alderson to change his mind when he had only recently rejected the suggestion when made by Ms. Selinger and myself, Mr. Smithson said, "I guess it's a man thing." When I asked, "What does that mean?", he replied, "Take it for what it's worth." I immediately knew from his remarks and the way he said them to me that Mr. Smithson had no respect for women. I also knew that Mr. Alderson would only implement a cost-saving suggestion if it was made by a man, not a woman.

17. On March 13, 1999, I was on vacation and stopped into the store to cash a check. Mr. Smithson came up to me and said, "If I'd known you were back in town, I would have had you work today." I told him he could not make me work because I was still on vacation. He then said, "I'm the General Manger, I can do whatever I want to do." I never saw him treat male managers with such disrespect.

18. On May 6, 1999, I was helping out at the front end and refunded a tax overcharge to a regular business customer in the amount of $250.00. I did not ask him to show proof of purchase since he was required to sign a tax refund log and because Mr.

Smithson had previously made a large refund to a regular customer based solely on the customer's word. After the customer left, I realized that I did not have the refund slip and had used the wrong code for the transaction, so I immediately informed the accounting office of my mistake and told them how to correct it.

19. Approximately one week later, I was accosted by Mr. Chuck Roberts, a Wal-Mart loss prevention investigator, who insultingly implied that I had stolen the $250.00. I was placed on suspension and told to "go home" while he contacted the customer to verify the transaction and that the customer had actually received the refund money. Mr. Roberts told me that it would only take him a "couple of hours" to contact the customer. I waited at home for at least five days before being cleared of suspicion of theft.

20. Even though Mr. Roberts finally verified that the customer did receive his $250.00 refund, I was not even allowed to set foot back into the store. On May 20, 1999, Mr. Smithson and Mr. Roberts met me at a Wal-Mart store across the street from the Sam's Club, and gave me a written "Decision Making Day" discipline because I had "circumvented refund procedures." They told me that I could never re-enter the Sherman store and that I had to relocate to a Sam's Club in either Lubbock or Amarillo, Texas. I chose Lubbock.

21. In early April 1999, before I was falsely accused of mishandling the tax refund, I had interviewed on the telephone with Mr. Shawn Baldwin, Director of Operations, for a Co-Manager position in Tulsa, Oklahoma. Mr. Baldwin said I was a strong candidate for the position and told me he would get

back to me. Some time afterward, Mr. Alderson came into the store and told me that he heard I was going to get the job and that Mr. Baldwin should be contacting me to tell me. Mr. Smithson later told me that Mr. Alderson had indicated to him that I was going to get the position and asked me if I had heard anything yet. On May 19, 1999, after I had been suspended by Mr. Smithson, I called Mr. Baldwin who told me that a male General Manager from Florida was stepping down from his position "for personal reasons" and assuming the Co-Manager position in Tulsa which I should have gotten. I believe that Mr. Smithson sabotaged my promotion opportunity by unfairly suspending me and disciplining me even though Wal-Mart had verified that the refund I had made had actually occurred. Mr. Smithson simply did not want me to get the Co-Manager job in Tulsa because I am a woman.

22. I reported to the Lubbock store in June 1999. The General Manager was Mr. Duke Parrish.

23. On October 7, 1999, Mr. Parrish invited the three male Assistant Managers, Keith Musick, Jerry Ratliff and Ron Torres, to take a "skills assessment test" to assess their ability to perform the duties of General Manager. I was excluded from this opportunity to demonstrate my ability to perform as a General Manager, a position I had been seeking for a long time.. I approached Mr. Parrish and said, "How come the three guys get to take it [the skills assessment test] and I don't? Why can't one of the guys not take it and I can?" Mr. Parrish said there were only three tests which had been designated for only these three managers. I believe I was never allowed an opportunity to take this test because I am a woman.

24. On October 15, 1999, I discovered that Mr. Parrish failed to deposit approximately $3,000.00 in cash he had received for the sale of a company forklift and had instructed that the cash instead be placed in the office safe which was in violation of Wal-Mart's policy. I immediately directed the accounting office associate to deposit the money and made a report of Mr. Parrish's policy violation to Ron Torres, the Assistant Manager in charge of the store in Mr. Parrish's absence.

25. On October 16, the very next day, the store implemented a new "elite membership" upgrade program, and I was responsible for training the store's employees regarding the new procedure. I gathered several employees together to demonstrate the new system. Since there was no one to use as an example to demonstrate how to upgrade their membership to an elite membership, we searched the computer for an employee for whom it would cost very little to upgrade their membership, based upon a proration of their existing membership value. Our research revealed that an Assistant Manager, Keith Musick, would only have to spend $13.74 to upgrade his existing membership to an elite membership. Using him as an example for demonstration purposes, I showed the employees how to accomplish the upgrade process. I then instructed an associate in the accounting office how to reverse the transaction if, when we spoke with Keith, he did not want the upgrade. I also reported what had happened to Mr. Tones, the acting General Manager at the time. I later informed Mr. Musick what we had done, and he said he would let me know later that day whether or not he wanted the upgraded membership. Instead of hearing back from Mr. Musick later that day, Mr. Parrish called me into his office because apparently

Mr. Musick had complained about me using his membership account as a training example, and Mr. Parrish said he would have to consult with Mr. Alderson about "what action to take." Mr. Torres was also present and denied that I had informed him about the situation when it occurred. The next day, Mr. Parrish told me, "I talked with Larry [Alderson]; we have decided that we are going to terminate you for violation of company policy."

26. After being terminated by Mr. Alderson and Mr. Parrish, I learned from Ms. Suzanne Austin, an hourly associate at the Sherman store, that a male manager in a Phoenix, Arizona, Sam's Club, Wayne Backus, had already departed the Phoenix store on October 15, 1999, the day before my supposed "violation of company policy" on October 16, to move to Lubbock to replace me. I then recalled a telephone conversation between Mr. Parrish and Mr. Backus I had overheard on October 3, wherein Mr. Parrish told Mr. Backus, "Don't worry, I'll talk to Larry [Alderson]; he'll make room."

27. Because my termination was so obviously discriminatory and unfair, I then used the Open Door and called Mr. Greg Spragg, the Regional Vice President. Mr. Spragg told me that he had been told that I rang up Mr. Musick's membership because I "felt pressure to get an elite membership," which I told Mr. Spragg was totally false. I then confronted Mr. Spragg with the fact that Mr. Backus was already on his way to the Lubbock Store to take my job. Mr. Spragg admitted that he had authorized Mr. Backus' transfer and that the Lubbock store would then have more managers than were required for a store of its size. Mr. Spragg then said that he was going to send a person from loss prevention to contact

me. I never heard from loss prevention, but I did receive a call from Mr. Steve Rodriguez, the Regional Personnel Manager. I told him about the harmless training exercise that had occurred. On October 29, 1999, I received a call from Mr. Spragg who said he was going to uphold my termination.

28. I believe I was terminated because I am a woman, because I complained to Mr. Parrish about gender discrimination regarding his refusal to allow me to take the skills assessment test, because I challenged Mr. Parrish's authority when I reported his failure to deposit the cash sale funds in accordance with Wal-Mart policy, and because Wal-Mart had already made the decision to replace me with a male manager from Arizona and therefore needed to fabricate a reason to terminate me.

29. Since I knew that I had been discriminated against because of my gender, I filed a Charge of Discrimination with the EEOC through my attorney on October 25, 1999. See Exhibit A attached hereto and incorporated herein. I filed an EEOC Charge of Discrimination form, dated January 4, 1999 [sic 2000]. See Exhibit B attached hereto and incorporated herein. I filed an Amended Charge of Discrimination with the EEOC, dated April 3, 2000. See Exhibit C attached hereto and incorporated herein.

30. If I could be assured that I could work at Wal-Mart free from gender discrimination and retaliation, with equal opportunity for promotion and pay, I would consider re-employment with Wal-Mart as a manager.

I declare under penalty of perjury of the laws of the United States and the State of Oklahoma, that the foregoing is true and correct.

This Declaration was signed by me on April 10, 2003, at Tulsa, Oklahoma.

/s/ Stephanie Odle

Stephanie Odle

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF CLEO PAGE IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, CLEO PAGE, declare:

1. I make this statement on the basis of my personal knowledge, and, if called as a witness, could and would testify competently to the facts herein.

2. I am a 34 year old African American woman and I currently work as a teacher for a disabled student in Sappala, Oklahoma. I have held this position since August 2001.

3. I was hired at the Tulsa, Oklahoma Supercenter in July 1997 and worked there until July 1998. When I applied to work at Wal-Mart in the summer 1997, I had prior retail experience working in several retail stores including Foley's, Lane Bry-

ant and T.J. Max over a period of several years. Despite my prior retail work experience, I was placed as a cashier and stayed in that position throughout the entire period that I worked at the store. I observed that women mostly worked as cashiers and in departments that included clothes and lingerie, while men staffed the automotive, meat and produce departments. I was not given the opportunity to expand my knowledge of the various departments in the Tulsa store.

4. In approximately June or July 1998, I made the decision to move to California. I attempted to transfer from the Tulsa store to a store in California. I contacted the store manager Wes Morris, who informed me that I was not eligible for transfer because of information concerning written coachings in my personnel file. Wal-Mart denied my request so I resigned my employment at the Tulsa store in July 1998. I applied for a position at a Wal-Mart store in Union City, California, in August 1998 and was hired to work in the return center accepting returned merchandise. When I began working at the Union City store, I observed that the store operated the same as the Tulsa store except that there had been a larger food section in Tulsa because it was a super center. The application process and orientation at the Union City store were similar to what I had experienced at the Tulsa store.

5. Within weeks of my hire at the Union City store #2031, I found a place to live in Livermore, California that required me to commute 30 to 40 minutes each day one way. I requested and received a transfer to the Wal-Mart store in Livermore, California in October 1998 where Monique Taylor was store manager. When I transferred to her store,

Monique Taylor told me that if I had come to her store initially, she would have arranged to transfer me from Tulsa to her store. Monique Taylor's statement made it clear to me that exceptions could be made to any Wal-Mart policy or procedure as long as someone in management took the steps to do so. However, I discovered that such exceptions were made only for those who management favored and wanted to see advance within the company.

6. My first position in the Livermore store was at the return desk where I worked for one to two months. In December 1998, I applied for and was promoted to Customer Service Manager ("CSM"). As a customer service manager, I was responsible for supervising employees and overseeing the operations of the front end of the store. I worked as a customer service manager until approximately November 1999. During that time, the cashiers and accounting employees voted me the best customer service manager in the store. I performed well in the position and my colleagues recognized and acknowledged me for it. I received an above standard evaluation for the year.

7. While I was a CSM, I applied for a support manager position between December 1998 and November 1999. A support manager assists assistant managers in managing different areas of the store. The position provides associates with the opportunity to get experience in all parts of the store and prepares an employee to perform the duties of an assistant manager. For these reasons, support manager is a stepping stone to promotion to the assistant manager in training program. Because I wanted to be selected for the assistant manager in training program, I expressed interest in promotion to

Monique Taylor to support manager and applied for an available position. However, a less qualified male CSM Jason Luna was promoted to the position despite my above standard rating and recognition as the best customer service manager in the store.

8. After I was denied the position of support manager, I continued to express interest in promotion and eventually was selected for promotion to department manager of the Mens' Wear Department in November 1999. Shortly after I was promoted to Mens' Wear department manager, Store Manager Taylor informed me that I had to transfer to the Boys Department because of a requirement that new department managers start with a smaller department. It seemed odd to me that Store Manager Taylor was unaware of this requirement when she selected me for the Mens' Wear position in the first place. I had never heard of this requirement before nor did I find it in writing on the Pipeline or elsewhere. I transferred to the Boys Department and remained in the position until I resigned in November 2000.

9. Throughout the remainder of my time at Wal-Mart, I expressed interest in promotion to the support manager position and to the assistant manager training program to store managers Monique Taylor and then to Hahn Seraypheap, who replaced Ms. Taylor in early 2000. When I spoke to Store Manager Taylor specifically about a promotion to assistant manager training, she informed me that if I wore blouses and tops with collar, I would be a good candidate for promotion. However, I was never selected for the assistant manager training program while she was store manager although my evaluations reflected that I dressed appropriately. I applied for another support manager position between

January and November 2000 while I was department manager in the Boys Department. After the selection was made, I spoke to Store Manager Seraypheap about why I had not been selected for the support manager job or for the assistant manager program. She told me that she wanted me to work in a bigger department before I was promoted to support manager because, if I could run a large department, I could run the store effectively. However, Ms. Seraypheap never provided me with the opportunity to manage a larger department so that I could get the experience that she told me I needed.

10. While I was at the Livermore Wal-Mart store I observed, as I had in the Tulsa Supercenter, that there were certain departments where men were selected to manage as department managers. I specifically recall that men were assigned to work in the automotive and sporting goods departments. At a meeting in late 1999 or early 2000, in which I was present with other department managers, Store Manager Seraypheap stated that she was going to give an available sporting goods department manager position that was posted to a man because she "needed a man in the job."I did not apply for the position because I understood that the store manager had already made up her mind about the gender of the successful applicant. True to her word, Store Manager Seraypheap promoted a male associate, Curtis Koonce, who had been hired a year after I was in the Livermore store and who had been employed by Wal-Mart for only a few months, to the department manager of sporting goods. The sporting goods department is a large department in the store and I would have been interested in the job because it would have given me the experience that I had been

told I needed to be promoted to support manager or assistant manager trainee.

11. I also learned that Curtis Koonce earned a higher salary than I did although I had been with the company longer and had been in various supervisory positions.

12. In October 2000, I received a written coaching from the store manager, and assistant manager Matt Mayland after I left shopping carts along the wall of my department. I was surprised by the coaching because I had seen Ms. Seraypheap the day before. She had seen the baskets and never indicated that there was a problem. During my employment at Wal-Mart, I observed that other departments had not only left baskets but also unsightly trash and I am unaware of anyone being written up in the same manner. I was also aware that the written coaching was not in compliance with Wal-Mart policy, which requires a verbal coaching prior to a written coaching. This had been my first coaching in the Livermore store.

13. After I received the coaching, it became clear to me that, despite my repeated expressed interest in promotion and the efforts that I had made to improve my chances for promotion, I was not going to be promoted to support manager or assistant manager trainee. The store manager was making no effort to ensure that I was getting the experience that she said I needed to move up in the company. I was particularly frustrated after I was denied two support manager positions, as discussed above, that I was qualified to fill. It was also discouraging to observe that a less qualified man could be promoted to a larger department and earn more money than I although I had worked well as a customer service

manager and department manager and was qualified for advancement to management. It became clear to me based on my experiences that I would never be promoted to support manager or assistant manager trainee.

14. As a result of the coaching and my frustration and disappointment after I was denied promotions to support manager and assistant manager trainee, I resigned from Wal-Mart in November 2000.

15. I decided to become a named plaintiff in this action because I was denied promotions to management positions I was qualified to fill and was paid a lower salary than less qualified men despite my qualifications. I also observed how women were assigned to departments that were less likely to lead to promotion while men were promoted to departments that were larger and provided them with greater opportunities for advancement within the company. My primary goal is to make sure that Wal-Mart can no longer stop the progress of women who want to be promoted to management and that Wal-Mart's discriminatory practices be changed, to ensure fair and equitable treatment of female employees. I understand the responsibilities of a named plaintiff and I am prepared to fulfill my duties to the women in the class.

I declare under penalty of perjury of the laws of the United States and State of Oklahoma that the foregoing is true and correct.

This Declaration was signed by me on Cleo Page 4/7/,2003, at 10081 S. Sheridan, Tulsa, OK 74133.

/s/ Cleo Page
Cleo Page

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF CAROLYN PERKINS IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, CAROLYN E. PERKINS, declare:

1. I worked at Wal-Mart from November 1998 to September 2001. I worked at two stores in North Carolina, the Aberdeen store and the Laurinburg store. Both were Supercenters. I am female.

2. I was hired in November 1998 as a sales associate in softlines at a pay rate of $5.75/hour. This low hourly wage was given to me despite the fact that, on the job application, I requested a starting wage of $6.50 to $7.00/hour. I thought that I should have been paid more because I had prior retail experience. I had most recently been making $7.50/hour managing a convenience store. I asked the personnel manager, Tina [Last Name Unknown],

why the starting wage was so low, and she said that's just what the starting wage was.

3. While I was working in softlines at Wal-Mart, I alerted store management to 13 customers who were shoplifting in the store during a three-week period. Because of these efforts, I was transferred to loss prevention in August 1999. My starting pay in loss prevention was $7.50/hour.

4. For two years, I worked as a loss prevention associate. I always received satisfactory performance evaluations.

5. During those two years, there were up to six other employees, all men, working loss prevention in the same District. One of them, James Watkins, kept telling me that he made a lot more money than I did. He started saying this about three months after I was transferred to loss prevention. He said he made almost twice what I was making.

6. In about December 2000, when I was making $9.00/hour, I complained to my supervisor, Jeff Cope, about the pay difference. He said he would check into it and get back to me, but he never did. I kept after him to raise my pay. Sometimes he just said it wasn't in the budget. Other times he said that he would have to ask his supervisor, Tim [Last Name Unknown], the Regional Manager for Loss Prevention, but then he would never get back to me.

7. In about April 2001 I became aware that many of the men working loss prevention in our district were making more per hour than I was, including James Watkins, Steve Maim, Chad [Last Name Unknown], Jason Evans, Vince Bustillo, and Derek "Keith" Todd. Some of these men had been working at Wal-Mart less time than I had. I learned about the

pay differences because James Watkins had a special code to get into the computer and sometimes he would pull up all the pay rates. He showed them to me as well as several other people. I recall that the male loss prevention associates made at least $1 to $4 more per hour than I did.

8. I complained to Loss Prevention Manager Cope after this happened. I told him I did not think it was fair that I should be making so much less money than all the men, especially because I usually made more apprehensions (caught more shoplifters) than they did. In fact, there were many months in which I exceeded my quota. However, Manager Cope would take some of my apprehensions away from me on the monthly report and give them to some of the guys to bring them up to their quotas. After I complained about my pay, Cope said he would check into it. He also said he would talk to Regional Manager Tim [Last Name Unknown] about it. When I hadn't heard anything back, I reminded him again three or four weeks later, but he never got back to me.

9. One time I spoke directly to Regional Manager Tim [Last Name Unknown] about it. He said he could understand why I was upset at not getting paid as much as the men, especially because I was working in a Supercenter. However, he did nothing to correct the pay difference.

10. In about May 2001 I called the Wal-Mart "800" number. I told the person I spoke to about the pay disparities. She took my name and telephone number and said she would get back to me, but I never heard from her. Within days of that phone call, I received a coaching for unintentionally working more than 40 hours in a week resulting in a small amount of overtime. I had *never* received any disci-

pline or coaching before and I don't think the timing was a coincidence. During the same pay period, James Watkins and Steve Mann had both worked more than 40 hours, and as far as I know neither one of them got coached for it.

11. In June 2001, Jeff Cope wrote me up again. He claimed that I was not making enough apprehensions. As noted above, a number of male loss prevention associates did not meet their apprehension quotas but, as far as I know, they did not get written up for it. I had also missed my quota previously, but I had never been disciplined for it before.

12. In September, 2001, I was terminated. I stopped a boy whom I observed taking a pair of earrings off a display and putting them in his right front pocket. The boy refused to admit he had taken the earrings when I stopped him, and his mother later complained about to management. My supervisor, Jeff Cope, claimed this was a questionable stop and terminated me for it. I was aware of male loss prevention associates making similar or more "questionable" stops and they were not disciplined for it, let alone fired. For example, on one occasion Steve Mann, who was also working in the Laurinburg store, stopped a young male whom he had observed shoplifting a watch. When Mann approached the young man outside the store and questioned him about having taken the watch, the man denied it, caused a big ruckus, and threatened to sue. I was at the store that day and heard about the incident from Mann. Assistant Manager Jimmy Atkins informed Jeff Cope about the incident, but as far as I know Mann was not disciplined for it and he certainly was not fired.

13. I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of North Carolina that the foregoing is true and correct.

This Declaration was signed by me on April 9, 2003, at Raeford, N.C. 28376.

/s/ Carolyn E. Perkins

Carolyn E. Perkins

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, KAREN WILLIAMSON, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF LORI PIDICH IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Lori Pidich, declare:

1. I am a woman and a former Wal-Mart employee. After working for Wal-Mart for six years, I was fired because I would not relocate my home.

2. I began working at Wal-Mart in 1994 when I was twenty-three years old. Prior to working at Wal-Mart, I worked for more than four years as a front end supervisor at two different retail stores. I had also earned an Associates degree in applied retail science. At my interview to work for Wal-Mart, I told Assistant Manager John Kramer that I was interested in a career with Wal-Mart because I had heard that the company provided advancement opportunities. I love the retail environment and was excited to work for Wal-Mart. I had heard of Wal-

Mart's reputation as our country's up-and-coming retailer.

3. From 1994 until 2000, I worked as an hourly employee in the following positions: customer service manager, jewelry department manager, electronics department associate, accessories department manager, girls department manager, and infants department manager. During this period, I worked in a Division One Wal-Mart store in West Miflin, Pennsylvania and in a Wal-Mart Supercenter in Mount Pleasant, Pennsylvania.

4. In 1995, after having worked as jewelry department manager, I was transferred to the electronics department. At the time, there was no department manager in electronics. I assumed the responsibilities of department manager, but was not given the title. While I was working in the electronics department, I received an annual evaluation. I was rated "above standard." A manager wrote on the evaluation that "Lori will be a department mng [manager] someday." A true and correct copy of that evaluation is attached hereto as Pidich Exhibit A. After I began working in the department, a male employee, named Eric Deutsch, transferred into the department and became the department manager. Mr. Deutsch did not know how to run the department. I trained Mr. Deutsch to be the electronics department manager. I never saw a posting for the electronics department manager position that Mr. Deutsch filled, and I was never offered the position.

5. During my career as an hourly employee of Wal-Mart, I repeatedly told my supervisors that I wanted to be promoted to a support manager or Assistant Manager position. I saw male department managers being promoted more quickly than I was.

Eric Deutsch, the electronics department manager that I trained, was promoted to support manager and then to the management training program. Brian Lemley, the chemicals department manager, was promoted to support manager and later to Assistant Manager. Scott Stanley, the sporting goods department manager, was promoted to support manager and later to the management training program. Bob Mathers, a receiving department employee, was promoted to support manager and then to the management training program. Chad Mathers, the food department manager, was promoted to support manager and then to the management training program. These five men were promoted to support manager, management training, and Assistant Manager positions years before I was invited to enter management training.

6. After becoming Assistant Managers, Bob Mathers and Brian Lemley continued to work in the West Miflin Wal-Mart store. Mr. Mathers and Mr. Lemley were not required to relocate. As Assistant Managers, Scott Stanley and Chad Mathers were assigned to Wal-Mart stores in the Pittsburgh area. My home is within commuting distance of Pittsburgh, Pennsylvania.

7. I received an annual evaluation in October 1997. Assistant Manager Krista Bobnar wrote on that evaluation that I "would make a good support manager." A true and correct copy of that evaluation is attached hereto as Pidich Exhibit B. I saw a support manager position posted in the store where I worked on only one occasion. I applied for the position, but was not selected. Despite the comment on my evaluation, I was never promoted to the position of support manager.

8. When Bob Mathers was promoted to support manager, I asked Store Manager Herman Enderle why Mr. Mathers was promoted instead of me and why the position was not posted. Mr. Enderle told me that it was his decision, that I should just keep working hard, and that there would be other opportunities in the future. Because Mr. Enderle did not tell me that I could do anything to get promoted, other than working hard as I was already doing, I did not think that using the "open door" would be effective when Chad Mathers, Brian Lemley, and Eric Deutsch were promoted to support manager positions instead of me.

9. I began working at the Mount Pleasant Supercenter in September 1999. Although I was classified as a UPC clerk, I frequently performed special assignments. I trained department managers. I traveled to different stores in the district to perform STAR audits. I worked on a "high shrink review" at the Belle Vernon, Pennsylvania store. I helped prepare the Uniontown store for an inventory. I worked at the Washington, Pennsylvania Wal-Mart store while it was being converted to a Supercenter, helping Assistant Manager Michelle Jones to run the Division One store while the new Supercenter was being set-up. I assumed the responsibilities of the softlines Assistant Manager in the Mount Pleasant store when the Assistant Manager was on a leave of absence. In that capacity, I prepared the softlines department managers for a scheduled inventory.

10. In the summer of 2000, District Manager David Rulli asked me if I wanted to interview for the management training program. Mr. Rulli told me that Mount Pleasant Store Manager Delia Gerdes had recommended me. Ms. Gerdes was the first and

only female Store Manager for whom I had worked at Wal-Mart. Ms. Gerdes became Store Manager of the Mount Pleasant store only a few months before Mr. Rulli approached me about entering the management training program.

11. I told Mr. Rulli that I wanted to be promoted to management, but I did not want to relocate my home. I have lived in the same area of western Pennsylvania all of my life. All of my family lives there, including my grandmother who resided in a nursing home. I was willing to drive to any store within the district and to stores outside of the district that are within commuting distance. Mr. Rulli told me that I would not have to relocate my home and that, as an Assistant Manager, I would be placed in a store within the district.

12. Mr. Rulli completed a form that showed that I was being promoted to the management training program. He told me that he had written on the form that I could not relocate. A true and correct copy of that form is attached hereto as Pidich Exhibit C. "No Relo" is written on the bottom left-hand corner of the form.

13. On the same day, I signed another form stating that I agreed "to move" following completion of the training program. A true and correct copy of the form is attached hereto as Pidich Exhibit D. I understood my signature to mean that I would have to move to a different store after completing the training program. I did not understand my signature to mean that I would have to move my home. I trusted District Manager Rulli's promise that, as an Assistant Manager, I would be assigned to a store within his district.

14. I transferred to the Belle Vernon, Pennsylvania store to do my training. I began the training program later than planned because, at the time that I was scheduled to begin, I was I performing the duties of softlines Assistant Manager in the Mount Pleasant Supercenter. The Store Manager in Mount Pleasant would not let me leave the Mount Pleasant Supercenter.

15. As I was nearing completion of the management training program, Belle Vernon Store Manager Jim Lowe informed me that I was assigned to work as an Assistant Manager in a Wal-Mart store in Shrewsbury, Pennsylvania. Shrewsbury is about a four or five hour drive from my home. It is not in the district where I was working.

16. I spoke to District Manager Rulli about my assignment to Shrewsbury. I reminded Mr. Rulli of the paper on which he had written that I would not be relocated. Mr. Rulli denied writing that.

17. I used the "open door" policy to contact Regional Personnel Manager Kirk Garza. After I explained the situation, Mr. Garza replied that it was my word against Mr. Rulli's word, and that he believed Mr. Rulli. I told Mr. Garza that a male in the management training program, Charles "Vince" Garufi, had been assigned to work in the Wal-Mart store in Uniontown, Pennsylvania, within Mr. Rulli's district. To my knowledge, Mr. Garufi had never worked for Wal-Mart before entering the management training program. Mr. Garza told me that he would not discuss other trainees' assignments with me. Mr. Garza told me that my only options were to transfer to Shrewsbury or to resign. I asked Mr. Garza if I could step down to an hourly position. Mr. Garza refused to permit me to step down, even

though doing so would enable me to continue working for Wal-Mart. I found that the "open door" policy was ineffective.

18. After I was told of my assignment to Shrewsbury, I learned that there was an opening for a girls department manager in the Belle Vernon, Wal-Mart store where I was doing my training. I applied for the position. I had managed the girls department at the West Miflin store, and I had years of experience managing other softlines departments. I was not interviewed for, or offered, the position.

19. On January 19, 2001, I was fired from Wal-Mart because I refused to transfer to Shrewsbury. A few weeks after I was fired, I received a call from Belle Vernon Store Manager Jim Lowe. Mr. Lowe told me that he would permit me to call Store Managers outside of Mr. Rulli's district to find out whether there were any openings for hourly positions. Mr. Lowe told me that I could not ask those Store Managers if there were any Assistant Manager openings.

20. After I was fired, I filed a complaint with the Pennsylvania Human Relations Commission. In that complaint, I alleged that Wal-Mart discriminated against me on the basis of my gender by assigning me to Shrewsbury while assigning a male employee, Vince Garufi, to a store within the district where I worked. A true and correct copy of that complaint is attached hereto as Pidich Exhibit E.

21. At my deposition, Wal-Mart produced a response to my discrimination complaint. A true and correct copy of the response is attached here to as Pidich Exhibit F. The response is verified by Robert C. DeMoss, Corporate Counsel of Wal-Mart Stores, Inc. In paragraph 5 of the response, Wal-Mart "denies

employing a male associate, Mr. Garufi." That statement by Wal-Mart Corporate Counsel is false.

22. I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Pennsylvania that the foregoing is true and correct.

This Declaration was signed by me on April 10 (month and day), 2003, at Monessen PA (city and state).

/s/ Lori L. Pidich

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF SUE MCFARLAND RAMIREZ IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, SUE RAMIREZ, declare:

1. I make this declaration on the basis of my personal knowledge, and, if called as a witness, could and would testify competently to the facts herein.

2. I was employed by Wal-Mart, Inc. from August 1989 until September 2001. I am female. While I was employed by Wal-Mart, I was known as Sue McFarland.

3. I began my career at Wal-Mart as a Customer Service Manager in the Wagner, Oklahoma. I moved on to be a District Assistant where I worked in approximately fifty stores. I was then a District Manager in the Shoes and Jewelry Specialty Division

over seven stores. I spent my last three years with the Company as a Co-Manager at a Supercenter in El Paso, Texas. I was never disciplined at any time during my employment with Wal-Mart and my performance evaluations were always at least "above average," "exceeds expectations," or "outstanding." I was never offered a Store Manager position.

4. I first applied to Wal-Mart after Store Manager Joe Swenson recruited me to apply for the Customer Service Manager (CSM) position at Store No. 63 in Wagner, Oklahoma. At that time, I had been the Store Manager of Arrow Printshop for five years and I believed Wal-Mart would offer me greater opportunities for advancement. In my initial interview with Personnel Manager Amy Prime, I expressed interest in a management career even though I knew I was applying for the CSM position. Ms. Prime did not provide me with any information about Wal-Mart's Management Training Program or how to apply for management opportunities. Instead I learned from Ms. Prime, and others after I started working, that you advanced at Wal-Mart by working your way up the ladder.

5. I tried to do that at the Wagner store. However, there was no formal posting or application system for moving to positions within the store or seeking a promotion. Instead, I learned about open positions by observing, or hearing from co-workers, that certain employees were quitting or being fired, transferred or promoted. After about a year as CSM, I became the UPC Clerk simply by asking male Store Manager Gary Dickens for the position when I learned it was vacant. I was "tapped on the shoulder" to be the UPC Assistant about a year later by the new male Store Manager, Mike Altemueller,

when the current UPC Assistant left the position. Mr. Altemueller just asked me if I wanted the position and I said yes. I remained in this position for about eighteen months when I learned that a new district was being created and that the new District Manager was going to be housed in the Wagner store. I asked the current male Store Manager, Greg Epps, if he would recommend me to the District Manager to be the new District Assistant. The new District Manager, Carl Simpson, interviewed me and gave me the position. The job was not posted and I did not apply for it other than asking my Store Manager to tell the District Manager that I was interested in it.

6. I was interested in getting a job at the District level because I believed it would offer me more advancement opportunities than the Wagner store had. After more than four years of employment at the store level, my pay rate had only increased from $5.25 to $7.70 per hour despite my good performance evaluations, various promotions, and merit raises. Moreover, I had observed that each of the jobs in the front end where I worked was comprised almost exclusively of women. I had also observed that the Store Manager had changed four times and each time a man had been transferred into the position. Finally, none of the Store Managers or Assistant Managers was mentoring me or in any way developing me for management opportunities.

7. I was promoted to District Assistant in November 1993. This is an hourly position and my pay had to be increased twice to bring me up to the Company pay guideline of $8.80 an hour. My job duties included budgeting, doing audits in the individual stores' offices, and assisting the District Manager in

the operational end of his work with the stores in his district.

8. Mr. Simpson's district initially included about seven stores. However, the district was constantly changing as Wal-Mart expanded. My job duties required me to visit all the stores in the district on a regular basis. This required extensive traveling. After about three years, Larry Wilcockson replaced Carl Simpson as the District Manager. The district continued to change and I was exposed to many different new stores. During the five years I was District Assistant, I also worked with District Managers Buddy Caldwell and David Carmen and had an opportunity to visit the stores in their district as well. I believe that I worked in over fifty stores while holding the position of District Assistant. I observed that each of the stores under District Managers Simpson, Wilcockson, Caldwell and Carmen operated similarly and followed the same policies and practices that I had learned as an associate in the Wagner store.

9. As District Assistant, I reviewed the daily, weekly and monthly financial and personnel reports that the Home Office prepared for each of the stores in my district. These reports were available to me from the Company-wide computer system that linked each store to corporate headquarters. The District Manager would review these reports with each Store Manager in the district on a regular basis, either through an individual telephone call or store visit, or through weekly conference calls with all the Store Managers in the district, or during district-wide meetings held at various stores. I frequently attended these meetings and participated in the conference calls.

10. I observed that my own job was gender-segregated. I did not meet any male District Assistants during the five years I was a District Assistant and I did not met any after I left that position. I also observed that men holding jobs with much less responsibility, such as grocery stocker or a grocery department manager, were paid more than I was. Despite an outstanding evaluation my last year as a District Assistant, my hourly rate was still only $11.50 an hour in 1996, seven years after I began my career at Wal-Mart. I wrote on my 1996 evaluation, as I had written on earlier evaluations, that I was interested in advancing in the Company: "Enjoy my job, working with Larry and each of the stores. Would like to continue to learn operations and more merchandising skills. Want to understand all company functions. Definitely want to grow with Company." (Attached hereto as Ramirez Exhibit A is a true and accurate copy of my 1996 annual performance evaluation.)

11. In May 1997, I talked with District Manager Wilcockson about my future with the Company. He told me that the only way to get promoted would be to become a salaried member of management. By now I was very well qualified for a management position and eager to move up. My ultimate goal was to become a Regional Personnel Manager. Mr. Wilcockson was supportive and several days later the male Regional Personnel Manager, Rod Thurston, called me. We discussed the job responsibilities of an assistant manager and he asked me to take a drug test. As soon as the results were in, Mr. Thurston told me that I was being promoted to Assistant Manager at Store No. 41 in Bartlesville, Oklahoma. The position was not posted and I did not apply for it. I was paid an annual salary of approximately $29,500. How-

ever, I was told not to transfer to the Bartlesville store until I had finished opening up several new Supercenters in my district and assisting the Regional Loss Prevention team with high shrink issues. I was also instructed to begin reporting to male Store Manager Rick Rubiken in the Bartlesville store and to complete the Assistant Manager Training Program through Wal-Mart's computer-based learning system.

12. Several months later, before I ever transferred to the Bartlesville store as an Assistant Manager, the Regional Manager for the Jewelry and Shoes Specialty Division, Cindy Marsh, visited the District Office looking for Assistant Managers interested in going into the Specialty Division Management Training Program. I started talking to her about it and indicated that I was interested in that opportunity. I was next interviewed by the Divisional Manager for the Jewelry and Shoes Specialty Division, Jim Wake, and accepted into the program. I was sent to train with a female District Manager, Jody McAnnally, in the Tulsa area.

13. I completed the Jewelry and Shoes Specialty Division District Manager Training Program in October 1997. I was promoted to District Manager in the St. Louis, Missouri area after Divisional Manager Wake called me about the opening. I went to corporate headquarters in Bentonville, Arkansas for further interviews. Mr. Wake informed me that I was being promoted. My salary only increased to approximately $32,000. I was required to relocate my home to St. Louis, Missouri to begin training. As District Manager in the Jewelry and Shoes Specialty Division, my duties included ensuring that the seven stores in my district were operationally correct re-

garding the inventory and staffing of the Jewelry and Shoe Departments, and controlling shrink in these departments due to theft. I held this position for about ten months. My direct supervisor was the Regional Manager over the Jewelry and Shoes Specialty Division. At first this was Ional Duval. Later, the position was filled by a male, Lenny Fulcher. The Regional Manager reported to the Divisional Manager, Greg Wake. This is the same reporting structure used by the main Wal-Mart stores.

14. During the time I was a District Manager in the Specialty Division, I observed that the Jewelry and Shoe Departments in each of my stores operated similarly and followed the same policies and practices as the other departments in the Wal-Mart store even though they were technically in the Specialty Division. Thus, I used the same Company guidelines and forms for hiring, evaluating, promoting, disciplining and terminating employees in the Specialty Division as had the District Managers I worked for when I was a District Assistant. I also attended the same Company-wide year-end and holiday meetings in Bentonville that the non-Specialty Division managers attended.

15. As a District Manager in the Specialty Division, I had available to me the same daily, weekly and monthly reports from corporate headquarters regarding the financial and personnel operations of the Jewelry and Shoe Departments in each of my stores as I had used when I was a District Assistant. I would review these reports with the Jewelry and Shoe Department Managers in my stores on a regular basis through telephone calls, store visits, or district-wide meetings held at various stores.

16. After about six months in the District Manager position, I decided that I wanted to return to the main Wal-Mart division because it had become clear to me that the Specialty Division was also segregated by gender and that my current position was not such a good stepping stone for achieving my goal of Regional Personnel Manager. In particular, I observed at the district level that women were assigned almost exclusively to the Jewelry and Shoes Division while men were most often assigned to the Tire Lube Express Division, the Pharmacy, and the Photo Lab.

17. I called the Regional Personnel Manager who had promoted me to Assistant Manager, Rod Thurston, and told him that I was interested a co-manager position. I was really worried that the District Manager position in Jewelry and Shoes would be a dead end for my career. Mr. Thurston and I discussed the responsibilities of the co-manager position, base pay, and the fact that I would need to relocate to another store. About four months later, Mr. Thurston informed me that I could begin co-manager training at Store No. 271 in Eureka, Missouri.

18. I transferred to the Eureka store and trained for approximately three months under male Store Manager Bud Gardner. In approximately November 1998, Regional Personnel Manager Thurston called me about an open co-manager position at Store No. 2612 in El Paso, Texas. We discussed whether El Paso would be a good place for me and my daughter and the moving arrangements. I told him that I was interested in the position so long as I did not have to relocate again until after my daughter graduated from high school, which would be in May 2000, about eighteen months away. I was re-

cently divorced and very much wanted a stable environment for my daughter.

19. Mr. Thurston called me back a day or two later and told me that I definitely had the job in El Paso. This job was not posted and I did not apply for it. I did not interview with anyone else besides Mr. Thurston. However, I would not have accepted the El Paso position if I had not understood from Mr. Thurston that the District Director in El Paso had agreed that I would not need to relocate until after my daughter graduated.

20. In approximately January 1999, after I had been working as a Co-Manager for approximately five months, Store Manager Lorenzo Nava told me that District Manager Rick Klein had told him that I was promotable and that I should start looking for a Store Manager position. I started looking for an open Store Manager position at this time but I also reminded Store Manager Nava and District Manager Klein that I could not look outside the El Paso area.

21. Over the next eighteen months, at least five Store Manager positions became available in the El Paso area in Stores Nos. 512, 500, 964, 1015, and 2612. Three of these positions were not posted and one was posted for a mere 24 hours before it was filled. I was not allowed to apply and/or was not considered for any of these positions, as detailed below.

22. In the fall of 1999, I learned through the grapevine that the current male Store Manager of Store No. 512, Rick Espino, was leaving. I wanted to apply for the job but it was not posted on Wal-Mart's Management Career Services computerized program. I called District Manager Klein to let him know that I was interested in the position but he was not in so I left a message with his Assistant that I needed to

speak with him. I also expressed my interest in the position to my Store Manager, Lorenzo Nava. Mr. Nava told me that Wal-Mart was filling the position with a male Co-Manager from Houston, David Watts. District Manager Klein never returned my phone call and shortly after my conversation with my Store Manager, David Watts did, in fact, become the Store Manager in Store No. 512.

23. During this same time period, I also learned through the grapevine that Store No. 500 was losing its current Store Manager. Again, the job was not posted on the Wal-Mart computer so I called District Manager Klein to let him know I was interested. He was not available but I left a message with his Assistant requesting him to call me. I never received a call from Mr. Klein and later learned that Rick Espino, the former Store Manager at Store No. 512, had transferred there.

24. Some time later but before my daughter graduated, another male Store Manager, James Zepeda, left Store No. 964. As before, I wanted to apply for this position but it was not posted on Wal-Mart's computer. I called District Manager Klein to apply for the job but he was again unavailable and never returned my call. I learned later that another male, Jose ("Harvey") Ayala, got the job.

25. I was extremely upset that District Manager Klein had not advised me of, allowed me to apply for, or interviewed me for any of the positions discussed above so I decided to use Wal-Mart's "open door" policy to discuss my concerns with the Regional Personnel Manager Tom Gallegos. I met with Mr. Gallegos privately during a company-wide meeting in Bentonville and informed him that I thought I had not been treated fairly when I was not interviewed

for these three positions, that I was aware of an upcoming opening for a Store Manager in the El Paso area at Store No. 1015, and that I would like an opportunity to apply for it. I understood from his response that I should go ahead and apply and that I would be considered. However, the very next day, District Manager Klein approached me and told me that he knew I had been petitioning for a store and that he did not appreciate it. I understood from this that District Manager Klein did not want me to apply for the position and that if I did, I would not be considered.

26. Unlike the prior Store Manager openings described above, the vacancy at Store No. 1015 was posted on the computer. However, the notice advised only current store managers to apply and it remained on the computer for only one day. Although I had expressed my interest in this position to Regional Personnel Manager Gallegos, I did not apply on the computer because I was not a store manager. Later I learned that a female Co-Manager, Liz Gonzalez, had been promoted to this position.

27. The day after I returned from a vacation after my daughter's graduation, District Manager Klein told me that I needed to apply for stores outside the El Paso area or step down from my position as Co-Manager. Although I was applying to stores outside of El Paso, I told District Manager Klein that I still preferred to remain in the El Paso area as I had made a new life in El Paso. I did not feel my request to remain in El Paso was unreasonable given that I had already relocated on numerous occasions for the Company and the El Paso area was a growing market for Wal-Mart. Also, I did not observe District Manager Klein insisting that the male Co-Managers

in his district leave El Paso or step down. When I complained to my Store Manager about how differently Mr. Klein was treating me, Mr. Nava responded that it was to be expected since I was not part of the "good 'ole boy" network. Later I learned from another female Co-Manager in the district, Sheryl Sink, that District Manager Klein had told her that she needed to find a store outside of El Paso or be demoted. Although Ms. Sink had been working at different stores in the El Paso area since 1984 when she first joined Wal-Mart management, and although she was the primary caretaker for her ailing mother, she was not promoted to a store manager position until she relocated to Store No. 829 in Santa Fe, New Mexico.

28. My daughter graduated in May 2000. Over the next year, I applied for store manager positions in Kingsport, Tennessee; Tucson, Arizona; Hilo, Hawaii; Alamagordo, New Mexico; Santa Fe, New Mexico; Las Vegas, Nevada; Sulphur Springs, Texas and Tahlequah, Oklahoma. Although I was interviewed over the phone for some of these positions, I was not selected for any of them.

29. Sometime in early summer 2001, I was recruited by KMart to join their Company as a Store Manager in El Paso. I shared this information with my Store Manager, Lorenzo Nava. Shortly thereafter, the new male Regional Personnel Manager, Brian Cabal, and the Regional Vice President, David Carmen, called me and asked me why I was considering going to another Company. I shared with them my frustration at the limited opportunities I was experiencing in trying to achieve my goal of being a Store Manager at Wal-Mart. They assured me that, if I stayed with Wal-Mart, I would have an opportu-

nity to apply for the next store that opened in El Paso. I told them that I would trust their word and stay. Relying on their representation that I would be considered for a Store Manager position in the El Paso area, I turned down the job with KMart.

30. The next Store Manager position to open in El Paso was at my own store, No. 2612, when Mr. Nava left his employment with Wal-Mart. The job was posted and I applied. Even though I was in charge of the store during the weeks after Mr. Nava left, I was not even interviewed for the position. It was given to another male, Roy Mendoza.

31. I called Regional Personnel Manager Cabal to complain that I had been denied an interview. I reminded him that I had turned down an opportunity and that I hoped I had not made a grave mistake. He responded that he hoped I had not, too. Meanwhile, District Manager Klein continued to pressure me to move out of his district or step down. Several months later I left Wal-Mart to take a Store Manager position at KMart because it was clear to me that I was not going to be promoted to a Store Manager position in El Paso or anywhere else in the country, much less reach my goal of becoming a Regional Personnel Manager.

32. After I left Wal-Mart, at least three male Co-Managers in Mr. Klein's district were allowed to remain in their stores as Co-Managers and not demoted for failing to obtain a Store Manager position: Dale Schier, Willie Huerta, and Fernie [LNU]. I believe District Manager Klein denied me the position of a Store Manager in his district because I am a woman.

I declare under penalty of perjury of the laws of the United States and State of Texas that the foregoing is true and correct.

This Declaration was signed by me on April 11, 2003, at ______________________.

/s/ Sue McFarland Ramirez
Sue McFarland Ramirez

Supreme Court, U.S.
FILED
JAN 20 2011
OFFICE OF THE CLERK

No. 10-277

IN THE

Supreme Court of the United States

WAL-MART STORES, INC.,

Petitioner,

v.

BETTY DUKES, ET AL.,

Respondents.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

JOINT APPENDIX
Volume 3 of 3
(Pages 1158a-1665a)

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PETITION FOR WRIT OF CERTIORARI FILED AUGUST 25, 2010
CERTIORARI GRANTED DECEMBER 6, 2010

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, KAREN WILLIAMSON, on behalf of themselves and all others similarly situated, Plaintiffs, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF SANDRA RATLIFF IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Sandra Ratliff, declare:

1. I am a female from Mustang, Oklahoma. I have worked for Wal-Mart in its Oklahoma City Neighborhood Market store since November 1999. During my employment at Wal-Mart, I have repeatedly attempted to get into the Management Training Program, but so far Wal-Mart has chosen to promote and hire males into the Management Training Program instead of me because I am a woman. I used the Open Door to complain about the disparate treatment of men and women in my store, which resulted in retaliation from my store manager and district manager.

2. I was hired at the Neighborhood Market in November 1999, as a meat cutter. Right away, I was

introduced to several company polices, including personnel policies. The same personnel policies that are employed by Wal-Mart in its general merchandise stores apply to the Neighborhood Markets. Every personnel policy that I have seen is labeled as a "Wal-Mart" policy, not a "Neighborhood Market" policy. For example, the benefits handbook and the associate handbook that I received at Neighborhood Market are "Wal-Mart" handbooks. I was also taught the Wal-Mart cheer during my orientation.

3. In fact, it was during the extensive presentation on Wal-Mart history and Wal-Mart values that I was inspired to aim for a long-term career and management track at the Neighborhood Market store. I took my interest in a management position to my Store Manager, Keith Smith, and my District Manager, Mike Moore. By April 2000, I had told them that I would like to develop a career with Wal-Mart and I would like to become an Assistant Manager, preferably in the meat department, which was one of my areas of expertise. Prior to working at Wal-Mart, I had spent six and a half years in grocery store management, five years as a meat department manager and one and a half years as a produce manager at an Oklahoma grocery store chain.

4. Mr. Smith and Mr. Moore initially responded to my interest in promotion with apparent encouragement. They told me there was a great potential for me to move into a management position at Neighborhood Market. They explained to me that I would first have to complete the Management Training Program. They told me they would let me know when an opening was available.

5. In April 2000, I was promoted to Lead Associate of the Meat Department. I took the position so

that I could learn more about Neighborhood Market operations to help prepare me for a management position in the store.

6. For months after speaking to Mr. Smith and Mr. Moore about becoming a Wal-Mart Assistant Manager, neither of them provided me with any new information regarding how or when I could enter the Management Training Program. When I spoke to Mr. Smith, he said he would get back to me after he talked to Mr. Moore. When I spoke to Mr. Moore, he told me he would get back to me after he talked to Mr. Smith.

7. In August 2000, a male, Corey Zumbro, was promoted into the Management Training Program in our store. Mr. Zumbro had been a meat cutter, like me, in Oklahoma City Wal-Mart supercenter. However, unlike me, Mr. Zumbro had no prior management experience. The opening was not posted. Mr. Smith and Mr. Moore never informed me or approached me about this open trainee position before they gave it to Mr. Zumbro.

8. I was disappointed that a less experienced male was placed in the program instead of me, but nevertheless, I continued to express my interest in promotion to Mr. Smith and Mr. Moore. They continued to tell me they would "get back to me." Finally, in October 2000, Assistant Manager Shari Kinsey, who was the Area Manager over the meat department, approached me and told me that Mr. Moore had scheduled me to enter the Management Training Program. Assistant Manager Kinsey told me I would start after the holiday season, in the beginning of 2001.

9. I was very excited to finally begin the program. I had been living over two hours away from

the store and decided that, since I was entering the program, I would commit to living closer to Oklahoma City. In reliance on the increase in salary that I would receive as a Trainee and later as an Assistant Manager, I bought my first home, closer to the Neighborhood Market store.

10. The year 2001 began and I was not promoted to the Management Training Program. By February 2001, a male, Jeff Miller, had entered the Management Training Program. District Manager Moore did not offer me any explanation for failing to promote me and instead promoting Mr. Miller. When I asked Store Manager Greg Hobbs, who had replaced Mr. Smith in the fall of 2000, how this had happened, he acted surprised and said he did not know that I was supposed to be entering the program.

11. I continued to ask Mr. Moore when I would start the program. I also talked to Mr. Hobbs about entering the program. They never gave me any guidance about what I could do to achieve the promotion. They only reiterated that there were lots of opportunities in management because Neighborhood Market stores were expanding, and on one occasion, Mr. Hobbs handed me a print-out which described what a great career opportunity the Management Training Program provided.

12. In May 2001, another male, David Wilcox, was picked for the Management Training Program. Again, I was not put in the program. Mr. Moore or Mr. Hobbs never gave me an explanation for why I was not being promoted to a Management Trainee and Mr. Wilcox was being placed in the program.

13. For over two years, I persisted in pursing a Management Trainee position, by constantly ex-

pressing my interest to Mr. Hobbs and Mr. Moore. By September 2002, I was overwhelmingly frustrated. I was on the verge of bankruptcy, because I could not afford the payments for the house that I had bought in reliance on being paid a management salary. I used the Open Door and wrote to Lee Scott, CEO of Wal-Mart, because I was not getting anywhere within my district. Attached hereto as Exhibit A is a true and correct copy of the letter that I sent to Lee Scott. I explained to Mr. Scott that I had been deprived of promotion opportunities to Management Trainee. I explained that I was frustrated with making less money than a male employee in my department while I was working harder than male employees in my department. Joe Mains, a regional employee, responded to my letter, but he soon stepped down from his position and I was never contacted regarding my complaints again.

14. Within a month of my Open Door letter, my third annual performance evaluation was completed in October 2002. For the first time ever, I received only a "meets expectations" on my performance evaluation. My prior ratings were all "exceeds expectations."

15. A few days after I received the rating, Store Manager Mr. Hobbs and District Manager Mr. Moore brought me in the store office. They told me I was not ready for the Management Training Program and cited as proof my "meets expectations" rating on my recent evaluation.

16. My performance had, as usual, "exceeded expectations" so I was very upset about receiving the less desirable and undeserved rating. I believe that Mr. Hobbs and Mr. Moore gave me this rating in retaliation for my using the Open Door to complain

about the different treatment of males and females in my store. Additionally, I feel that Mr. Hobbs and Mr. Moore gave me the lower rating to provide themselves with an excuse for keeping me out of the Management Training Program.

17. I also believe that I was denied entrance to the Management Training Program during the past two and one-half years because I am female. Before I reported the gender discrimination to Lee Scott and subsequently received a "meets expectations" rating, my performance had been evaluated as excellent. I had over six years of management experience. However, not only did I not make it into the program, no female in my store has been promoted into our Management Training Program. Since I began working at the Neighborhood Market in November 1999, every employee promoted into the Management Training Program in the Oklahoma City store has been male. Every employee hired into the Management Training Program has also been male. To my knowledge, at least eight males have been Management Trainees in my store since I have been working for Wal-Mart.

18. In January 2003, Store Manager Greg Hobbs announced that those who were interested could apply on the store computer for the Management Training Program. He assured us that everyone who applied would be interviewed for the position. I applied. In March 2003, I was called for an interview. The interview was conducted by the District Manager Lynn Pearsy, a male. He asked me scripted, canned questions. None of the questions were geared toward my work performance, my contributions to the company or what I could offer the company in a management position. I left the office

feeling like the interview was staged and that Wal-Mart was not truly considering me for a Management Trainee position.

19. A week later, the District Manager called me and told me that there had only been a "few" positions available, and I did not get one of them. It is now April 2003, and I am still not in the Management Training Program. I have had to declare bankruptcy because I could not afford my house payments. I am resigned that I will not be given a fair opportunity to advance within Wal-Mart because I am female. However, to survive financially, I must continue working here.

I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Oklahoma that the foregoing is true and correct.

This Declaration was signed by me on April 10, 2003, at Mustang, Oklahoma.

/s/ Sandra Ratliff

Sandra Ratliff

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF DONNA REED IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Donna Reed, declare:

1. I make this statement on the basis of my personal knowledge, and, if called as a witness, could and would testify competently to the facts herein.

2. I am female and a former Wal-Mart Stores, Inc. employee. I worked for the Sam's Club in Chesapeake, Virginia from April 1994 until February 1998.

3. Prior to working for Sam's Club in 1994, I took several college level courses in business management. Between 1985 and 1993, I had six years of management experience at McDonald's and Wing King.

4. While at Sam's Club, I worked as a Team Lead from 1994 to 1997 and as a Receiving Area Manager from 1997 to 1998.

5. My performance evaluations were consistently above average. I worked well with my peers and maintained good relationships with my managers.

6. During my four years at Sam's Club, I often expressed my interest in pursuing management positions. My General Manager, Mike Manahan, always rebuffed me. He stated there were no openings for management positions and that I was not ready to move into a management position, despite my previous management experience.

7. In 1996, a male Team Lead, Chris Logan, received management training after my request for training had been denied. We were equally qualified.

8. In May 1997, Assistant Manager Regina White informed me of an opening for Receiving Area Manager. The position was not officially posted in the store and Ms. White told me that several other male employees had been offered the position but had turned it down. I applied for the position because I believed it would facilitate future promotions within the Company. However, after a year in the position, I did not receive a promotion to management.

9. In August 1997, I learned that Mr. Manahan was fraternizing with another Sam's Club employee. Their relationship was affecting the workplace in a negative way and I used the Open Door to report the affair to my Regional Manager, Ron Borga. Shortly after this conversation took place, Mr. Manahan began to treat me more harshly than he

had before. I felt that Mr. Borga breached my confidentiality and informed Mr. Manahan of my concerns.

10. While working an overnight shift in December 1997, Assistant Manager Jim Burton distributed Christmas gifts to each of the approximately thirteen night crew members with whom he worked. The next morning, Mr. Burton instructed me to ring up the roughly $100 worth of merchandise he had distributed to employees the night before. Mr. Burton was not reprimanded for his actions.

11. Later that month, while working an early morning shift, I became ill and required medication. All the registers were closed at the time my pain began, so I saved the product label and, because I left my employee badge at home, paid for the item the next morning under a co-worker's name. Two months later, Mr. Manahan informed me they were investigating the incident and asked for my badge and keys. Despite my proof of purchase and the electronic computer records maintained in the store, I was fired and escorted out of the store on February 4, 1998. I feel that my termination was retaliation for my use of the Open Door six months earlier.

12. I filed a complaint with the EEOC alleging gender discrimination and received a Right to Sue letter in February 1998.

I declare under penalty of perjury of the laws of the United States and the State of Illinois that the foregoing is true and correct.

This Declaration was signed by me on 3-28-2003, 2003, in Chicago, Illinois.

/s/ Donna L. Reed

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES,
PATRICIA SURGESON,
CLEO PAGE,
CHRISTINE KWAPNOSKI,
DEBORAH GUNTER,
KAREN WILLIAMSON
AND EDITH ARANA, on behalf of themselves and all others similarly situated,

Plaintiff,

vs.

WAL-MART STORES, INC.,

Defendant

Case No. C-01-2252 MJJ

DECLARATION OF CLAUDIA RENATI IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I, Claudia Renati, declare:

1. I make this statement on the basis of my personal knowledge and, if called as a witness, could and would testify competently to the facts herein.

2. In 1993, I began working in a Pace Store in Roseville, CA that was bought soon after by Sam's Club. In 1994, while I was Marketing Membership Team Leader, the Regional Sales Manager Ken Elton left and I became responsible for running the region and doing all the ads and marketing programs. I completed all the tasks of a Regional Sales Manager for two years without the proper title or pay. When I asked Director of Operations Bob Alderman to promote me to this position, he refused because I had

not gone through the management training program. When I asked about getting into the program, he told me that I would have to be willing to sell my house and move to Alaska. It seemed remarkable to me that the only way for me to obtain management training was to relocate to Alaska since there were many Sam's Clubs in California. I told him that I could not relocate to Alaska. Shortly thereafter, Mr. Alderman hired his neighbor, Michael Hasley to be the Marketing Manager. Mr. Hasley had no managerial experience and had not gone through the management training program. Mr. Hasley was hired to be my supervisor yet I was responsible for training him.

3. By 1995, I had trained 10 associates in my area and was responsible for supervising 24 employees. I consistently spoke with General Manager Lovina Kirkpatrick about moving into other positions such as claims in order to improve my opportunities for promotions. Ms. Kirkpatrick was unresponsive. That same year, Mr. Hasley (Alderman's neighbor) left the Marketing Manager position. I again asked Mr. Alderman about moving into this position or into management training. Mr. Alderman told me that the position had been filled. He had hired another neighbor, a male, Kirby Jessen who was trained as a Microbiologist. He also had no management experience and had not gone through the management training program. Once again, I had to train a man who was hired to be my supervisor. Mr. Jessen quit one year later because he was unable to handle the responsibilities.

4. I continued to inquire to Ms. Kirkpatrick and the new Director of Operations Phil Goodwin about opportunities to attend training classes in or-

der to assist in my chances of getting promoted. Mr. Goodwin and Ms. Kirkpatrick told me that training classes were only available for managers.

5. Throughout my career with Sam's Club, I always received "Above Standard" or "Exceptional" ratings on my evaluations and I continually expressed my interest in career advancement and the MIT program in my evaluations.

6. By 2000, I had trained almost 20 managers in Marketing, all of whom were male, and many of whom never went through the management training program nor were never required to relocate. Some of the men I observed who got into management or the management training program without having to relocate were: Dan Dugger—started as a Meat Cutter in my store later than I did and is now a General Manager; Dennis Costa—promoted to Meat and Bakery Manager; Mike Medina—promoted to Bakery Manager; Ed Walker—promoted to General Manager; Rick Biegacki—promoted from Floor Team Leader to General Manager; Matt Johnson—promoted to Merchandise Manager; Larry Monroe—promoted from Team Leader to Merchandise Manager; Chad Hague—promoted from Floor Team Leader and is now Center Floor Manager. Even so, I continued to express an interest in advancing into management and was eager to learn all I could in order to increase my chances of promotion.

7. In 2000 while still Marketing Team Leader, I was out for six weeks getting knee surgery. While I was out, Ms. Kirkpatrick and Regional Sales Manager Theresa Hagensen called to tell me that they were combining marketing departments and getting rid of my position. I asked about becoming Manager of the department that was being created but they

told me that the position had been given to a male, Larry Turner. I was told I could return only as a Cashier, Meat Wrapper, Cart Runner or Telemarketer. I chose Meat Wrapper. Later that year, I was out sick for a few days due to a cold. When I returned, Meat Manager Jim Ross and Ms. Kirkpatrick informed me they had hired a young male, Rusty Ocheltree, to replace me as Meat Wrapper and that they were moving me to the Membership Desk. I discovered that my supervisor at the Membership Desk was someone whom I had previously supervised for six years. I was extremely frustrated at the way I had been treated at Sam's Club, particular regarding career advancement. In September 2000, I left Sam's Club and noted in my Exit Interview that it was due to a lack of promotional opportunities.

8. In May 2001, Ms. Kirkpatrick contacted me and asked me to return to Sam's Club to sell credit at the Membership Desk. I specifically inquired about opportunities for future advancement, making it clear that this was a condition for my return. She assured me that, with my experience, I would definitely be given opportunities for promotion. I returned in June 2001 to sell credit.

9. In early 2002, I applied for a position for Photo Manager. I did not receive an interview and a male, Brett [last name unknown], who had no management experience and who had only been with Sam's Club for six months as a Cashier, got the position. A few months later, Brett left and the position came open again. The position was not posted. I spoke with Assistant Manager over the Photo Department Michael Hasley (Director of Operations Bob Alderman's neighbor who had originally been hired as Marketing Manager and who had since been

promoted) about this position and he told me I was qualified and he offered me the position. About one month later, a male [name unknown], who transferred from another Sam's Club, was given the position. I spoke with Mr. Hasley about why I didn't get the position and he told me it was up to the General Manager. I spoke with Ms. Kirkpatrick and she just told me that the position had been filled.

10. I spoke with Director of Operations Phil Goodwin again about my desire to move into management and the fact that I had spent nine years working at Sam's Club with little advancement. All of my evaluations (including those before I left in 2000 and after my return in 2001) were excellent. I had also never received any coachings. Mr. Goodwin then asked me if I could stack 50-pound bags of dog food. When I told him I could not repeatedly lift 50 pounds, he told me there was nothing he could do for me because, before I could become a manager, I would have to be Floor Team Leader and that requires stacking 50-pound bags of dog food. I know of several males, including Mr. Hasley and Mr. Jensen who never had to become Floor Team Leader and stack 50-pound bags of dog food before going into management. I had also never seen any written job description with this lifting requirement nor do I believe that one exists. I believe that this was an excuse for keeping me from advancing.

11. In April 2002, after repeated attempts to move up at Sam's Club, I again spoke with Ms. Kirkpatrick about career advancement. In that conversation, she conceded that it was unlikely that I was going to advance in my career at Sam's Club. I tried to speak with her again a month later but she stated she was too busy. I left Sam's Club in August

2002 and made it clear that I was leaving Sam's Club due to a lack of promotional opportunities. Attached hereto as Exhibit A is a true and correct copy of my Exit Interview dated August 28, 2002.

I declare under penalty of perjury of the laws of the United States and State of California that the foregoing is true and correct.

This Declaration was signed by me on March 17, 2003, at my home 5561 Getta Way Pilot Hill, CA

/s/ Claudia L. Renati
Claudia Renati

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, KAREN WILLIAMSON, on behalf of themselves and all others similarly situated, Plaintiffs, v. WAL-MART STORES, INC. Defendant.	Case No. C-01-2252 MJJ **DECLARATION OF KARLA ROJAS IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Karla Rojas, declare:

1. I am a 41 year old female living in Dallas, Texas. I worked at numerous Wal-Mart stores in Texas as well as in Wal-Mart's Home Office in Bentonville, Arkansas, from June 11, 1983, until March 1, 2000. Although I was one of the few women to make it into Wal-Mart management, I was a victim of Wal-Mart's gender discrimination in the work assignments I received and the company's failure to promote me and adequately train me.

2. I started my Wal-Mart career in the Management Training Program in the Longview, Texas, store. When I first met Bob Madden, the Longview, Texas, Store Manager, he said: "I don't like college graduates, and I don't like female managers." Con-

sidering I had just graduated in May, 1983, from the University of Arkansas (Fayetteville) with a BSBA in Marketing and was reporting to him to commence the Management Training Program, my introduction to the Wal-Mart "family" was extremely hostile.

3. Although the Management Training Program was designed to last several months, I was pulled from the program after only one month by an order from the Home Office so that I could assume the responsibilities of the "Manager in Charge of Hardlines" at the Longview, Texas, store. I was never promoted to Assistant Manager during my time in this position and never received a pay increase above the hourly wage I was supposed to receive during the "training" period.

4. When I completed my unofficial "Manager in Charge of Hardlines" position at the Longview, Texas, store in February, 1984, Wal-Mart assigned me to an Assistant Manager position at the Henderson, Texas, store. Because I had received only one month of the training typically provided to Assistant Managers, I made a request to both Jerry Wade, the Store Manager, and Frank Boren, the District Manager, that I be provided more training so that I could perform all of my job duties. Mr. Wade and Mr. Boren denied my request and commented that training would not help me because I was "incompetent."

5. After I had been working for a while as an Assistant Manager at the Henderson, Texas, store, Mr. Boren called me into his office for a meeting. Mr. Boren suggested that I resign from my position and find a husband to settle down with and have children to relieve my "work-related stress." I was shocked and upset to hear this from my District Manager and immediately wrote a letter to Harry Green, Regional

Vice-President, wherein I recited Mr. Boren's remarks. Mr. Green called me on the telephone within a few days and told me not to worry because I would not lose my job and that Mr. Boren would apologize to me for his remarks. Although I did not lose my job, I never received an apology from Mr. Boren.

6. After working as an Assistant Manager at the Henderson, Texas, store in 1984 and 1985, I was assigned to work in Assistant Manager positions at the Canton, Texas, and Marshall, Texas, stores in 1985 and 1986, respectively. In 1986, I moved to Bentonville, Arkansas, and worked at the Home Office for three years. During my time at the Home Office, I held positions of Fashion Distributor and Associate Buyer. In the three years I worked at the Home Office, I only observed two females in supervisory positions.

7. In 1989, I relocated to the Duncanville, Texas, store as an Assistant Manager, where I worked for two years. After I had worked at the Duncanville, Texas, store for about a year, the Store Manager, Larry Statton, took medical leave, which opened up a vacancy for the Store Manager position. At the time, I was the lead Assistant Manager and had expressed to Mr. Statton my desire to be placed into the Store Manager position. Ed Nagy, the District Manager, and Mr. Statton, however, decided to place David Bickell, a male Assistant Manager, into the Store Manager position. Mr. Bickell had three or four months experience at the Duncanville store – compared to my year of experience at the store – and had less Wal-Mart and managerial experience than me.

8. I had repeatedly made it known to all of my Wal-Mart District Managers that I wanted to become

a Store Manager. Mr. Nagy, the District Manager, told me that in order to become a Store Manager, I had to first work as an Operations Assistant Manager. Believing that this was the track I needed to follow to become a Store Manager, I agreed to be assigned to an Operations Assistant Manager position. After Mr. Nagy was replaced by Brent Allen as District Manager, Mr. Allen informed me that Wal-Mart was eliminating the Operations Assistant Manager Program, and that if I wanted to become a Store Manager, I needed to first work as a Co-Manager.

9. I continued to be denied a promotion to a Store Manager position from Wal-Mart. In 1991 at the Duncanville store, I was next in line for a promotion to a Co-Manager position when Wal-Mart eliminated the Co-Manager position at the store. I then took an Operations Assistant Manager position at the Allen, Texas, store, but in 1992, Mr. Allen, the District Manager, told me that my Operations Assistant Manager position was being eliminated and that I would be required to accept an Assistant Manager position at the Garland, Texas, store. I took the Assistant Manager position in Garland, and while there, was told by Mr. Allen that I would have to relocate if I wanted my name to be placed on the "Promotable List," which he told me was a prerequisite to becoming a Store Manager. I complained to the Regional Vice-President about this relocation requirement, and was finally placed on the "Promotable List." I understood that the Home Office maintained this "Promotable List," which was a list of Wal-Mart employees that were deemed by Store Managers, District Managers or Regional Managers to be worthy of promotion to management positions at the level of Store Manager or higher.

10. In 1995, Wal-Mart assigned me to be a Store Manager in The Colony, Texas, store. When I arrived as Store Manager in The Colony store, I found that the store was in terrible shape and employee morale was very poor. For example, the store was dirty and signs were outdated, the stock room was too full and unorganized, store record-keeping was shoddy and had been manipulated in the past, the personnel office was dysfunctional and previous store management had not followed Wal-Mart policies and rules. In an effort to improve conditions at this store, I requested from Dale Neighbors, the District Manager, more employees, storage space and funds to pay overtime wages. My requests were denied, and when the store conditions did not improve, Wal-Mart unfairly placed me on probation. After six months in the job, I could tell that it was a no-win situation for me, and I asked to step down from the Store Manager position. Wal-Mart accepted my request, but kept me on as the Store Manager for another nine weeks before replacing me with Lincoln Williams, a male. After I left The Colony store, Wal-Mart authorized the new male Store Manager to pay overtime wages to improve the conditions at the store.

11. My next assignment, in 1995, was as an Assistant Manager in the Lancaster, Texas, store. At one point during my two years at the Lancaster store, David McKenzie, the Store Manager, and Janet Hatfield, the District Manager, asked me to perform the role of Acting Store Manager at the Irving, Texas, store in approximately May, 1997. I accepted this assignment and managed the Irving, Texas, store very well by improving employee morale, cleaning out receiving overstock and improving overall store standards. On numerous occasions, I

expressed my desire to be promoted into the permanent Store Manager position at the Irving, Texas, store to Janet Hatfield, the District Manager. Wal-Mart denied my promotion request and placed a male into the permanent Store Manager position at the Irving store. My belief is that Wal-Mart did not want a female Store Manager at the Irving store because the store received frequent visits from Wal-Mart executives and vendors and was thus considered a high profile store.

12. Later in 1997, either Gary Loafman or Janet Hatfield, the incoming and outgoing District Managers, respectively, told me that Wal-Mart had reinstated the position of Co-Manager and that I would have to serve in this position before I could become a full-time Store Manager. Because of what I was told regarding Wal-Mart Store Manager promotion policies, I returned to the Duncanville, Texas, store and accepted an assignment as Co-Manager with the goal of eventually becoming a full-time Store Manager.

13. Wal-Mart, however, made an exception to its alleged "policies" when it promoted Charles Thomas to a Store Manager position at the Balch Springs, Texas, store in 1997. I knew Mr. Thomas from my time at the Lancaster, Texas, store, when we were both Assistant Managers. At the Lancaster store, Mr. Thomas was lower on the Assistant Manager hierarchy scale than me. Wal-Mart promoted Mr. Thomas directly from an Assistant Manager position into a Co-Manager position, then into a Store Manager position, without requiring him to serve as an Operations Assistant Manager. Moreover, Mr. Thomas held these three positions at the same store in Balch Springs, Texas. After observing Mr. Tho-

mas' promotion to Store Manager. I concluded that Wal-Mart applied their Store Manager promotion "policies" differentially in order to exclude me from Store Manager positions because I am a woman.

14. On nearly all of my Performance Appraisals I received a performance rating of at least four out of five, indicating that I "Exceeded Expectations." Two exceptions to this were the Performance Appraisals I received on September 12, 1995, and March 2, 1998. The 1995 Performance Appraisal referred to my time in The Colony store as Store Manager when I was set up to fail. In fact, my District Manager stated in the "Comment" section of the appraisal: "I myself accept responsibility" for the poor performance of the store. *See* Annual Performance Appraisal dated September 12, 1995, a true and correct copy of which is attached hereto as Exhibit A. The 1998 Performance Appraisal was the last appraisal I received from Wal-Mart before I resigned. I received a "Below Expectations" on the 1998 Performance Appraisal, and in the "Comment" section I wrote the following objection to the very unfair rating: "I believe I have been set up to fail because my concerns are not being addressed and because there has been a conflict over what my responsibilities are. I feel like the Open Door Policy has failed me." (Emphasis in original) *See* Annual Performance Appraisal dated March 2, 1998, a true and correct copy of which is attached hereto as Exhibit B.

15. I consistently and repeatedly made it known to Wal-Mart that I desired to be promoted into high-level management positions. In the "Comments" or "goals" sections of my Performance Appraisals, I almost always stated that I wanted to be promoted into the next level of management, includ-

ing Co-Manager, Store Manager and District Manager positions. *See* Comment pages of Annual Performance Appraisals dated December 20, 1984, September 8, 1989, March 22, 1990, August 9, 1990, March 8, 1991, August 15, 1991, April 8, 1992, October 18, 1992, January 28, 1993, September 15, 1993, February 15, 1995 and February 1, 1997, true and correct copies of which are attached hereto collectively as Exhibit C. On at least two occasions, my District Manager or Director of Operations commented on my Performance Appraisals that I was capable or ready to manage my own store. *See* Exhibit C, Comment pages of Annual Performance Appraisals dated August 9, 1990 and February 15, 1995.

16. In approximately January, 1999, I took a medical leave of absence. Due to the debilitating nature of my medical condition, I did not return to work at Wal-Mart and was terminated in March, 2000, in accordance with Wal-Mart's policy that the time limit for employee medical leave was one year.

17. I would consider returning to work for Wal-Mart if I were assured that I would be provided fair opportunities for advancement and a non-discriminatory working environment.

I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Texas that the foregoing is true and correct.

This Declaration was signed by me on April 8, 2003, at Dallas, Texas.

/s/ Karla Rojas
Karla Rojas

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF KATHLEEN SCHMEIDA IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Kathleen Schmeida, declare:

1. I make this statement on the basis of my personal knowledge, and, if called as a witness, could and would testify competently to the facts herein.

2. I am female. I worked at three Wal-Mart stores in Ohio from 1998 through 2001. In all three stores, I noticed that the policies and practices regarding hiring, training, and discipline were the same.

3. I began working at Wal-Mart in Macedonia, Ohio, on May 23, 1998 as an Assistant Manager. Throughout my time at the Macedonia store, I told my Store Manager, Rodney Bowden, that I was interested in learning how to make myself promotable

because my goal was to become a Store Manager. In response to my question, Store Manager Bowden told me that in order to advance I would have to relocate to another state. He also told me that any additional information on training for advancing within the Company was "available on a need-to-know basis" and that I did not need to know.

4. In June of 1999, District Manager Paul Beno transferred me to the Streetsboro, Ohio Wal-Mart. While at the Streetsboro store I continued expressing my interest in advancing within the Company, and even wrote my goal of becoming Store or Co-Manager on my annual performance evaluation. A true and correct copy is attached hereto as Exhibit A. I spoke with Store Manager Franklin Cottrill about my goals but never received the additional training I needed in order to be considered for Co-Manager and Store Manager positions. It was common, however, for Store Manager Cottrill to provide on-the-job mentoring and computer training to male Assistant Managers such as Glenn Fry and Jim (last name unknown). I was not given the opportunity to participate in these informal mentoring sessions.

5. In May 2000, District Manager Paul Beno transferred me again to the Wal-Mart in Stow, Ohio. I requested additional training and information about being promoted to Store Manager from my Store Manager Scott Bernard but he never followed up with me.

6. In May 2001, I terminated my employment with Wal-Mart because I was dissatisfied with promotion opportunities.

I declare under the penalty of perjury of the laws of the United States and State of Ohio that the foregoing is true and correct.

This Declaration was signed by me on the 2 of April, 2003, in Ohio.

/s/ Kathleen Schmeida
Kathleen Schmeida

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF RAMONA SCOTT IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Ramona Scott, declare:

1. I make this statement on the basis of my personal knowledge, and, if called as a witness, could and would testify competently to the facts herein.

2. I was employed by Wal-Mart, Inc. from October 1990 until September 1998. I am female. Throughout my tenure at Wal-Mart, I was never disciplined or coached, and I received good evaluations.

3. I was hired by Wal-Mart as a Customer Service Manager (CSM) for a new store that was opening in St. Petersburg, Florida. I already had experience as a manager at a supermarket and video store, so I accepted the CSM position. As CSM, my duties included supervising cashiers, among other

things. When the store opened, I immediately became aware of departmental gender segregation. All the cashiers were women, while the electronics and sporting goods departments were predominantly staffed by men. Additionally, I realized that men were primarily in charge of the store; there was only one woman among the five Managers.

4. In July 1991, I received a promotion to Personnel Manager. I did not apply for this position, I was asked to take it. As Personnel Manager, I was responsible for hiring procedures, new employee orientation, distributing payroll, keying evaluations and merit raises, and ensuring compliance with Occupation Safety and Health regulations, and more. The actual paychecks came bi-weekly from Home Office in Bentonville, Arkansas.

5. On or about October 1991, I was transferred to a Wal-Mart in Pinellas Park, Florida, after I used the Open Door to complain about my Store Manager. I asked to stay at the St. Petersburg store, but the District Manager, David Bonar, said that it was better for me to move.

6. The departments at the Pinellas Park store were also largely segregated by gender. Most cashiers were women and men worked in electronics, sporting goods, and the garden center. The Store Manager was male, as were two of the four Assistant Managers.

7. In my capacity as Personnel Manager at the Pinellas Park store, I had access to payroll records. I noticed that generally men made more than women, and that men were able to get most of the overtime that was available.

8. Sometime in 1993, I sought approval for a merit raise for a female cashier, but the Store Manager, Gary Currens, denied my request. I responded that men were making more than women and asked why that was the case. Mr. Currens replied: "Men are here to make a career and women aren't. Retail is for housewives who just need to earn extra money." Some time in 1995 or 1996, I asked the male Assistant Manager for electronics, Anton Modrich, why he was giving one of his male employees a merit raise because I didn't think the employee had earned it; Mr. Modrich responded, "He has a family to support." I pointed out that I too had a family to support -- I was a single mother -- but he just walked away. I did not receive a raise.

9. As Personnel Manager, I was also involved in hiring hourly associates. Sometime in 1995 or 1996, Store Manager Currens directed me to hire a custodian to clean the employee lounge and store restrooms. He specifically told me that I had to hire a woman. Thereafter, whenever the custodial position opened up, he would reiterate that we needed to hire a woman for that position.

10. In about 1995 or 1996, I spoke with the District Manager, David Bonar, about getting into the Assistant Manager Training Program. Mr. Bonar said there were no openings. I knew of no posting or application process for the training program; to my knowledge, asking the District Manager was the only way to become an Assistant Manager. Mr. Bonar gave me no other assistance or guidance as to how to get into the program, how to find out when openings occurred, or whether there were in fact openings available.

11. Sometime in 1997, Nick Batista transferred from the Largo store to become the new Store Manager of the Pinellas Park store. When Mr. Batista saw my pay rate, he laughed and told me that the male Personnel Manager of the Largo store made "a lot more" than I did. He did not give me a raise after that.

12. In about 1997, I spoke with the Mr. Batista about getting into the Assistant Manager Training Program. Mr. Batista told me he had other plans for me, but never said what those plans were. Shortly after that, he told me that in order to get along with him, I needed to behave like his wife. From his description of his wife, I understood Mr. Batista to mean that he wanted me to wait on him and fix him his coffee. In fact, when the District Manager visited, Mr. Batista would tell me to go get them coffee. After this second instance of being rejected for admission into the Assistant Manager training program, I decided to give up on further promotion.

I declare under penalty of perjury of the laws of the United States and State of Florida that the foregoing is true and correct.

This Declaration was signed by me on April 1st, 2003, at St. Petersburg Fl.

/s/ Ramona Scott

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES,
PATRICIA SURGESON,
EDITH ARANA,
DEBORAH GUNTER,
CHRISTINE
KWAPNOSKI, CLEO
PAGE, KAREN
WILLIAMSON, on behalf
of themselves and all
others similarly situated,

Plaintiffs,

v.

WAL-MART STORES,
INC.

Defendant.

Case No. C-01-2252 MJJ

DECLARATION OF DAWNIA SELF IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I, Dawnia Self, declare:

1. I am a 33 year old female living in Madill, Oklahoma. I worked at Wal-Mart's Fort Collins, Colorado store for approximately two years, starting on April 22, 1998. I then transferred to the Wal-Mart store in Durant, Oklahoma for approximately nine months. After working at the Durant, Oklahoma store, I transferred once again to Wal-Mart's store in Madill, Oklahoma for seven months before moving to Sanger, Texas and working at a Wal-Mart distribution center until October, 2002.

2. During my employment at Wal-Mart, I encountered discrimination based upon my gender with regard to my compensation and work assignments.

3. When I worked as a Softlines Sales Floor Associate at the Fort Collins, Colorado store, I made requests for merit raises on numerous occasions to Ed Holt, the Store Manager, David Headrick, my immediate supervisor, and Jack Gunn, another Manager. My requests were always denied.

4. I know that other male employees at the Fort Collins store in 1998 and 1999 received merit raises and/or made an hourly wage that was higher than mine even though their experience and jobs at Wal-Mart were comparable to mine. Included among these men was John Brailsford, who worked in the Electronics Department. Mr. Brailsford told me what his hourly wage was.

5. I also know that other males who had experience comparable with mine made a higher wage than me for doing similar work when I worked at the Durant, Oklahoma store in the second half of 2000 and the first half of 2001. I am aware, for example, that John Branch was hired into a Day Receiving job at a very high hourly rate that exceeded my hourly wages.

6. During my employment at the Durant, Oklahoma store, I had to ask Mike Snell, the Assistant Manager, and Buddy Sherryl, the District Manager, repeatedly for a differential pay increase when I switched jobs from Cashier to Night Receiving. My husband, who also worked for Wal-Mart at the same store, received a differential pay increase when he switched jobs to Night Receiving, even though he did not have to ask for it. Wal-Mart eventually approved my differential pay request, but I should not have had to even ask for it, as it was Wal-Mart policy that Night Receiving positions received differential pay increases.

7. After working in the Night Receiving position, I moved into a Department Manager position in the Shoe Department. Mr. Snell, the Assistant Manager, gave the order that I would not be able to keep the pay differential I had in the previous Night Receiving position, even though my husband was able to automatically, without asking, keep his pay differential when he moved into Department Manager and Support Manager positions from Night Receiving. I spoke at length to both Mr. Snell and Brenda Logan, the District Manager, about my desire to keep the differential. My request was finally approved, but I was never compensated for the pay differential I was entitled to receive in the Shoe Department Manager position for the first few weeks of the job.

8. I transferred to the Madill, Oklahoma store in the fall of 2001 to be closer to where my ailing father lived. Males at the Madill store who had experience comparable with mine made a higher wage than me for doing similar work. One such person was Larry Bums, who had an Unloader position.

9. During my time at the Madill store, I had discussions with Tim Owen, the Store Manager, regarding my desire for merit raises, more hours per week, to be placed on full-time status and to be placed in the Management Training Program. Mr. Owen only laughed at me in response to my requests. I also met with Bill White, District Manager, to discuss being placed in the Management Training Program, but he ignored my request. In the "Associates Comments" section of my Annual Performance Appraisal in February, 2002, I asked to be promoted to a management position. *See* Annual Performance Appraisal dated 2/11/02 and identified as WMHO 1042861, a true and correct copy of which is attached

hereto as Exhibit 1. No one in management, however, responded to my requests.

10. When I moved to the Sanger, Texas store in approximately May, 2002, Wal-Mart assigned me to a Break Pack position. During my orientation at the Sanger, Texas store, out of the 18 people in orientation, there were only three women present. Greg Carpenter, a Maintenance Manager, attended one of my initial orientation sessions, and pointed around the room at each employee making comments about the positions to which he thought each employee would be assigned. When he pointed at me and the two other women, he said that he "knew where we were going," implying that the only job we were capable of doing was Break Pack. The following day, Jose Perez, orientation leader, was discussing company policies and stated that anyone who stereotyped people at Wal-Mart would be fired. After Mr. Perez said this, I told Mr. Perez about the stereotype Mr. Carpenter had used during our orientation. Mr. Perez told me that he would handle the situation. Mr. Carpenter was neither disciplined nor fired, but shortly thereafter received a promotion.

11. When my father died in August, 2002, I took a leave of absence. My husband automatically received bereavement pay without requesting it. I, however, had to request bereavement pay for my own father's death. At first, Wal-Mart refused to give me the bereavement pay, but only after I insisted, they finally agreed to give it to me.

I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Oklahoma that the foregoing is true and correct.

This Declaration was signed by me on April 11, 2003, at Kingston, Oklahoma.

/s/ Dawnia Self
Dawnia Self

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, KAREN WILLIAMSON, on behalf of themselves and all others similarly situated, Plaintiffs vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF SUSAN SERVATIUS IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Susan Servatius, declare:

1. I have personal knowledge of the facts contained in this declaration and, if called as a witness, am competent to testify to those facts.

2. I was employed by Wal-Mart Stores from January 14, 1991 until I resigned on March 7, 2001. I started as a management trainee and rose to the level of District Manager. I was one of only a handful of female district managers at the time that I left, a few months before this lawsuit was filed. During my ten years with Wal-Mart, I observed that the small group of women who actually reached the position of store manager were frequently given the smallest and most troubled stores in the Wal-Mart system. As a result, women had a much harder time succeeding

because the financial performance of store managers is based exclusively on the financial performance of their stores. My supervisors repeatedly told me that high volume and profitability were necessary for promotion.

3. I graduated from Fresno State with a B.A. in English and was recruited by Wal-Mart into the management training program. I started in January 1991 and was placed for training in a store in El Centro, California. Among Wal-Mart management, this was considered a very undesirable assignment because the store is in a poor community on the border with very few local amenities. It is Wal-Mart practice not to place a trainee as an assistant manager in the same store in which they trained. In discussion with assistant managers and with my store manager, I discovered that the company could not get anyone to transfer in to replace the assistants who arrived "temporarily" to open the market. I was placed in the El Centro store and stayed there eighteen months.

4. One of the male assistant managers in El Centro, Steve Markey, took an extended leave of absence and I assumed his responsibilities, in addition to my own and with no pay adjustments. I discovered that his areas were not functioning well and I put in place a number of steps to train his direct reports and improve overall functioning. When Steve Markey returned from his leave of absence, he was promoted to co-manager a few months later.

5. The store manager in El Centro was Norm Banwarth. He was only in his 20s but he was married to the Chief Financial Officer Paul Carter's niece. Banwarth had advanced from sales associate

to store manager in only three years. He was made a store manager at the age of 25.

6. Over a 12-month period, the store had three district managers, Ron Smoot, Rick Klein, and Larry Thompkins. Larry Thompkins, rarely came to our store because it was a long drive from his home store. On one of his rare visits to the store, six months or more after I started, I asked him whether I could transfer to a store in San Diego. He told me that there were no openings there and that I "needed more experience." I attended a company meeting shortly thereafter and met an assistant manager [name unknown] who complained to me that he had been transferred involuntarily to an assistant manager slot in San Diego. It was clear to me that Mr. Thompkins has lied to me about the availability of openings. Because there was no system for posting assistant manager openings, I had no access to information about what assistant manager positions were or might be coming available. Instead, I had to rely on Mr. Thompkins for such information; and found him to be dishonest in his communications.

7. I continued over the next year to request a transfer out of El Centro. When I heard nothing from my district manager, I decided to use the Open Door policy. I had to ask Store Manager Norm Banwarth about how to use the policy after which he gave me the direct contact of a Regional Personal Manager. I subsequently talked to the Regional Personnel Manager, Greg Samuelson. He was willing to move me to New York but told me that if it did not work out, I would be obliged to reimburse the company for my relocation costs (approximately $3,000). While I saw this requirement as unfair, I agreed. I am not aware of any other Assistant Manager who was told he or

she would have to reimburse relocation costs and, indeed, when I reached higher management, I found that the company had no such policy.

8. In August 1992, I transferred as an Assistant Manager to the Watertown, New York, a store near the Canadian border. The company was having trouble getting people for New York stores at that time. It was a new store and did not yet have a Store Manager.

9. Another female Assistant Manager, Tracy Schankle, moved from a Pennsylvania store to take the position of Co-Manager in Watertown, which she had been promised. Tracy was quite open in her communications regarding this situation and, as professional colleagues, we shared communications about our careers. When Ms. Schankle arrived, there was already a male Co-Manager in the store and she was placed as an Assistant Manager. I worked with two other male Assistant Managers, Dan Alcard and Dennis [last name unknown], both of whom made more money than I did

10. Eventually, Lance Delarossa, was assigned as the Store Manager. The District Manager was Mike Holigan. Mr. Holigan could not remember my name and frequently referred to me as "Tracy" (the other female assistant manager in the store) or "girl." I remember clearly that, on one occasion, I was so annoyed with being called "girl" that I asked Mr Holigan "what am I, Lassie?"

11. I went to District Manager Holigan and told him that I felt I was underpaid. He did increase my pay by $3,000-4,000. However, Mr. Holigan did not tell the store manager that he had given me a raise. When he find out, Store Manager Delarossa asked me "how the hell did that happen?"

12. I received an "exceeded expectations" rating for my evaluation in November 1992. In the section concerning career goals, I wrote that I wanted to be a store manager and "[eventually, within 3 years, I believe I will be capable of running a 90,000 or larger store. I hope to contribute to the company as a store manager." I was well aware of the practice of pigeonholing women managers into small square footage stores with low bonus potential and had not yet seen a female store manager running a high volume store. Attached hereto as Exhibit A is a true and correct copy of my November 1992 evaluation.

13. The other female assistant manager, Tracy Schankle, was offered a store manager position over Hooeksett Wal-Mart, the worst store in New Hampshire. Ms. Schankle was told about the problems in the store after she accepted the position. I drove with her to tour the store and its problems were apparent to both of us. Later, when I worked in the market, it was a store that was the butt of numerous jokes at our district meetings.

14. In May 1993, I was transferred to the Vestal, New York Wal-Mart as the Assistant Manager for Operations. This store also had problems – it had high shrink and a weak Store Manager, Jim Peck. On one occasion, Regional Vice President Jim Dowdy visited the store and inappropriately yelled at myself and the rest of the management staff in front of customers and hourly associates. The female Co-Manager, Shannon Craig, used the open door policy with then CEO Don Soderquist to complain about Dowdy's visit. Jim Dowdy returned with Divisional Vice President Larry Williams and gave the store an acceptable rating, although months later I learned from the district manager that Jim Dowdy brought

his supervisor to "prevent him from strangling her (Shannon)." Sometime after that, Shannon Craig was promoted to a small store in upstate New York, although she had already been promised a bigger and better store. Her experience made me very wary of using the Open Door.

15. In September 1993, I again received an "exceeded expectations" rating on my evaluation. I noted that my career goals were "within 1 year a co-manager in a 116,000 [sq. ft.]or higher so I'd be able to run within 2 years a 120,000 [sq. ft. store] as a Store Manager." Attached here as Exhibit B is a true and correct copy of the September 1993 evaluation. I was very specific about the size of the store because I had seen two other women managers, Tracy Schankle and Shannon Craig, sent to small or problem stores, where their careers effectively dead-ended.

16. In January 1994, I was promoted to Co-Manager for a store in Concord, New Hampshire, another problem store. I was told by the district manager that I would need to "light a fire" under the Store Manager David Dorfner. When I arrived, Dorfner was not welcoming and, in fact, did not at first give me a store tour or keys. Within a few months, I discovered that Dorfner was padding the inventory and violating payroll requirements. I reported this to the district manager, Joe Woods. Rather than terminating him, Woods sent Store Manager Dorfner to a Dale Carnegie course for "re-training."

17. The district supervised by Joe Woods included the small store that Tracy Schankle was running. When I addressed concerns over my ability to work with Mr. Dorfner, Woods often ridiculed Ms.

Schankle's performance to me and claimed she was a "snake" who could not be trusted Woods held a regular poker game for the managers and co-managers in his district Tracy Shankle and I were not invited to these games.

18. Because I had reported Mr. Dorfner's misconduct, I asked District Manager Woods to move me out of David Dorfner's store. He offered me a store manager position in the most remote part of Maine. I declined the move because I knew that that store could never be profitable and my career would go nowhere. I also reminded Mr. Woods that by performing as a co-manager I had fulfilled the prerequisite for receiving a 120,000 square foot store. I recognized at the time that it was very risky to turn down a promotion but I knew that, to fully develop equally with my male colleagues, I needed an equal challenge.

19. I was promoted to store manager over the Utica, New York store in December 1994. I received above standard visits from Bill Fields, then CEO, Lee Scott, then President of Merchandising, Mark Schwartz, the president of Super Centers, and my then-Divisional Vice President Larry Williams. I received an "exceeded expectations" review in October 1995. In February 1996, I was promoted to store manager for the Hudson, New York store. Tom Coughlin visited the store; and it was the Divisional Store of the Year for 1998. I also received the Samuel M. Walton leadership award for my work in this location. In March 1998, I received an "exceeded expectations" rating on my evaluation from my district manager, Dexter Hammer.

20. In our region, there was only one female district manager, Jerrie Awtry. I was aware that she

left the company after raising an open door complaint with Tom Coughlin. At the Year End meeting in either 1996 or 1997, diversity was discussed and the need to promote women. My then District Manager knew that I took offense to discussions that indicated that a quota system was the only reason that I was running the highest volume and profit store in the region at that time.

21. In September 1998, I was promoted to the position of District Manager. I was given a very poor district with three out of the five stores posting high losses and two stores decreasing. The district was a "bottom feeder" district (lowest in the region). The district went from bad to worse when the previous district manager stripped the stores of five assistants managers and left them short staffed, over inventory, and dirty. I expressed concern to my Regional Vice President, Greg Samuelson, but he laughed at me. I was determined to succeed and I set out to turn the district around. I lowered turnover, improved associate satisfaction or "UPI" indicators, reduced losses, improved profits over 100%, and ran for 18 months the highest increasing market in the company. I received accolades from my peers and my supervisor, Mike Huffaker, for my work.

22. As a Wal-Mart district manager, my chief responsibility was to ensure that each store in my district operated according to all company policies. The Bentonville headquarters has systems in place to closely monitor the sales performance and personnel in each store. I received, on a daily and weekly basis, a wide range of reports about each of my stores' performance on a variety of measures. Based on these reports, I would focus my activities on the store or stores that were not meeting company stan-

dards. Within the company, this was known as "management by exception." The oft-repeated goal was to have as little variation as possible with respect to how the stores would administer company policies and practices.

23. My district suffered an enormous blow when Wal-Mart purchased a retail chain known as Caldor's, which had a number of stores in my district. These locations were not given to me but instead managed through a special Regional Manager and his own district manager. These stores needed to be converted to Wal-Mart stores. Rather than incorporating the former Caldor's stores into existing districts, they were set up as a separate district, which overlapped geographically with my own. Lance Richards was put in charge of the district. Richards had previously been caught for fraternization/sexual harassment, terminated for 90 days and then rehired. Richards bragged openly about his indiscretions and the company's lack of response to them. I also learned from Mike Huffaker, Divisional Vice President, that Richards' irresponsible behavior caused the company to be sued for discrimination.

24. Richards immediately recruited 75 of the best managers and employees out of my stores, without any input or consultation with me. He was allowed to identify the individuals and offer them a 5% pay increase or more, even though the employees would be doing less work as the Caldor's stores were quite small in footage and volume. When I contacted the Regional Vice President Castural Thompson to discuss the issue, he told me to "shut up or you'll get yourself fired. Tom Coughlin is very big on this project." I then telephoned the Divisional Vice President, Mike Huffaker, to discuss the issue. Mr. Huf-

faker told me that I did not understand the big picture, that I needed to support the "agenda," and that the company was well aware of the financial impact and toll this would take on myself and my managers.

25. In October 1999, my father was scheduled to have life threatening surgery in New York. I followed all procedures necessary to obtain a few days of family medical leave through the Regional Personnel Manager Marie Hoag. I also arranged for another district manager to watch my district. While I was gone, Regional Vice President Thompson apparently claimed not to know where I was and directed the regional staff to call around and locate me in New York. He also ordered the district manager who was watching my district to stop doing so. When I returned from the leave, Mr. Thompson harangued me for not being available 24 hours a day, seven days a week and that he did not know where I was.

26. Regional Vice President Thompson scheduled annual deep sea fishing trips for the district managers in the region as a "team building" exercise. There was only myself and one other woman present. We were required to attend but we had to pay for the event ourselves. I attended the first two years but had little contact with Mr. Thompson who generally arranged for his friends to be in his boat. I was aware that the male district managers would "talk shop" but I was not generally included in these discussions. While I would have enjoyed an informal retreat with other district managers, this event seemed more like a "male-bonding" weekend and very little like a corporate retreat.

27. On a number of occasions, Mr. Thompson scheduled regional meetings in Atlantic City. The meeting schedule left a half-day for gambling and

drinking. We would have dinner as a group, and then Thompson would disappear with some of the other men. At other times, he scheduled regional meetings to coincide with major sporting events that would be taking place in the location of the meeting. (e.g. Pittsburgh Steelers and Patriots football games). I was aware that Mr. Thompson would attend these events with some of the male district managers after the meeting was completed. I was not invited or otherwise included in these after meeting activities. One such time, he spent the day touring with me and spent the evening in New York City with a male District Manager. The next day, he would continue to tour my market.

28. I was required to conduct a quarterly anti-union training for my store managers. Over four times, I scheduled the required union training for my store managers only to have Regional Vice President Thompson set up a regional meeting at the same time, so I would have to cancel it. I informed the labor team in Bentonville and others that I had not conducted the labor meeting for my store managers. A year later, Thompson accused me of lying about the fact that I had conducted the meetings and told me that I needed to be coached. I went to Divisional Vice President Huffaker about this incident. His response to me was that it sounded like he [Thompson] "just doesn't like white women." After a long discussion with Mr. Huffaker regarding Mr. Thompson's continual and constant harassment, Mr Huffaker assured me that it was confidential and that there would be no retaliation. One hour later, Mr. Thompson issued me a written warning, which I refused to sign, as it indicated I had purposely altered company information in order to lie to him.

29. I recall another example of the lack of support that I received as a district manager. I had an assistant manager whom I thought was not right for the store she was in. I wanted to move her to a smaller volume store to fill in gaps in her training. I called to check with Mr. Thompson about the proposed move. He refused to tell me whether or not it should be done – instead, he said "do what you think is best." Once I did it, however, Mr. Thompson became furious with me and told me that I did not have authority to make the decision. The woman filed a lawsuit against the company but I believe that it was ultimately dismissed.

30. The continuing problems that I had with Mr. Thompson prompted me to contact Divisional Vice President Mike Huffaker in the summer 2000. I recounted to him a number of the incidents and problems described above. I also told him that I did not feel that RVP Thompson was supporting me but, in fact, that his behavior had reached the point of harassment. Mr. Huffaker apparently immediately contacted Mr. Thompson about my complaints because, shortly thereafter, I received a phone call from Mr. Thompson thanking me for using the open door.

31. In August 2000, I received the Best District Manager of the Year award in my region.

32. At around this time, Divisional Vice President Huffaker started pushing me to transfer to New Hampshire. He told me that my current district was not a sufficient challenge and I needed more. He felt that, as a single woman, I should not plan to purchase a house in this new market because he indicated this district would lead to yet another promotion. I suspected that he was trying to solve the prob-

lem with Regional Vice President Thompson, simply by removing me from his region.

33. I received a phone call from Charlyn Jarrells-Porter, a People Vice-President, who advised me that she was investigating the issues that I had raised about Thompson. I was told not to discuss the investigation with anyone else, which I did not. In September 2000, Ms. Jarrells-Porter telephoned again. I assumed that she was calling to advise me of the status of her investigation. Instead, she chastised me for discussing my problems with Mr. Thompson with other district managers in my area and for being insubordinate to him. After that phone call, I never heard from Ms. Porter again and she never informed me of the outcome of her investigation.

34. Two months went by and, in November 2000, [title] Tom Coughlin called to tell her that they were going to be changes. Soon after, Regional Vice President Thompson was taken out of his position as Regional Vice President.

35. At the same time that Mr. Thompson was removed, Divisional Vice President Mike Huffaker called and wanted to meet with me to "coach" me. I had no idea what I had done or would be coached for. In my nine years with Wal-Mart, that was only the second time that I had received a coaching. It was, moreover, only two to three months after receiving the District Manager of the Year Award and after Mr. Huffaker had encouraged me to move to a larger district since I needed a bigger challenge.

36. I met with Mr. Huffaker and he coached me for gossiping and for swearing. He claimed that he "didn't like some of the things I said or did" and that I needed to support the position, if not the man. He presented no examples of inappropriate statements.

He also claimed that he had conducted an investigation on my leadership and my support for the "Open Door Policy." I considered both of these criticisms (gossiping and swearing) to be extremely sexist. I was well aware of my male colleagues often gave direct and sometimes negative direction to their teams with no consequence. I was somehow expected to be nice and nurturing. I had never heard of any male manager or district manager being criticized for "gossiping." I was, moreover, aware of many other male managers who swore much more than I did. Clearly, Mr. Huffaker had a mindset about how women managers should act and that did not include swearing or showing aggressive, assertive behavior to direct managers.

37. Regional Vice President Frank Washburn replaced Mr. Thompson. Encouraged by colleagues to be open with him about what he would expect from me, he claimed that "he was giving me a fresh start." On the very first conference call with the district managers, Mr. Washburn started out by saying "OK, guys. . ." He then stopped himself and apologized to me, telling the group that he "had never supervised women before" and that he would have to get used to it. I was the only female district manager in the region at that time and felt that the comment was unnecessary. In the ensuing months, I had little help and much criticism from Mr. Washburn, who also seemed angry with me about Mr. Thompson's demotion. He refused to give me any autonomy to allow me to fix the problems caused by the Calder location acquisition, claiming that perhaps I did not know how to do my job. Although a few short months before I had been given the District Manager of the Year award, Mr. Washburn suggested that I was the worst District Manager he had. He also realigned my

district giving my top two performing stores to my male colleague who later I learned received accolades for his district's financial performance.

38. In March 2001, I resigned my position with Wal-Mart. I became convinced that I would not receive fair treatment and support to succeed at Wal-Mart; and that I could no longer work within the company's double standards. Attached hereto as Exhibit C is a true and correct copy of my resignation letter. I discussed with Mr. Washburn how his business decisions made it impossible for my stores to survive the impact the Caldor's acquisitions had upon the districts financial performance; and that they would need additional resources which he refused to give me. Attached hereto as Exhibit D is a true and correct copy of the Exit Interview form from my personnel file, which I did not sign nor was discussed with me.

39. I recall attending district manager training in 1998 or 1999. The trainer distributed a handbook entitled "The Self-Interest in Diversity for Straight, White American-Born Male Managers (SWAMMs)" by Chuck Shelton. There was very little actual discussion or training about diversity and my impression was that they had passed up the handbook so that they could say that diversity had been covered.

40. On another occasion in 1998 after I was newly promoted to the District Manager position, I attended a meeting in Bentonville at which Wal-Mart's Chief Operating Officer Tom Coughlin was discussing the need for more women in management. He asked the managers present in the room to stand up and for the women to go to one side of the room and for men to go to the other. There were approximately 30 women and 290 men. I found it very em-

barrassing because everyone in the room was staring at our small contingent of women. While Mr. Coughlin decried the small number of women, it was not at all clear what steps would be taken to address the imbalance. Again the implication among our male colleagues was that our primary qualification for promotion was our gender and our ability to fulfill a company quota. More importantly, in my experience as a district manager, I received very hostile treatment by my Regional Vice President. The lack of support from higher management ultimately prompted me to leave the company.

I declare under penalty of perjury of the laws of the State of Connecticut that the foregoing is true and correct. Executed this 19th day of April, 2003 in Madison, Connecticut.

/s/ Susan Servatius
Susan Servatius

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, KAREN WILLIAMSON, on behalf of themselves and all others similarly situated, Plaintiffs, vs. WAL-MART STORES, INC.,	Case No. C-01-2252 MJJ **DECLARATION OF JODY SHEARER IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Jody Shearer, declare:

1. I am female and a former employee of Wal-Mart. I reside in Ohio.

2. I was hired at a Wal-Mart store in Wooster, Ohio on February 2, 2000. I had about two years of previous retail experience working for K-Mart and for JoAnn Fabrics.

3. I was assigned to a position as a Sales Associate in the Lawn and Garden Department. Shortly after I started working, I found out that two male Sales Associates in the Garden Center, who had both been hired after I was, were making a higher hourly wage than I was. I was hired at $6.50 per hour. Gregory Via was hired as a Sales Associate in about May 2000 at $6.75 per hour. Arthur Berry was hired as a Sales Associate in approximately June 2000 at

$6.75 per hour. I know their wages because both Mr. Via and Mr. Berry told me what they earned.

4. I used the Open Door to complain about the differences in our wages to Assistant Manager Jerod Strong. Mr. Strong told me I must be mistaken and he also told me not to worry about the difference. I asked him for a pay raise at that time, which he denied. After Mr. Strong told me I must be mistaken about the pay difference, I asked Mr. Via and Mr. Berry again what they earned. They both confirmed that they earned $6.75 per hour. I know of no legitimate explanation for the difference in our wages.

5. At my 90-day evaluation in May 2000, I received a 35-cent raise to $6.85 per hour. However, if my starting pay rate had been the same as Mr. Via's and Mr. Berry's, my 90-day raise would have been to $7.10 per hour.

6. At the same Open Door meeting with Mr. Strong, I told Mr. Strong that I wanted to be considered for the Management Training Program. I knew about the program from a meeting in the store and from reading a poster that listed the requirements, which included a high school degree. When I asked Mr. Strong about the Management Training Program, he replied, "Management's not for you." He did not explain what he meant by that statement. I knew that approval of a manager was required to enter the Management Training Program. Mr. Strong's statement led me to believe I did not have his support and discouraged me from taking additional steps to get experience that would qualify me for a management position.

7. Of the four Management Trainees who trained at the Wooster store while I worked there, only one was female.

8. I was never disciplined while I worked at Wal-Mart. I received two performance evaluations. On my 90-day review, I received an "exceeds expectations" rating. (True and correct copy attached hereto as Shearer Exhibit A.) On my annual evaluation, I received a "meets expectations" rating, and I wrote in the comments section, "I am interested in becoming a department manager." (True and correct copy attached hereto as Shearer Exhibit B.)

9. Even though I expressed interest in management positions both to Assistant Manager Strong and during my annual review, I was never given the opportunity to apply for the Management Training Program. I was never told what qualifications were necessary for the Management Training Program or what the application process was. I never saw applications for the Management Training Program. If I had seen applications, I would have applied.

10. I left Wal-Mart in December 2000 to accept a position as a management trainee at McDonald's. In my exit interview with Wal-Mart, I specified that I was leaving due to my dissatisfaction with pay and to accept a management position with another company. No one in Wal-Mart management made any effort to dissuade me from quitting. (True and correct copy of Exit Interview attached hereto as Shearer Exhibit C.) Currently, I am an hourly supervisor at Lowe's Home Improvement Warehouse.

11. I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Ohio that the foregoing is true and correct.

This Declaration was signed by me on April 15 (month and day), 2003, at Wooster Ohio (city and state).

/s/ Jody Shearer
Jody Shearer

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, KAREN WILLIAMSON, on behalf of themselves and all others similarly situated, Plaintiffs vs. WAL-MART STORES, INC.,	Case No. C-01-2252 MJJ **DECLARATION OF BARBARA STEELE IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Barbara Steele, declare:

1. I am a woman and a former employee of Wal-Mart. I reside in Arizona.

2. I worked for Wal-Mart for 16 years as an hourly employee, an Assistant Manager, a Co-Manager, and a Store Manager. I held field management positions in several different states.

3. I was hired in 1986 as an hourly employee at a Wal-Mart in Carthage, Missouri. Within a year and a half, I had been promoted to Department Manager and then to Support Manager. In approximately 1988, Store Manager Lou Amato asked me what my career goals were, and I told him I was interested in a management position. Mr. Amato told me that the District Manager's approval was required for me to join the Management Training Pro-

gram, and he told me that he would recommend me to District Manager Dave Simpson. My co-worker Sherrie Lambeth also expressed interest in management during the same conversation, and Mr. Amato said he would recommend her also. I also expressed my interest in management on my 1988 performance evaluation, on which I received an above-standard rating: "My goal is . . . to advance myself to the highest possible position." (True and correct copy attached hereto as Steele Exhibit A.)

4. During the next year, Ms. Lambeth and I tried to arrange interviews with Mr. Simpson whenever he was in the store, but he was completely unresponsive. In autumn 1989, I asked Mr. Amato why my promotion was being delayed, and he told me that Mr. Simpson refused to recommend me or Ms. Lambeth for the Management Training Program because he did not believe women should have management positions.

5. In October 1989, I was finally promoted into the Management Training Program by District Manager Jim Lund. Mr. Amato and Mr. Lund both told me that managers were required to be available to relocate anywhere in the country. I expressed my availability to work anywhere Wal-Mart needed managers.

6. I was assigned to a store in Joplin, Missouri, for management training. When my training was complete, I again told District Manager Lund that I was willing to move my residence if necessary for an Assistant Manager assignment. Shortly thereafter, Regional Personnel Manager Marie Hughes offered me a position as Assistant Manager at a store in Atascocita, Texas, which I accepted.

7. I worked as an Assistant Manager at the Atascocita store for two years, and was then transferred in 1992 to a store in Porter, Texas, where I worked another year as an Assistant Manager. By this time, I had been an Assistant Manager for three years, and I was becoming concerned that I would not be promoted to Store Manager, despite my positive evaluations and hard work.

8. I called Regional Personnel Manager Hughes to tell her my career felt stalled. Ms. Hughes suggested that I take an assignment as Assistant Manager at a "problem store" in Silver City, New Mexico. I then spoke with that store's District Manager, Rick Klein, who told me that if I could get the store "under control," I would get promoted to Store Manager. I accepted the assignment.

9. I started at the Silver City store in September 1993. During the two years I worked in Silver City, I was frequently assigned to set up new stores in other states, including North Dakota, South Dakota, and Missouri. I was always told that I needed to accept these "opportunities" in order to improve my chances for promotion. However, no matter how many such assignments I accepted, I continued to work as an Assistant Manager with no promotion in sight.

10. I was finally promoted to Store Manager of a store in Winslow, Arizona, 1995, by District Manager Charles Balentine. I had been an Assistant Manager with positive evaluations and no coachings for six years.

11. Throughout my career at Wal-Mart, I observed many male Assistant Managers obtain promotions to Store Manager after spending less time as an Assistant Manager than I had. For example, Gary

Freeman was promoted to Store Manager of the Atascocita, Texas store in 1990 after only three years as an Assistant Manager. Richard Bourget was promoted to Store Manager of a store in Scarborough, Maine, in 2000 after only three years as an Assistant Manager and nine months as a Co-Manager. I also learned that Sherrie Lambeth, my co-worker from Carthage, Missouri, spent ten years as an Assistant Manager before she was promoted to Store Manager.

12. In the two years I was Store Manager in Winslow, my management team and I improved the store's overall performance rating from second or third-worst in the region to one of the top ten percent.

13. In 1997, I obtained a transfer as a Store Manager to a larger store in Lewiston, Idaho. In the two years that I was Store Manager in Lewiston, my management team and I improved the store's overall performance rating in the region from the bottom quarter to the top quarter.

14. Nonetheless, in 1999, District Manager Alan Schamber demoted me to Assistant Manager and transferred me to a store in Yakima, Washington, for allegedly backdating the evaluation date for one of my employees. I felt strongly that my demotion for such a minor infraction was unfair, and I used the Open Door to complain to Regional Vice President Bob Erickson. Mr. Erickson told me that the demotion would stand but that I could start applying for promotion again to Store Manager after 90 days.

15. Over the next three years, I applied more than twenty times for Store Manager positions using Wal-Mart's new computerized Management Career Selection system. I was never reinstated to a Store

Manager position. I learned that many of the Store Manager positions that I applied for went to men with equal or lesser qualifications than I had. In 2000, Richard Bourget was chosen over me for promotion to Store Manager in Scarborough, Maine. Mr. Bourget had only three years' experience as an Assistant Manager and nine months' experience as a Co-Manager. I had four years' experience as a Store Manager and six years' experience as an Assistant Manager. Also, In 2000, John Clifton was chosen over me for promotion to Store Manager in Salem, Oregon, even though Mr. Clifton had only five years' experience as an Assistant Manager and less than one year's experience as a Co-Manager. Also, in 2000, James Sexton was chosen over me for promotion to Store Manager in Edmond, Oklahoma, even though Mr. Sexton had only four years' experience as an Assistant Manager and two years' experience as a Co-Manager. Also in 2000, Michael Kelly was chosen over me for promotion to Store Manager in Vancouver, Washington, even though he had only two years' experience as a Store Manager.

16. I also saw male employees, who had been demoted or terminated for more serious misconduct than I had been accused of, granted promotions in violation of the 90-day rule. For example, Mr. Schamber, the District Manager who had demoted me, was terminated for fraternizing with a female Store Manager shortly after my demotion. He applied for and received the position of Store Manager at a store in Vancouver, Washington, even though fewer than 90 days had passed since his termination. I had just passed the 90-day mark, and I also applied for that Store Manager position. I never received an explanation as to how Mr. Schamber had access to

the Management Career Selection system during a period when he was not a Wal-Mart employee.

17. In total, I know that men with equal or lesser qualifications than I had received most of the Store Manager positions I applied for via the Management Career Selection system. I never received any information about why I was not chosen, other than a form letter via Wal-Mart's internal e-mail system stating that another applicant had been offered each position. During this time period, my evaluations were consistently "above standard" or "exceeds expectations."

18. After my demotion, I worked as an Assistant Manager in Yakima for one year. In approximately 2000, Store Manager Shannon Horton (male) asked District Manager Don Schulties, in my presence, why I had not been promoted to Store Manager. Mr. Schulties replied, "Home Office won't let me re-promote her." When I heard Mr. Schulties' comment, I finally realized that I was unlikely to ever regain a position as Store Manager. However, because I was the sole wage earner for my family, I continued to work at Wal-Mart for another two years as Grocery Co-Manager. During that time, I continued to use the Management Career Selection system to apply for Store Manager positions, but I was never promoted to Store Manager.

19. In January 2003, District Manager Dennis McMillan told me that he was assigning me the position of Co Manager of Softlines and the Front End in addition to my existing position of Grocery Co-Manager. No raise was included with this "offer." To me, the message was clear: I was qualified to do all the difficult work of store management, but I was not

ever going to obtain a promotion back to the level and salary rate of Store Manager.

20. I left Wal-Mart in late January 2003, out of frustration with Wal-Mart's failure to promote me. I am a Store Manager at Fry's Grocery in Arizona.

21. In my 16 years at Wal-Mart, I never worked with a female Store Manager, and I only knew of one other female Store Manager. I never worked with or knew of any female District Managers.

22. I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Arizona that the foregoing is true and correct.

This Declaration was signed by, me on April 18, 2003 (month and day), 2003, at Phoenix, Arizona (city and state).

/s/ Barbara Steele
Barbara Steele

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES,
PATRICIA SURGESON,
CLEO PAGE,
CHRISTINE KWAPNOSKI,
DEBORAH GUNTER,
KAREN WILLIAMSON
AND EDITH ARANA, on behalf of themselves and all others similarly situated,

Plaintiff,

vs.

WAL-MART STORES, INC.,

Defendant

Case No. C-01-2252 MJJ

DECLARATION OF SANDRA STEVENSON IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I, Sandra Stevenson, declare:

1. I make this statement on the basis of my personal knowledge, and, if called as a witness, could and would testify competently to the facts herein.

2. I am a 50-year old woman who worked at the Sam's Club in Gurnee, Illinois from November 1996 until June 2000. I currently am employed with the United States Postal Service where I work part-time as a substitute mail carrier.

3. When I joined Sam's Club, I intended to stay with the company until I retired. I thought it was a place where if I worked hard and performed well, I would advance and succeed in the company. My experience, however, reflected a different reality.

4. My first assignment at Sam's Club was in the position of cashier. I worked as a cashier for approximately six weeks and then requested to be transferred to the night shift where I worked as a receiver. I did this so that I could earn additional income during the day by painting and wallpapering homes. Furthermore, the night shift paid $ .50 more per hour.

5. In approximately October 1997, it became apparent to me that women were not welcomed in management positions, as I observed the lack of women in management. Most of the managers in the Gurnee store were men and it was referred to as the "Boy's Club" by women who worked in the store as well as women who worked at other Sam's Clubs in the area. I continued to work hard in the hopes that I could somehow get past the obvious limits on women's advancement opportunities in the store.

6. In the fall of 1997, management decided to fill the position of overnight supervisor, which had been open for several months. The job was not posted and I heard about it through word of mouth. The acting General Manager James Allen, Grocery Team Leader Aaron Tinsley and Team Leader Lauren Young Loderek informally interviewed me after I verbally expressed interest in the position. I was promoted to overnight supervisor in approximately December 1997.

7. In mid-to-late1998, I repeatedly verbally expressed my interest in becoming a manager to General Manager Poulin, Merchandise Manager Roberts and Merchandise Manager Brent Fairmen. I received no meaningful response.

8. In the spring of 1999, it was apparent to me that if I wanted to be promoted I had to transfer to

the day shift. I informed Acting General Manager Orences Christian and Merchandise Manager Jennifer Glowiak that I wanted to transfer. Despite my continued efforts to be promoted, I observed that male partners were being promoted to positions for which they were not qualified or for which they were less qualified than I. For example, in approximately October or November 1999, I observed as Acting General Manager Orences Christian told Jonathan Williams, a stocker in the freezer/cooler area that he would make a good team leader in the produce area. Mr. Williams had no prior experience in the department and no supervisory experience. I was very upset that Acting General Manager Christian had not offered the position to me even though he was aware that I wanted to transfer to the day shift and wanted a promotion. I pulled him aside to discuss this. His response was, he was sorry, but he did not think I would be interested in that position. I was quite upset with his response and stated that I would be the judge of that, and furthermore, I was interested in any position that would be or lead to a management position. Not surprisingly, Mr. Williams did not stay in the position for very long and, eventually, resigned from the store.

9. Also, I watched as male employees including David Jordan and Kelly Walker were groomed for management while I was at a complete standstill despite my supervisory experience and obvious interest in promotion. Kelly Walker was promoted to Team Leader for Hardlines in 1999 although he had only worked in the Tire Mounting Area and had no prior experience in Hardlines. He was, eventually, selected for New Coach Development, Sam's Club's management training program. Kelly's brother, Randy Walker, whom I had supervised when he worked

overnight, was promoted to the Team Leader for the freezer/cooler section although he had no prior supervisory experience in the area. I was not offered any of these open positions despite my prior experience as overnight supervisor and obvious interest in promotion.

10. At the end of 1999, or the beginning of 2000, a Produce and Floral Team Leader position was available. It was not posted and I verbally expressed interest in it to Merchandise Manager Jennifer Glowiak. I told her that I wanted to be the next Produce Team Leader or Produce Manager, that I had worked hard to become overnight supervisor and that when I started with Sam's Club I had planned to retire from the company. I also informed Merchandise Manager Glowiak during a meeting in January 2000 that either I would be considered for the Produce Team Leader position or I was going to leave the company. A few days later, Merchandise Manager Glowiak called me at home on my day off to offer me the Produce and Floral Team Leader position.

11. After I transferred to Produce, and Floral Team Lead in January 2000, Merchandise Manager Glowiak informed me that that I needed to become familiar with the department and how it ran in order to be promoted to Produce Manager. She also told me that General Manager Todd Christian and Fresh District Operations Manager Brian Grossi would make the decision about whether to promote me to Produce Manager. Shortly after I transferred to produce, it was apparent to me that management had no intention of promoting me to Produce Manager. Whenever I asked a manager about promotion to Produce Manager, I, again, got the runaround. Mer-

chandise Manager Lauren Loaderek joined the management team in February 2000. She told me in the spring of 2000 that the decision to promote me was up to Fresh District Operations Manager Grossi and General Manager Christian. General Manager Christian said it was up to Fresh District Operations Manager Grossi and District Operations Manager Greene. Every time I attempted to talk to a manager in the store, each would direct me to speak with someone else. No one seemed to be able to give me a straightforward answer.

12. In late spring of 2000, once again, I repeatedly expressed my interest in becoming promoted to the position of Produce Manager. I called District Operations Manager Greene on the telephone to exercise the Open Door Policy. However, Mr. Greene never returned my call. I was also discouraged from using the Open Door when Area Bakery Manager Dave Ashmore advised me not to go over General Manager Christian's head. I performed many of the responsibilities of Produce Manager while I was in the position of Produce and Floral Lead. The department was seriously understaffed and at times I was forced to work off the clock to complete my job duties throughout the time I was team leader. Despite this obstacle, I was able to increase the department's percentage of total store sales and led a company-wide contest in the sale of oranges for a number of weeks.

13. Despite these accomplishments, management continued not to support me in my efforts to perform my job duties as team lead. On a holiday weekend, when there was a great deal of produce to stock General Manager Christian fired the only employee I had in the department. Mr. Christian did

not discuss it with me prior to firing the employee and made no effort to find a replacement for him. I was forced to load the produce myself and worked off the clock with management's knowledge to get the job done. The incident was particularly frustrating and upsetting because I had been scheduled to attend the wake of a family member, which I was forced to miss in order to complete loading produce.

14. I finally had gotten the message. Management would not support or encourage me in my goal to join management. On June 21, 2000, I resigned from Sam's Club.

15. During my employment at Sam's, open positions were not posted. The only time I can recall any position being posted were the two instances in which I posted for open positions in produce and floral when I was team lead. In all other instances, open positions were communicated by word of mouth.

16. I also worked in the Evanston Sam's Club in the latter part of 1999 and the Vernon Hills Club in 1999 temporarily. I had the opportunity to observe how each one operated and observed that they operated the same way as the Gurnee Club.

I declare under penalty of perjury of the laws of the United States and State of Illinois that the foregoing is true and correct.

This Declaration was signed by me on April 23, 2003, at Lake County.

/s/ Sandra Stevenson
Sandra Stevenson, Declarant

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, KAREN WILLIAMSON, on behalf of themselves and all others similarly situated, Plaintiffs vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF ANNA STUMPF IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Anna Stumpf, declare:

1. I have personal knowledge of the facts contained in this declaration and, if called as a witness, am competent to testify to those facts.

2. I grew up in Versailles, Missouri, the site of one of the original five-and-dime stores run by Bud Walton. Wal-Mart and particularly the Walton family were very important in the town. As children, my classmates and I were excused early from school if Sam or Bud Walton came to town. Several family friends were employed by Wal-Mart.

3. I obtained a bachelor's degree in Marketing from Southwest Missouri State in 1993. I was recruited on campus by Wal-Mart for the Assistant Manager training program and started work on May

17, 1993, three days after my college graduation. I was very excited for the opportunity because I had seen Wal-Mart grow from a local business in my hometown to a retailer of national importance. My parents were also very proud that I was going to work for Wal-Mart.

4. I understood from the outset of my employment with Wal-Mart that I was expected to be 100% relocatable, meaning that I might have to move anywhere in the United States at any time. Since 1993, I have been assigned to nine different locations in four different states (Missouri, Florida, Virginia and Kentucky). I was also sent at various times to do short-term store set-ups and clean-ups at stores in Tennessee and North Carolina.

5. From the time I was hired, my goal was to advance as far as I could within Wal-Mart management. I was initially interested in becoming a store manager and, later, developed an interest in becoming a Regional Personnel Manager. Because of my strong work ethic, good people skills and consistently excellent reviews, I believed that I could reach these goals. For eight years, I sacrificed many important things in my life – a stable home and community, friends and family – for Wal-Mart. For example, I could not attend holidays with my parents and extended family and I missed the funerals of a number of friends and family members. I was unable to join and participate in any church where I lived because of my long hours, weekend schedule and frequent moves.

6. At the beginning of my tenure with Wal-Mart, I trained for four months in the Osage Beach, Missouri Wal-Mart store and was made an Assistant Manager in the store in October 1993. I was trans-

ferred in March 1994 to a Jacksonville, Florida store. During the year that I was there, the Jacksonville store went through a remodel, the holidays and inventory. During one period, I worked 63 overnights in a row (a minimum 12-hour shift) without a day off. When I was not working in my own store, I was often called in to help on my day off with the remodeling in neighboring Wal-Mart stores.

7. I received a "meets expectations" rating on my evaluation in February 1995. However, District Manager, Charles Durr, told me that my performance was "above standard," but that I had not been an assistant manager long enough to receive anything above a "standard" rating. The size of my raise was determined by the evaluation rating. I wrote on my evaluation that "I hope to eventually go on to Supercenters - and have my own store within four years." Attached hereto as Exhibit A is a true and correct copy of my February 1995 evaluation.

8. In May 1995, I requested a transfer back to Missouri, preferably to a supercenter where I felt that I could best advance my career. I was placed in a Jefferson City, Missouri supercenter. When District Manager Durr learned of my impending move to Missouri, he told me that he would have given me the above standard rating had he known he would not be paying me for the entire year. In other words, Mr. Durr made it clear to me that he underrated my evaluation in order to lower payroll expenses in his district despite his recognition that I was performing at a higher level and deserved higher pay.

9. My district manager in Jefferson City was Charles Benzoni. A few weeks after I arrived, he approached me on the sales floor to talk. He told me that I was one of the hardest working, most talented

assistants that he had but also that I was the lowest paid assistant manager in the district. He arranged for a pay adjustment for me, although I do not know whether the adjustment brought me to a pay level that reflected the quality of my performance or was equal to my male peers.

10. In March 1996, I interviewed at the Wal-Mart Home office for a position as Regional Trainer. I received the position and was required to relocate to Brooksville, Florida, although I was considered a Home Office employee. As a Regional Trainer, I was responsible for conducting field training programs for Assistant Managers and other store managers, primarily the 3 1/2 day Leadership Foundation training. This training program, developed in the Bentonville headquarters, had a standard curriculum and was administered company-wide. I was required to make a two-year commitment to the position. During this time, I became interested in obtaining a position as a Regional Personnel Manager.

11. While working as a Regional Trainer, I received an "exceeds expectations" performance rating in March 1997. About my personal goals, I wrote: "This time next year my goal is to be a co-manager in a Supercenter, a step toward my ultimate goal of becoming an RPM for the Supercenter division." Attached hereto as Exhibit B is a true and correct copy of my March 3, 1997 evaluation.

12. As a regional trainer, I became acquainted with Regional Vice President Leroy Schuetts and I discussed with him my career goals at Wal-Mart. I considered this new relationship to be extremely important for me because I had always understood the importance of having a mentor in a corporation to help guide one's career. I felt that Mr. Schuetts was

willing to give me this help. I told him that I had become interested in the Regional Personnel Manager (RPM) position. He urged me to get back into store management if I wanted to meet my goal.

13. At Mr. Schuetts' recommendation, I accepted a temporary position as a Co-Manager in the Kissimmee, Florida store in September 1997. Mr. Schuetts wanted me to work there through the holidays and then move to a store in Valdosta, GA that was slated to open. I was designated a "Co-Manager in Training" in Kissimmee although I was doing the same work as the other co-managers and was in no sense in training. In my past experience, the position of Co-Manager in Training was ordinarily used only for brand new management employees to Wal-Mart, which I plainly was not. I learned that I had been given this designation so that I would be paid out of the Home Office training account rather than the store account. As a result, the store would show higher revenue figures (ensuring the bonuses for existing store managers) but I would not receive a bonus as all the other male Co-Managers in the store did. It also put me at a disadvantage later in my career in applying for store manager positions, which often carried a requirement that one have first completed 12 - 18 months as a Co-Manager. I am not aware of any male employee in a comparable position that has been designated a "Co-Manager in Training."

14. After a month in Kissimmee, I was moved in November 1997 to Plant City, Florida as a third Co-Manager. Regional Vice President Bob Erickson told me that the store was in bad shape because the store manager had just been fired and the holidays were fast approaching. Leroy Shuetts, who had now

been promoted to Divisional Vice President, told me that the Plant City assignment would be temporary and that I would soon be placed in a newly opening store in Valdasta, Georgia. I still had the Co-Manager in Training designation and was not entitled to receive a bonus, although I was working 70 to 80 hours per week.

15. I prepared and submitted comments in connection with my performance evaluation (which once again was "exceeds expectation") about the unfairness of the "in training" designation. I stated in part: "I feel that for the five months that I was left in the Co-Manager training account I was not utilized to my potential, challenged or developed in an effective manner. . . . decisions and placements done in dealing with my career this year have put me at a disadvantage." Attached hereto as Exhibit C are true and correct copies of my evaluation and my comments. My district manager, Guy Peshek, strongly encouraged me not to include these comments with my evaluation, which he implied would hurt my image in the company. He also suggested to me that the comments were unnecessary and would not make any difference. To me, this was a clear message that the Open Door Policy was not intended for use by managers and that using it might, in fact, be perceived negatively.

16. Just after the holidays, I learned from my Regional Personnel Manager and my Regional President, Bob Erickson, of an opening for a Regional Personnel Manager. Knowing my keen interest in the position, they submitted my name for consideration, after consulting with Leroy Schuetts. Several weeks went by and I did not hear anything about my application so I faxed a letter to Maxie Carpenter, who

was the hiring authority for the position, on January 19, 1998. I still heard nothing so, on January 23, I telephoned Mr. Carpenter. He told me that I was ineligible for the position because I had not "run a store," meaning that I had not been a store manager. Within weeks of my conversation with Carpenter, I learned that an RPM position went to a male employee, Joshua Ramsey, who ran the documentation department in the Home Office. Mr. Ramsey had never served as a store manager.

17. In February 1998, I was making plans to move to Valdasta, Georgia when I received a call from the new Regional Vice President Arthur Emmanuel. He told me that the company needed me to stay at the Plant City, Florida store. Mr. Emmanuel felt that the troubled store was "turning around" and he needed me to stay there. Perhaps recognizing the difficulty of the assignment, Mr. Emmanuel promised me that I would have my own store (e.g. be promoted to store manager) by the end of 1998 or beginning of 1999. He reassured me that I was a Rising Star in the region and on the promotable list.

18. In August 1998, I attended the company-wide holiday meeting and ran into Divisional Vice President Leroy Shuetts. Mr. Shuetts assumed that I had gone to Valdasta, Georgia but I told him that I was still in Plant City. He told me that Wal-Mart was opening a store in Lexington, Kentucky and he wanted me to move there as a third co-manager to assist with the opening. He then said: "you'll have your own store right after we open this one, we've moved you around enough and if you can help us, we'll take care of you." I subsequently received a call from the RPM over the Kentucky store, Debbie Moody. She advised me that DVP Shuetts and the

RVP for the store, Bill Dillehea, had talked and agreed that there would not be a third co-manager in the store after the first of the year, and that I would then be promoted to store manager.

19. In September 1998, I moved to the Lexington, Kentucky store and assisted with the enormous effort of opening the store. I was not promoted to a store manager position after the first of the year, as had been promised. In January 1999, I checked the MCS job posting system for store manager openings. I found an opening at a supercenter in Venice, Florida. As required, I sought and received the approval of my district manager, Gerry Gant, before posting. I also spoke to Divisional Vice President Schuetts, who encouraged me to post and described the position as a "perfect first store."

20. After posting, I did not hear anything and telephoned the RPM in Florida, Steve Schulteis. He told me that I could not be interviewed because RVP Bill Dilleahea had entered a "no" recommendation next to my name (i.e. vetoed my application). I was outraged and telephoned RPM Debbie Moody to find out the reason that Mr. Dillehea was standing in the way of my promotion. Ms. Moody advised me that Mr. Dilleahea would not move any of the managers out of the Lexington, Kentucky store for six months after the opening, precisely the opposite of what I had been told before moving to Kentucky, four months earlier.

21. I telephoned Mr. Dillehea in early February to discuss it. Wal-Mart policy (the "Sundown Rule") requires management to return phone messages from customers and employees on the same day that they are received. He did not return my call for over a month. Attached hereto as Exhibit D is a true and

correct copy of the chronology of key events that I kept on my computer.

22. Before I heard from Mr. Dillehea, however, I received my written performance evaluation for 1998, which was again very high (4.1 - exceeds expectations) based on the excellent turn-around work that I had done in Plant City. While the evaluation had been prepared by the district manager over the Plant City store, Greg Ley, Mr. Gant told me that he wholeheartedly agreed with its strong endorsement. Attached hereto as Exhibit E is a true and correct copy of the performance evaluation dated February 19, 1999.

23. Despite the very high score, my district manager, Jerry Gant, then changed his tone and told me: "I am supposed to tell you that you are not promotable and do not post." Mr. Gant then read to me from a list provided to him by Debby Moody (RPM for Bill Dillehea) of three areas in which I purportedly needed to improve (i.e. get organized, be more firm, hold myself accountable, take on a mentor). Ironically, these were the three key areas of strength identified in the written performance evaluation that Mr. Gant had just given me. Mr. Gant could not offer any examples of inadequate performance on my part and, to his credit, he told me that he did not agree with the list. I was told not to post for store manager openings for six months and not to call Leroy Schuetts to express interest in being promoted. I told Mr. Gant that I felt that I had been lied to and that "the Open Door had been closed." Mr. Gant told me candidly that he agreed with me and that he would support me if I took further steps because he did not feel that I was being treated fairly.

24. RVP Dillehea finally returned my phone call on March 9, 1999. He told me that he would not put me on the promotable list and there were many others ahead of me on his list, people that he had known longer and to whom he "owed favors." I objected that I was already on the promotable list and he responded: "not in my region." He encouraged me to move laterally out of his region. I knew from my past experience that there were not different promotable lists by region. Rather, the promotable list was company-wide and was maintained on a wall in the Home Office. It was plain to me that Mr. Dillehea was not willing to consider my promotability based on the merits and that he was willing to lie to ensure that his candidates got preferential treatment.

25. Within weeks of my March 9, 1999 conversation with Mr. Dillehea, two male assistant managers in the Lexington, Kentucky store (William Cotton and Tony Bryant) were offered promotions and/or allowed to promote out of the store, despite RVP Dillehea's alleged six month-prohibition on any moves.

26. On March 24, 1999, I telephoned Divisional Vice. President Leroy Schuetts to complain about the inequitable treatment that I had received. I specifically told him that I felt that I had been the subject of discrimination. He asked me to write a letter explaining my concerns. Attached hereto as Exhibit F is a true and correct copy of the letter that I faxed to Mr. Schuetts. I met with Mr. Schuetts and Mr. Dillahea on April 12, 1999. That meeting took place face to face because, after reading my letter, Leroy Schuetts said that my story did not match the one that Mr. Dillahea was telling and he wanted to get us both together. At the meeting, RVP Dillahea made it clear that, while I was welcome to stay in the region,

he would not promote me. Mr. Schuetts asked me to move temporarily to Raleigh Durham, North Carolina (outside of Mr. Dillahea's region) to once again clean up a group of troubled stores there. Recognizing I had no future under RVP Dillehea, I once again acquiesced to the move. I stayed five weeks in a hotel while working without days off to complete a remodel on the store. I had planned to attend my 10-year high school reunion and had paid for reservations and a plane ticket for the event. I could not attend because of the assignment in North Carolina.

27. I was then assigned as a co-manager to a supercenter in Virginia Beach, Virginia which Schuetts told me was "the best store in the division." He told me that every co-manager in that store had been promoted within six months. After the first of the year, Divisional Vice President Leroy Schuetts told me that he would call me and tell me which store to post for: "sit tight and we'll find you the right fit."

28. In January 2000, Schuetts called and told me to post for a store in South Boston, VA. I understood by the RPM Josh Ramsey that it was a "difficult ethnic store" but I went ahead and posted. At approximately the same time, I learned of a store manager opening at a store only two miles from the Virginia Beach store (Store 1688). While the store had also had some problems, I felt that I had a good chance of obtaining this store because I was known to and respected by both my District Manager Chad Madison and the Regional Vice President Dave Norman. I applied on MCS for the position in Virginia Beach.

29. I once again received an "exceeds expectations" ranking on my February 2000 evaluation. I had become, however, extremely frustrated with the

continuously shifting requirements and obstacles to my promotion. For so many years, I had done whatever Wal-Mart asked of me without complaint – whether it be to work 80 hours a week or months without a day off. I finally began speaking up for myself to senior management and objecting to the unfair treatment that I received. My store manager and district manager criticized me for being "too impatient" and "too emotional." I feel that, had I been a man, I would have been seen as aggressive and hard-driving. Instead, the expectation that was communicated to me was that I should sit quietly, be patient and not question even if the most egregiously discriminatory treatment.

30. On March 15, 2000, Regional Vice President Norman called to tell me that I had not been selected for the Store 1688 position in Virginia Beach. He told me that, while I was "more qualified" than the male who was selected for the position, the employees in the store wanted this individual who was a current co-manager there. It is unheard of at Wal-Mart that the employees in a poorly performing store would be allowed to select their manager. Since the employees in that store had never met me, I had no chance to compete for their endorsement. I responded: "so, I lost the popularity contest?" I told Mr. Norman that I had been waiting for four years for "a store manager position and I would no longer do what was the easy thing for Wal-Mart. I would no longer pick up and move to yet another troubled store based on some vague promise of future advancement. At that point, I concluded that I would never receive fair treatment at Wal-Mart nor could I expect to advance further.

31. Shortly thereafter, I accepted a position as the District Manager of Shoes and Jewelry in Indi-

anapolis. Based on observation and knowledge, this position is held almost exclusively by women. My salary was $55,000, far less than I would have made as a store manager. Moreover, the Shoes and Jewelry DM position was subject to a salary cap while there was no such limit for store manager compensation. I held that position until recently, when I decided that I wanted to go become a school teacher. I am now back in school full-time and work as an hourly employee for Wal-Mart in Store 1141 as a training coordinator.

32. I have never been involved in a lawsuit before. I decided to become a witness in this case after I heard Wal-Mart's CEO Lee Scott give a speech shortly after this lawsuit was filed. He claimed that the "Open Door" policy could handle any discrimination problems at Wal-Mart. I honestly did not understand how Mr. Scott could stand in front of us and make this statement that he surely knew was untrue. Based on my own experience, I disagreed with Mr. Scott. As my declaration makes clear, I had used the open door many times but I was unable to get a promotion to store manager.

33. As an assistant manager and co-manager, I worked with other store management to identify candidates for the Management in Training program. In deciding which individuals to recommend, we always discussed whether the candidate was "relocatable." If they were not relocatable, they would not be recommended for the training program.

34. As an Assistant Manager, I was frequently moved from one store to another on short notice. It took very little time to assimilate into the new store because every Wal-Mart store operates with the same set of policies, equipment, staff and procedures.

35. During my career, I worked in both Division 1 stores and supercenters. The difference between them is that the supercenters have additional departments for grocery, dairy, bakery and meat, which are not in Division 1 stores. However, I was trained to use the same Wal-Mart personnel policies and practices in the supercenters, whether hiring, promoting or disciplining employees, as were used in the Division 1 stores. The responsibilities of Assistant Managers in both stores are the same. Since 1996, the company has made a conscious and concerted effort to eliminate any organizational differences between Division 1 stores and supercenters. Management level employees regularly transfer between them and local districts include both kinds of stores. Finally, there was one Wal-Mart culture that we consistently taught to associates, regardless of the kind of store that they worked in.

I declare under penalty of perjury of the laws of the State of Indiana that the foregoing is true and correct.

Executed this 25th day of March, 2003 in McCordsville, Indiana.

/s/ Anna Stumpf
Anna Stumpf

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF PATRICIA SURGESON IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Patricia Surgeson, declare:

1. I am a named plaintiff in this action. I worked at the Wal-Mart Store in Vacaville, California from August 1997 until March 2001. I am female and live in Vacaville, California.

2. I was hired to be a cashier/stocker in the Tire and Lube Express department ("TLE"). Within my first month working in TLE, a male co-employee Patrick [last name unknown] approached me when I was on a ladder and grabbed my buttocks. I yelled at him and was very upset. Patrick had previously made inappropriate comments to me, including offering money to me to have a baby with him. He frequently tried to touch me. I went to Kevin [last

name unknown], the male Support Manager who was my immediate supervisor, and complained about Patrick's actions. As a result of my use of the Open Door, I was transferred to another department, although I liked working in TLE and would have chosen to continue there. I was not given an option. Patrick was not transferred, but instead was permitted to keep his position in TLE. I continued to see Patrick in the breakroom. To my knowledge, no investigation of Patrick's misconduct occurred. Patrick was not disciplined to my knowledge.

3. I was transferred to the Toys Department for one day and then to the Health and Beauty Aids Department ("HBA") where I was a sales associate for over a year, until November 1998. I did not participate in any additional orientation process to move from TLE to the Toys and HBA departments.

4. In my first annual review in July 1998, I was rated as "above standard," a hard worker and a team player. Attached hereto as Surgeson Exhibit A is a true and accurate copy of this review.

5. As my confidence and skills grew, I began to look for opportunities for advancement at Wal-Mart. I wanted to take the next promotional step and began looking for a chance to be a department manager. I applied for department manager positions that were posted as available. I did not receive any of these positions. In late 1998, when I was denied a promotion to a department manager position for which I had applied, I asked Store Manager Allen Becker for an explanation. Mr. Becker responded by telling me that there was a position in the Lay-Away Department that would be soon available, and offered it to me. It had not been posted. I accepted and began training in that position shortly thereaf-

ter. I understood that eventually I was to be made the Department Manager of Lay-Away.

6. I moved to the Lay-Away Department in November 1998. After I was in that position for approximately six months, I spoke with Store Manager Allen Becker about my future. Mr. Becker offered me the position of Lay-Away Manager, as the current manager was leaving. The position had not been posted and I did not fill out an application. I accepted the position. I had new responsibilities, including supervising and giving direction to other workers in the department, preparing the paperwork for the department, and ordering supplies. I wore a name tag that identified me as "Lay-Away Manager." When I needed employment confirmation as I moved into a new apartment, the personnel office at Wal-Mart confirmed that I was Lay-Away Manager.

7. A new Store Manager, Marvin Raps, replaced Mr. Becker in October of 1999. Mr. Raps told me that the Lay-Away Department did not need a manager and that I would continue with the same responsibilities but without the title.

8. In the summer of 2000, I moved to the Cash Office as I believed it was a step up in my career. When Store Manager Marvin Raps told me I was being given the position, he told me it was a confidential position with a lot of responsibility as I would be handling a great deal of cash. Despite this increase in responsibilities and my good performance, I received no raise with this move. I made a written request for a merit increase, but received no response. I asked Assistant Manager Rod Couture for an answer to my request, but just received promises that he would look into it. I did not receive an increase and was never given a reason from any manager.

9. After I moved to the Cash Office, a male associate named B.J. Jawanda was moved to manage the Lay-Away Department Because I was in the Cash Office at the time, handling payroll, I saw Mr. Jawanda's direct deposit pay stub when he replaced me in the Lay-Away Department. Mr. Jawanda was paid approximately $2.00 an hour more than I was in the Lay-Away department for doing the same job.

10. In January 2001, I asked a young male Assistant Manager Trainee, Adam Kingsley, how to get into the Management Training Program. He told me that he had been recommended by his Store Manager, when he had been at a different store. He provided no further information. His response was vague. I knew of no other means of entry to the Management Training Program and had never seen anything in writing about management training. There was never a posting that I saw by which I could have expressed my interest in joining management.

11. While I was in the Cash Office, I saw the payroll of all employees. I saw that male department managers in garden and furniture were paid more than female department managers. I saw that my hourly wage was lower than men who had been hired after me and did not have the significant responsibility that I had.

12. In March 2001, I quit my employment at Wal-Mart because it was apparent my talents and contribution to Wal-Mart were not appreciated. Seeing that male employees were paid more for the same job, and experiencing that discrimination first-hand with the Lay-Away Manager position, made me believe I would never be treated with equality. My efforts at promotion had been brushed aside. I be-

lieved I would be forever stuck in a dead-end job and denied the opportunities for growth and increasing responsibilities. I found another job immediately. I was hired as an Assistant Manager at a small clothing store, where I was paid slightly more.

13. I decided to become a named plaintiff in this action because I have been unfairly denied promotional opportunities and equal pay. A man doing the same job that I had done was paid more. My requests for raises were ignored and my effort to learn how to enter the Management Training Program was summarily brushed aside. My primary goal is to ensure that the employment practices at Wal-Mart that hinder the progress of women wishing to enter management be changed, to ensure fair and equitable treatment of female employees. I understand the responsibilities of a named plaintiff and I am prepared to fulfill my duties to the women in the class.

14. I filed a Charge of Discrimination with the Equal Employment Opportunity Commission on or about May 31, 2001. I brought the charge on behalf of myself and similarly situated women who receive less pay, promotions and training than male employees. A true and correct copy of this charge is attached hereto as Surgeson Exhibit B. I received a Notice of Right to Sue, a true and correct copy of which is attached hereto as Surgeson Exhibit C.

15. I have personal knowledge of all of the foregoing facts and if called as a witness could and would testify competently thereto.

16. I declare under penalty of perjury of the laws of the United States and the State of California that the foregoing is true and correct. Executed this 17 day of April, 2003 in Vacaville, California.

/s/ Patricia Surgeson
Patricia Surgeson

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant.	Case No. C-01-2252 MJJ **DECLARATION OF DAWN SWEENY IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Dawn Sweeny, declare:

1. I have personal knowledge of each and every fact set forth in the Declaration, and, if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

2. I have worked at Wal-Mart for approximately 10 years. I am female.

3. I began working for Wal-Mart, Inc. on May 25, 1993 as a Bakery Associate in the Stillwater, Oklahoma store. I am currently a Co-Manager at Store 3285 in Cedar Hill, Texas.

4. During my tenure at Wal-Mart, I have worked in seven different stores throughout Okla-

homa and Texas. In all stores in both states, I received information from a centralized computer system, also called the Store Manager's Workbench. Store Managers and Co-Managers only have access to the Workbench. From these tools, I have discerned that personnel policies and practices in the stores relating to compensation, promotion, discipline, and training are the same.

5. When I started in Stillwater, Oklahoma as a Bakery Associate, I was paid one dollar less than a man whose name I no longer recall. We were hired for the same position and received training at the same time. Neither of us had prior experience.

6. While in Stillwater, I was denied promotions into management positions repeatedly. In 1994, I spoke a number of times to my Co-Manager, Joe Flack, and my Store Manager, David Mooneyhan, about my interest in becoming a Support Manager. They told me they would consider promoting me. This was before the computer system for expressing interest in a job was in place, so jobs were advertised by word of mouth or, on occasion, sign up sheets were posted. In approximately 1995, I applied for two Support Manager positions by expressing interest on a sign up sheet. I was neither interviewed nor selected for either. Instead two men, whose names I no longer recall, got the positions. I never received any explanation or learned who had gotten the position. Despite my repeated expression of interest in management, I was not offered an opportunity to join the management training program during my first four years at Wal-Mart. I was given no guidance on how to get training and no application forms were made available to me.

7. I left Wal-Mart in 1997 because I could not get promoted into the Management Training Program. In March 1998, a female District Manager, Janet Hatfield, and a female Store Manager, Bonnie Summers, recruited me back to Wal-Mart, offering me a position of Support Manager in the Richardson, Texas store and assuring me that I would be promoted into the Management Training Program shortly.

8. In July 1998, David McKinsey, the District Manager, approved Bonnie Summers' recommendation that I enter the Management Training Program. I trained at Store 1216 in Carrollton, Texas. When I entered the program, my pay was reduced from $13.15 to $10.81 per hour. As a result, my salary was $27,500. I am aware of male associates, Jerry [last name unknown] and Ron Lockridge who were paid up to $40,000 when they entered the Management Training Program.

9. After completing the Management Training Program, I was transferred to Oklahoma City to work as an Assistant Manager at Store 2804. From January 2001 through June 2001, I applied for five Store Manager positions. I applied for the positions through the computerized system, called MCS, and was interviewed for all of them. Four of the positions went to men. I once was notified by e-mail that I had not gotten the promotion. The other times I received no notification and would find out the position had been filled because it no longer was posted as an opening. I followed up with Lisa Heilman, the Regional Personnel Manager in Oklahoma City to ask why I wasn't getting these positions. Ms. Heilman just told me to keep applying.

10. In July 2001, I transferred to a Wal-Mart in Colony, TX as Assistant Manager. There was only one other female Assistant Manager in the store. For the first 2 months, I was a day Assistant Manager and then was scheduled for the overnight Assistant Manager shift. The Store Manager in Colony was a male named Jodie Dean. Store Manager Dean communicated more with male than female Assistant Managers. For example, Store Manager Dean would conduct meetings with male Assistant Managers in his office but did not invite female Assistant Managers to join.

11. On one occasion when I was the only female in a meeting, Store Manager Dean made a derogatory comment about large women and a Co-Manager, Gary Schultz, asked me to leave the room so that he could make a return comment. I refused to leave and the conversation ended. Two other males, Jessie Franco and Doug Richard were also present at this time.

12. In October 2001, I wanted to be promoted to Store Manager and so I contacted Nikki Bayne, my Regional Personnel Manager. Ms. Bayne told me that I needed to become a Rising Star to be eligible for promotion. I contacted Jim Strauss, my District Manager, and asked to be placed on the Rising Star list because of my interest in being promoted. District Manager Strauss came into the store the next day and told me that he would place me on the list. I was given my Rising Star badge that same month. Jim Brasher was the other Overnight Assistant Manager in the Colony store at that time. Mr. Brasher said that he had been surprised a few weeks earlier when Store Manager Dean and District Manager Strauss announced they had put him on the

Rising Star list. Mr. Brasher also told me that he did not have to ask to be put on the list.

13. Rising Star Assistant Managers, Co-Managers and Store Managers are supposed to attend Holiday and Year-End meetings. I was the only Rising Star in my store who was not invited to attend any of the meetings. District Manager Strauss selected Will Baird, Jodie Dean, and Jesse Franco--all men--to attend the meetings. When I learned I would not be able to attend the meetings, I asked my Store Manager Dean to re-consider the decision. Mr. Dean told me there were no slots available. To this day, even as Co-Manager, I have not been invited to attend any Holiday or Year-End meetings.

14. In March 2002, District Manager Jim Strauss told me a Co-Manager position would be available in Colony, Texas. There was a TLE district manager, Greg Epling, who was offered the position prior to me. Mr. Strauss told me that he would offer me the position if Mr. Epling turned it down. After Mr. Epling turned down the position, Mr. Strauss offered the position to me and I accepted. The position was not posted. In fact, previously when I asked about where Co-Manager positions were posted, I was told that they are not.

15. In May or June 2002, District Manager Strauss asked me if I would accept a position as Store Manager of a Neighborhood Market store. I turned down the offer because my salary would have been reduced significantly since Neighborhood Markets are not as profitable as Wal-Mart stores.

16. A couple of weeks later, District Manager Strauss asked me to transfer to Store 3285 in Cedar Hills, Texas as a Co-manager. I felt like I was being forced out of Mr. Dean's store and that if I turned

down the position that I would not be able to progress at Wal-Mart.

17. Now, I earn $45,000 per year. In contrast, Tim Long, the other Co-Manager in my store told me that he earns at least $47,500 annually.

18. Within the past month I have applied to three additional Store Manager positions on MCS, the computerized system and have interviewed for two of them, but was not contacted or interviewed for the third. I am still awaiting the outcome of these but plan to continue applying for Store Manager positions until I reach my goal.

19. I declare under the penalty of perjury of the laws of the United States and State of Texas that the foregoing is true and correct.

This declaration was signed by me on April 16, 2003, in Euless, Texas.

/s/ Dawn Sweeny
Dawn Sweeny

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF ANDREA TALLENT IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Andrea Tallent, declare:

1. I make this statement on the basis of my personal knowledge, and, if called as a witness, could and would testify competently to the facts herein.

2. I was employed by Wal-Mart, Inc. in Franklin in North Carolina, from September 27, 1988 until November, 2000. I am female.

3. I received an AAS degree in accounting in 1976, a diploma in auto mechanics in 1978, and an AAS degree in Paralegal Technology in August 1988. I have an additional 2 years of college education. All of this training was on the initial resume I submitted to Wal-Mart in 1988.

4. Prior to being hired by Wal-Mart, I sold fabric in a retail store from 1983 to 1988. From 1989 to 1990 I owned a store with Glenda Anderson, craft department manger, while also working at Wal-Mart.

5. I was originally hired by Wal-Mart as the fabric department manager because of my retail experience with fabric and crafts.

6. As Stationary Department Manger I received two "Great Job" awards before 1993. One was for sales increase and the other for mark-up increase. These awards are each 1/4 share of stock, from the Regional Manager, I cannot recall his name.

7. After asking several times, I was finally promoted to Support Manager in approximately 1997. The only other position I was offered was Photo manager, a position I held from February to November 2000.

8. I began asking about the management training program for Assistant Manager positions at my initial interview with Roger Smith, Co-manager, in 1988. In Spring 1993 I was sent on a three week setup in Greenville, SC which was extended to sex weeks at the request of the set up supervisor because I was doing such a good job. When I returned I gave John Hay, District Manager, a copy of my excellent evaluation and asked him again about the management training program. I had also requested that the setup supervisor call him and recommend me for the promotion.

9. Mr. Hay offered me the management training position on the condition that I would transfer to a store anywhere in the United States. He did not offer me the option to transfer to the Wal-Mart store

in Sylva, about 18 miles away. I accepted the promotion based on Mr. Hay's conditions with the intention of moving my family. Several days later I told Mr. Hay that I wanted the promotion, but had to decline since I could not relocate further away than the Sylva store due to a change in my home situation. When I told Mr. Hay about the limitation on my ability to relocate, I stepped down from the assistant manager trainee to a position handling competition ads and store signing. Since this was not a classified position I was titled as a cashier. Later on I began running a register full-time when computer scheduling was implemented. I was made Department Manager again just prior to being made Photo Lab Manager in February 2000.

10. The same week that I was promoted and then demoted, Mr. Dahmer was hired as a third shift warehouse Assistant Manager in the Franklin, NC store. Mr. Dahmer told me that Mr. Hay had hired him from McLane's, a supplier bought by Wal-Mart, as a third shift manager with the promise that he did not have to transfer.

11. In 1988 during a department manager's meeting in the old upstairs breakroom, Roger Smith Store Manager, told us at that "men need to be paid more than women because they have families to support."

12. I told district manager John Hay's assistant, Karen Jones, that he had a history of promoting single white men under 30 and it was beginning to become a legal issue. The next day a woman named Mary Beth who worked in softlines in the Franklin, NC store and was promoted to the assistant manager training program.

13. Ken Kribbs and Sharon Kribbs were hired on the same day as sales associates, although they worked as stockers. I was Ms. Kribbs supervisor and she told me Mr. Kribbs was being paid more per hour then she was.

I declare under penalty of perjury of the laws of the United States and of the State of North Carolina, that the foregoing is true and correct. I signed this on April 17, 2003 in Franklin, North Carolina.

/s/ Andrea Tallent
Andrea Tallent, Declarant

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF SANDRA THOMAS IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Sandra Thomas, declare:

1. I make this statement on the basis of my personal knowledge, and, if called as a witness, could and would testify competently to the facts herein.

2. I was employed by Wal-Mart, Inc. in the Norman, Oklahoma Supercenter from April 26, 1999 to August 26, 2000. I am female.

3. I was hired at a wage of $6.15 per hour as a claims manager. I was told by Mike Butts and Stephen Butts that they were hired at the same time that I was, but were paid $8.00 per hour. Based on what Mike and Steve Butts told me, I complained several times to Jack Scott, Co-Manager that I was paid $1.85 per hour less than both Mike Butts and

Stephen Butts when I was doing similar work and neither of us had any retail experience prior to working at Wal-Mart experience. I did inventory control and kept books for years at other companies and Mike Butts told me he ran a forklift and stocked inventory at an office supply company for 8 - 9 months. Mike Butts earned $1.85 per hour more then I earned even though I was required to complete the monthly financial journals for his department because he did not know how to keep the journals. Eventually, about 6 months after using the Open Door policy and complaining to Mr. Scott on several occasions, my wage was increased by $1.25 per hour to $7.40 an hour. Then after my performance evaluation for 2002 I received another increase of $0.61 to bring me to $8.01 an hour.

5. Although my pay was increased to $8.01 per hour after I complained, I was then singled out as a "troublemaker" for having complained. Specifically, Mr. Scott took away my assistant, Sally, who was assigned to my department to help process claims for returned and damaged merchandise. I was her supervisor and I was responsible for the entire department. When Sally was moved from my department, my work load increased dramatically. The merchandise to be returned for credit or damaged merchandise started accumulating in large piles. Mr. Scott and Assistant Manager Mark told me that if I was not able to handle the work they would get someone who could handle it. They indicated they did not care how I did it, I was to just get the work done whether or not I followed procedures. It was unheard of to have one person in the claims department in a store that large and it made it impossible for me to keep up with the amount of work to be completed. I was trained by a friend of Jack Scotts, 30 year veteran of

Wal-Mart, whose name I cannot remember, who told me Supercenters always had at least two people in claims.

6. After being harassed on a daily basis about getting the work done and watching it pile up I told them to get someone else to do it and I would do inventory control. After three days of working inventory control I was told I would be responsible for unloading the trucks in the evening. I knew it would be physically damaging for me to do that kind of heavy work, so I quit rather then risk injury.

I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Oklahoma that the foregoing is true and correct.

This Declaration was signed by me on April 18, 2003, in Washington, Oklahoma.

/s/ Sandra Thomas
Sandra Thomas, Declarant

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF VICKI THORNTON IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, VICKI THORNTON, declare:

1. I worked for Wal-Mart at the Racine, Wisconsin Supercenter from 1998 to 2001. I am female.

2. I obtained a bachelor's degree in accounting from Parkside University in Kenosha, Wisconsin in 1982. Prior to applying for work with Wal-Mart in 1998, I worked for three years as the Store Manager at a Family Dollar Store. I earned $27,000/year and had seven employees reporting to me.

3. In August, 1998, when a new Wal-Mart store was opening in my community, I decided to look into whether there might be a career opportunity for me there. I interviewed with Bill Baumann, the Store Manager, and Matt McKee, an Assistant

Manager. I told them of my background in retail, my college degree, and that I was looking for an opportunity to advance my career. I also told them that I preferred to be hired for a management position because I felt I had the background and experience to succeed, and that I wanted to move up in the company.

4. Store Manager Baumann offered me a position as Department Manager in Chemicals. Baumann promised me that I could enter the manager training program within six months of starting to work at Wal-Mart, but that I needed to start out as a Department Manager. Assistant Manager McKee also agreed that I should be able to enter the manager training program promptly. With the understanding that I would be moved into management within six months, I accepted the Department Manager job at a starting wage of $9.00/hour. I worked 7:00 a.m. to 4:00 p.m., Monday through Friday.

5. Despite their promises, and despite the fact that my annual evaluations during my three years at Wal-Mart always recognized me for exceeding expectations, I did not advance at Wal-Mart. I was never allowed to join Wal-Mart's management training program.

6. I was successful as the Department Manager of the Chemicals Department. I was rated "above standard" on my 90-day evaluation and was given a 5% pay increase. After about five months on the job, Store Manager Baumann asked me move to the Produce Department. He said he thought it would be more of a challenge for me because I had never worked in food or grocery before. As Lead in the Produce Department, I learned my job quickly and performed well. However, after I had been on the

job for a few weeks, I started experiencing sexual harassment from Produce Manager Donnie Gateley. He was constantly saying things to me like, "Can't you wear lower cut shirts?" "You have a nice ass." "Women are put on this earth for one thing. My wife isn't any good at it. Are you?" Or he would hold up a head of lettuce and say, "I've got a head for you." This was any every day thing. The very first day Gateley said these things to me I complained to Store Manager Baumann, but he did not do anything about it. The harassment continued over the next couple of months. I complained to Baumann nine or ten times. I also complained about it to Assistant Manager in Grocery Jeff [Last Name Unknown]. Jeff told me to "grin and bear it." I then complained again to Baumann, and told him what Jeff had said to me, and Baumann just repeated that I should "grin and bear it." To my knowledge, there was no investigation of my allegations of sexual harassment. It was only after I threatened to get a lawyer and sue Wal-Mart that they agreed to move me to another department. In about April, 1999, Store Manager Baumann moved me to Support Manager on the 3rd shift, which was the night shift. Donnie was allowed to keep his job. To my knowledge, he was never disciplined or coached for his conduct. Indeed, I am not aware that anyone in management ever even discussed it with him.

7. I was only Support Manager for a few weeks in 1999. I could not stay in that position either because I was subjected to sexual harassment again, this time by Ron West, the Manager of the Meat Department. He would ask me to come into the cooler with him because he "needed to be satisfied." This time, when I complained to Store Manager Baumann and District Manager Don Breuss, they moved me to

a different department right away. However, again, I observed that West was allowed to keep his job. I became Department Manager in Dairy. Despite all these problems, I continued to perform well. On my first annual evaluation, I was rated as "exceeds expectations" and given another 5% raise. I never complained about the harassment to anyone higher up at Wal-Mart because Baumann and the District Manager said they would take care of it.

8. With each department move, I kept asking Store Manager Baumann, Co-Manager Dean DeBona, and Assistant Managers McKee, Ed Covey and Stewart Coffee to be admitted to the manager training program. Baumann and DeBona always told me that there were no openings in the program. However, I observed that new management trainees were always being assigned to our store and that male employees at the store were admitted to the program. For example, Zeke Radovanovic, a male Department Manager, was admitted to the program in January 2000.

9. I ran the Dairy Department for about a year. In the summer of 2000, I received another "exceeds expectations" performance evaluation and another 5% raise. Nonetheless, at about the same time, Store Manager Baumann moved me from Dairy and made me a stocker in Lawn and Garden. He left my pay alone, but he changed my title from Department Manager to Sales Associate. I objected to him that this was a demotion and definitely a move in the wrong direction. Baumann told me not to look it at that way, and that he "had other plans for me." Store Manager Baumann then gave the Dairy Department Manager position to Brian Frederickson. Brian had been running the Dairy Department for the year be-

fore I took over, but stepped down because he said it s too much pressure. Store Manager Baumann told me that Brian had asked for the position back and that is why he had to move me.

10. After about two months in Lawn and Garden, Store Manager Baumann moved me to Seasonal. There, I had Department Manager responsibilities, but my title was still Sales Associate. Baumann told me he would change my title back to Department Manager, but before he had a chance to do this, he was transferred to a Wal-Mart store in Arkansas. Store Manager Heather Nutini succeeded him. I told her that Baumann had been planning to restore my Department Manager title. She told me she was not going to do it. She refused to give me a reason. For the next nine months, Nutini moved me back and forth between Seasonal and cashier. For the next year, I applied for every Department Manager position that was posted, but I was only interviewed once.

11. In the summer of 2001, I again received a performance evaluation rating me as "exceeds expectations" along with another 5% raise. When I asked Store Manager Nutini in about June or July of 2001 whether there were any openings in the management training program and whether I could apply, she told me there were no openings. Just weeks later, I was told by a male employee in our store, Brian Yust, who was Department Manager in Frozen Foods, that he had been admitted to the program. He had been at Wal-Mart less time than I had. He told me that he had no prior grocery experience before coming to Wal-Mart, but wanted to get into a new profession. He had gotten all of his training from me and the other department managers.

12. I never saw any postings for openings in the management training program and I knew of no way to get admitted to the program other than through the Store Manager. I believe I was not admitted to the program because I am female. In all the time I was at the Racine Supercenter, I only saw one woman admitted to the training program – Beverly Graves. All the other trainees that I observed were male.

13. In June 2001, I became aware of this lawsuit and contacted the plaintiffs' lawyers because I believed that I had been excluded from the management training program based upon my gender. Less than two months later, on September 11, 2001 and with no prior warning whatsoever, I was paged to the office in the middle of my shift and terminated for "gross misconduct." Store Manager Nutini said I had "stolen time." She said that I had punched in about a half hour before the start of my shift several days earlier. I was terminated on the spot. The story was completely fabricated. This was two months to the day after I had contacted the lawyers for the sex discrimination lawsuit against Wal-Mart. I am very suspicious about the timing of my termination. I had, until then, had an excellent performance record. There was no factual basis for the allegation against me.

14. I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Wisconsin that the foregoing is true and correct.

This Declaration was signed by me on April 10, 2003, at Union Grove, WI.

/s/ Vicki Thornton

Vicki L. Thornton

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF MELODIE UNDERWOOD IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Melodie Underwood, declare:

1. I am a female and a former employee of Wal-Mart Stores, Inc.

2. Prior to working at Wal-Mart, I had worked in retail. From approximately 1984 to 1988, I was a cashier at Super X Drugs. While I was employed at Super X Drugs, I was assigned management responsibilities when no manager was present at the store, and I was given management training. From approximately 1988 to 1995, I worked at the Dollar General store. I was hired as a cashier, but after approximately one year I was promoted to the position of Store Manager.

3. I began working for Wal-Mart in May 1999 as a Cashier at Wal-Mart store in Osage Beach, Missouri. When I applied for the job, I gave Wal-Mart a written recommendation from my supervisor at Super X Drugs, Store Manager Laura Ferguson. A true and correct copy of this recommendation is attached hereto as Underwood Exhibit A. Although I had experience in retail management, I was offered an entry-level position as a Cashier. I accepted the position with the intention of working my way up into management.

4. Soon after I began working at Wal-Mart, I told Head Customer Service Manager Mary Simpson that I wanted to become an Assistant Manager. She told me that there were lots of opportunities at Wal-Mart. Another Customer Service Manager conducted a ninety-day review of my job performance. At that review, I again expressed my interest in getting into Wal-Mart's assistant manager training program. Neither she nor Ms. Simpson told me what steps I should take to try to achieve my goal.

5. In approximately August 1999, I spoke with Assistant Manager Marcy Turner about my interest in becoming an Assistant Manager. Ms. Turner told me that I had what it took to become an Assistant Manager. Ms. Turner also told me that she began working for Wal-Mart fifteen years earlier and, at that time, Wal-Mart did not put women into management. She told me that even now, as a woman, I would need to work twice as hard as male employees to get promoted.

6. From approximately August 1999 until August or September 2000, I worked a part-time evening shift at Wal-Mart because I had a full-time job during the day as Store Manager of Farberware.

Farberware is a retail store that specializes in cooking equipment. From approximately August or September 2000 until November 2000, I worked a full-time evening shift at Wal-Mart, while I continued to work at Farberware during the day. I continued to work at Wal-Mart even though I had another job because I was extremely interested in becoming a manager at a Wal-Mart store.

7. In approximately April 2000, I received my first annual evaluation. I was rated "exceeds expectations." That is the highest rating that one can be given. I wrote on the evaluation that I wanted "to become part of the management team." A true and correct copy of the evaluation is attached hereto as Underwood Exhibit B.

8. The evaluation was conducted by Assistant Manager Melissa Callen. During the evaluation, I told Ms. Callen that I wanted to become an Assistant Manager with Wal-Mart and asked what I had to do. She told me to talk to the Store Manager. I took her advice and spoke with Store Manager Ron Kinnison about my interest in promoting into management. Mr. Kinnison told me that it would be possible, but that I had to learn two other front-end positions, Service Desk Associate and Customer Service Manager, and the sales floor positions. Despite the fact that I had repeatedly expressed interest in promoting into management, that was the first time anyone told me about those requirement. Mr. Kinnison also told me that I had the ability to be a manager.

9. Because of Mr. Kinnison's advice, I asked to be transferred to the other front-end positions. In approximately June 2000, I was transferred to the position of Customer Service Manager. While working as a Customer Service Manager, I learned the

service desk responsibilities and supervised the cashiers, who were almost all women. On one occasion, I trained a male Assistant Manager Trainee on how to operate the service desk and the cash register.

10. In approximately November 2000, I transferred to a Wal-Mart store in Las Vegas, Nevada. I received a raise to bring my wages to the Las Vegas scale, but I was raised only to the "new hire" rate of $8.50.

11. I continued to work as a Customer Service Manager in Las Vegas. I did not receive any additional training when I transferred to the Las Vegas store. The work rules and procedures in Las Vegas store were the same as in Missouri where I had worked previously.

12. Almost as soon as I began working at the Las Vegas store, I told Store Manager Jay Mossell that I was interested in promoting into management. He told me that I would have to learn how to use the telxon machine, which is a hand-held computer used on the sales floor. As a result, I asked to be transferred to a position that would enable me to learn the telxon.

13. In November 2000, I was transferred to a clerk position in the Electronics Department. I took this position because I believed that I would be given the opportunity to be promoted into management if I learned the sales floor skills. The form showing that I was being transferred says that I was "moving to learn further the steps to becoming a department manager, moving later into management." A true and correct copy of this form is attached hereto as Underwood Exhibit C. In January 2001, I was promoted to the position of Furniture Department Manager.

14. In April 2001, while I was working as Furniture Department Manager, I received my second annual evaluation. Again, I was rated "exceeds expectations," the highest rating possible. I wrote on the evaluation that my goal was to get into the Assistant Manager Training Program. A true and correct copy of that evaluation, is attached hereto as Underwood Exhibit D. That evaluation is signed by Store Manager David Lorentz.

15. In late 2000, I attended a meeting at which the District Manager was present. I approached him and told him that I was interest in promoting into management. He did not respond.

16. On two occasions when I was working in the Las Vegas store, in December 2000 and June 2001, there were openings for support manager positions. I applied for the positions. On one occasion, I was interviewed by a female Assistant Manager who told me that I was a strong candidate. I was not interviewed the second time. One of the positions was filled by a man. I do not know who filled the position the second time. No one told me why I was not selected for the positions or what I needed to do to get promoted to Support Manager.

17. A man named Matt Ward was an Assistant Manager at the Las Vegas store at which I worked. Prior to becoming an Assistant Manager, Mr. Ward was in the military. To my knowledge, Mr. Ward did not have any retail experience prior to working at Wal-Mart. Mr. Ward was not required to work in the front-end positions or a sales floor position in order to hold the position of Assistant Manager.

18. On approximately June 12, 2001, I submitted a letter of resignation, stating that I would resign as of two weeks from the date of the letter. In the

resignation letter, I explained that I had obtained an Assistant Manager Trainee position at K-Mart. I also wrote, "I have tried to get into this program with Wal-Mart for 2 years now without any luck. I regret to give you this notice but I have to look out for my future." A true and correct copy of my resignation letter is attached hereto as Underwood Exhibit E. No member of Wal-Mart management tried to discourage me from resigning. Instead, when Store Manager Dave Lorentz returned from vacation on June 19, 2001, he did not permit me to work until the end of my two weeks notice. Mr. Lorentz told me that I was being terminated immediately because I had taken a job with a competitor.

19. During the entire time I worked at Wal-Mart, I never saw an application for the Management Training Program or was told how to apply for the Management Training Program. I did everything I could think of to make my interest in promoting known to my managers, but it was not effective. Had I been promoted, I would not have resigned from Wal-Mart.

20. I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Nevada that the foregoing is true and correct.

This Declaration was signed by me on April 7, (month, day), 2003, at Las Vegas, NV. (city, state).

/s/ Melodie Underwood

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF DAWN WHITE IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, DAWN WHITE, declare:

1. I have worked for Wal-Mart for a total of about seven years in stores in Alabama, Florida and Georgia. I am female.

2. All the Wal-Mart stores I worked in had basically the same policies. They used the same employee handbook and the same computer systems. I did not have to repeat the orientation when I transferred from one store to another.

3. I was first hired by Wal-Mart in 1988. I took a break in my Wal-Mart employment in 1990 when my husband was transferred to Japan with the United States military. While we were in Japan, I worked as a sales clerk and cashier at the Army-Air

Force Exchange Service store for one and a half years.

4. I resumed my employment at Wal-Mart, at the Fort Walton Beach, Florida, Supercenter, in September 1998. Since January 2001 I have worked at the Supercenter in Valdosta, Georgia. I was promoted from sales associate to Department Manager of the Pet Department in February 2001. Since August 2002 I have been Department Manager in Hardware.

5. I have been interested in a career at Wal-Mart ever since I was 16 years old, when I worked part-time in the Prattville, Alabama store. I first started to pursue my interest in management at the Valdosta store in early 2001. I spoke to every manager I could about wanting to get into management. In about April 2001, I mentioned it to the District Manager Michael Fendley one day when he was in the store for a quick inspection. A couple of days later, he came back to the store to interview me as a candidate for the Management in Training program. He told me that I seemed to know what I was doing as Department Manager and would be a good candidate for promotion to Assistant Manager but that I needed to be a Department Manager for at least 90 days before I could be considered for promotion to Assistant Manager.

6. I continued as Department Manager in Pets for more than a year. During that time, I did everything I could to increase my chances for promotion. I tried to get a mentor. Assistant Manager Janice Duncan was supposed to mentor me through the management mentor program, but she never did. I asked for training. Co-Manager Kevin Fullmer advised me to go to Linda [Last Name Unknown], the

personnel training manager. She checked my CBLs and my Telxon and said that since everything was up to date there was nothing she could train me on. I asked Store Manager Harwell several times to help increase my readiness for promotion. Even though he spent a lot of time with male Department Managers, training them, he would not help me. I estimate he spent a total of two hours in my department from about July 2001 to about June 2002. He basically ignored me.

7. During that same time period, I was asked by Co-Manager Fullmer to train at least two men, Alan Scott Kent and Jason Reed, to prepare them to move up at Wal-Mart. Both men were in the management mentor program, which is, as I understand it, a preparatory stage for employees who want to enter the Management in Training program. I started training Alan Scott Kent in about January 2002. He had been at Wal-Mart less time than I had. He was made a Department Manager in about February 2002. After Kent was made a Department Manager, I observed that Store Manager Harwell worked with him in his department and continued to give him management training to prepare him to move up in the company.

8. In about January 2002, after I had been a Department Manager for almost a year, I spoke to Co-Manager Kevin Fullmer again about my possibly being promoted into management. He said he thought I was ready to be promoted but that I would need to speak to the Store Manager about it. When I spoke to Store Manager Harwell, he said I was not worthy of promotion and would never be management material. This was despite the fact that I have always gotten excellent evaluations.

9. I started training Jason Reed in about April 2002. Though Reed had been at the Valdosta store longer than I had, he was a recent high school graduate and did not have nearly as much retail experience as I did. He had been promoted to Department Manager of Grocery and Dry Goods, but he did not have a clue as to how to run his department. After Reed was made Department Manager, I observed that Store Manager Harwell worked with him in his department and continued to give him management training to prepare him to move up in the company.

10. In the spring of 2002 I was making only $7.59/hour. I became aware that Jason was making almost $2.00/hour more than me as a Department Manager, even though he had only about two years of experience to my six. He told me this in casual conversation. He said that he had bargained with Wal-Mart for a big raise when he became Department Manager because he deserved it if he was going to manage such a large department and because he needed more money because he was getting married.

11. Recently, in about January 2003, Wal-Mart posted an announcement in the Valdosta store that any employee who met certain qualifications could sign up to enter the Management in Training program. I would have been very interested in signing up, except for the fact that I did not meet one of the qualifications – that you had to be without any write-ups or other disciplinary measures for at least six months. Just before the announcement was posted, Assistant Manager Kelly Ivey gave me my first ever written warning. It was for using a light bulb count off the computer instead of physically counting all of them (there were many thousands). Even though it was pretty routine to use the computer count for

items, like light bulbs, where there were thousands in stock -- in fact this practice was sanctioned by District Manager Michael Fendley – I was written up for doing it.

12. At this point, I am very disillusioned about opportunities for me at Wal-Mart. My original plan when I started working at the Valdosta store was to become an Assistant Manager quickly, then spend seven years in that position until my husband retired from the military. Then I would be ready to be promoted to Co-Manager, and I could become the main breadwinner in the family. This would give my husband a chance to follow his dreams and have the "fun" job for a change. Now all of that is down the tubes. My family will soon be relocating to North Dakota. I plan to take my experience and work somewhere else where they are willing to appreciate what I have to offer.

13. I have personal knowledge of each and every fact set forth in this Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Georgia that the foregoing is true and correct.

This Declaration was signed by me on April 8, 2003 at Valdosta, GA.

/s/ Dawn M. White
Dawn M. White

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF DEANNA WILLARD IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, DEANNA WILLARD, declare:

1. I worked for Wal-Mart for eight years, from September 1991 until October 1999. During this time, I worked at one store in Utah and three stores in Florida. My last store was in Tampa, Florida. I am female.

2. Before joining Wal-Mart, I had about five years of retail experience. I also completed almost two years of college courses toward an Associate of Arts degree at Weber State University in Ogden, Utah.

3 I started at Wal-Mart as a sales associate at the Layton, Utah, store in 1991. I worked in fabrics and men's wear, in the UPC office, and as a test

scanner. In 1993, I moved with my family to Florida and continued to work as a Wal-Mart sales associate, first at a Wal-Mart store in Tampa, then at a Wal-Mart store in Bloomingdale, Florida. I worked in receiving and lawn and garden. I transferred to another Tampa store in late 1994 and worked in softlines processing and as a night stocker for about a year. Then I was promoted to Department Manager of Infants.

4. All of the Wal-Mart stores I worked in had the same policies. They used the same handbook and the same computer systems. I did not have to repeat the orientation when I transferred from one store to another. At the last store I worked in, in Tampa, Florida, we were given two trainings that I had not received at the other stores: one on sexual harassment and one discouraging us from joining a union.

5. I was interested in promotions at Wal-Mart from the very beginning. I indicated this interest on my 90-day evaluation as well as on several subsequent evaluations. My goal was to become at least an Assistant Manager. I started asking about the process for being trained to be an Assistant Manager at my first Wal-Mart store, where I spoke to Store Manager Gregg Scanlon about it in approximately 1992. He told me that I could be considered for the Management Training Program "soon" if I "kept up the good work." I asked Store Manager Al [Last Name Unknown] about entering management training at my first Tampa store in about 1993. He told me it would take awhile, but that I should keep working towards it. Shortly after I transferred to the second Tampa store in late 1994, I asked my supervisor, Night Receiving Manager Jennifer [Last Name Unknown], how to get into management training.

She told me I would have to be a Department Manager for awhile first, and that she would help me prepare for promotion. She was very supportive, and I was promoted to Department Manager of Infants in 1995. Shortly after that promotion, I asked Assistant Manager Dale Thompson how I could join management training. She also told me I would have to be a Department Manager for awhile first, and that she would help train me in anything I needed to help prepare me for promotion to the next step. She advised me to speak to Store Manager Rick Watkins about my desire for promotion to Assistant Manager.

6. Store Manager Watkins gave me a commendation and merit raise in October 1995 for making a significant improvement in the Infants department. I first spoke to him about my interest in Promotion around that same time. He told me it would be awhile before I could be considered. He did not provide any specific guidance nor indicate what I needed to do to ensure this promotion. In early 1996, Mr. Watkins asked me to accept the position of Department Manager of Domestics because, he said, the department "needed help." A few months later, he gave me another commendation and another merit raise for my outstanding performance in the Domestics Department. In August 1997, Mr. Watkins asked me move to Department Manager of Housewares. Again, he told ne it was because the department needed to be cleaned up and put into shape.

7. It was at about this time that I spoke to Mr. Watkins again about my interest in entering the Management Training Program and being promoted to Assistant Manager. I told him that I was very serious about my interest in moving up into manage-

ment. I felt I had proved myself as a Department Manager and that it was time for me to be considered for the next step. He told me that there were a couple of male employees ahead of me in line for the program and that it would be about four months until there would be an opening for me. At about the same time, I also spoke to Assistant Manager Percy Weatherly and Assistant Manager Adam Cohen. Mr. Weatherly told me it would be up to Store Manager Watkins to make the decision. Mr. Cohen brushed me off by just starting to talk about something else. I also spoke to District Manager Dave Bonar about getting admitted to the Management Training Program. He told me I would have to go through Store Manager Watkins.

8. I compared notes with several other Department Managers who I knew were also interested in being promoted to Assistant Manager. Judy Blondell, Department Manager of Stationery, and Donna Webster, Department Manager of Housewares and then Foods, both told me that when they tried to get information about promotion to Assistant Manager they were ignored. Natasha [Last Name Unknown], Department Manager of Foods, told me that she had been told by a member of Wal-Mart management that an employee had to work as a department manager for at least year before being considered for the Management Training Program. Diane [Last Name Unknown], Department Manager of Men's Wear, told me that she had been told by an Assistant Manager that department managers had to work in every department in the store before being considered for the Management Training Program. Jerome [Last Name Unknown], Department Manager of Furniture, told me that Store Manager Watkins told him that he would only have to be a department manager for a

few months before he could be promoted to Assistant Manager.

9. I watched as at least four men were admitted to the Management Training Program in the six months after I had spoken to Store Manager Watkins and he had told me that my turn would come in about four months. As best as I can recall, three of these were Terry McNeil, Robert Cook, Alan Talaski. McNeil had only been a cashier and a customer support manager before being promoted to the Management Training Program. He had no experience as a department manager. Mr. Cook had been Department Manager of Housewares before me. It was his wreck of a department that Store Manager Watkins sent me in to clean up.

10. In 1998, when I again asked Store Manager Watkins about being admitted to the training program, he said he didn't have time to talk to me about it. I asked him to get back to me when he did have time to talk about it. He never got back to me.

11. None of the managers that I spoke to about joining the Management Training Program ever told me of specific steps I needed to take in order to be accepted into the program. I had been a successful Department Manager for three years. I had expressed my interest in promotion to a number of Assistant Managers, and had repeatedly approached the Store Manager to discuss my interest in promotion. I had spoken with the District Manger about my wish for promotion. I was aware of no way to apply for the program, nor anything else I could do to be promoted to Assistant Manager. My understanding, based on my conversations with the Assistant Managers, the Store Manager and the District Manager, was that I simply had to wait until Store Man-

ager Watkins deemed it the right time for me to enter the training program.

12. Before 1997, I had gotten excellent evaluations and frequent merit raises for my work at Wal-Mart. In 1997, when I started repeatedly expressing my ambition to Store Manager Watkins and requesting a promotion to Assistant Manager, everything changed for me at Wal-Mart. It seemed that I could do no right. Store Manager Watkins set unreasonable demands and treated me with disrespect, including yelling at me on the sales floor in front of other employees and customers. In about December 1997, I had an accident at the store and was injured. I worked in spite of the injury for almost a year, then took about three weeks off. I returned to work in December 1998 for a few more months, but I ultimately had to leave my employment at Wal-Mart for medical reasons.

13. I have personal knowledge of each and every fact set forth in this Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Georgia that the foregoing is true and correct.

This Declaration was signed by me on April 11, 2003 at Land O'Lakes, FL.

/s/ DeAnna J. Willard
DeAnna J. Willard

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES,
PATRICIA SURGESON,
CLEO PAGE,
CHRISTINE
KWAPNOSKI,
DEBORAH GUNTER,
KAREN WILLIAMSON
AND EDITH ARANA, on
behalf of themselves and
all others similarly
situated,

Plaintiff,

vs.

WAL-MART STORES,
INC.,

Defendant

Case No. C-01-2252 MJJ

DECLARATION OF JENNY WILLIAMS IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I, JENNY WILLIAMS, declare:

1. I was employed at the Bradenton, Florida Wal-Mart from May 1995 until March 2000. While employed at Wal-Mart, I used the name Jenny Washington. I completed two years of college-level course work while I was in high school. I had more than a year of experience as a cashier before I applied to work at Wal-Mart in March 1995. I am female.

2. I was hired and placed as a sales associate in the Jewelry department making $5.15 per hour. I was subsequently moved around to different departments as a sales associate—housewares, stationery,

back-to-school and seasonal. I also learned the front end.

3. During the busy Christmas season my first year at Wal-Mart, we were short-handed. I came in on my days off to help keep things in shape. During my shift, I was responsible for go-backs in housewares, small appliances, hardware, paint, stationery and toys. Upon customer request, I also had to cut fabric, mix paint, unlock the cologne cabinet and make keys in automotive. I also succeeded at the very cumbersome process of locating layaways by UPN code. After Christmas, I asked both Assistant Manager Derek Boswell and Store Manager Gerard Fruge for a raise. Boswell told me he thought I deserved it but that they did not have money in the budget for it. Fruge told me he did not think I deserved a raise. I did not get one.

4. I know of at least one male employee who was hired in at a higher pay rate than what I was making and who got a raise during that Christmas season. His name was Shawn Quail. He was hired in Day Receiving in November 1995. One day around Christmas he told me that he was going to get his first raise "next week." I remarked that I was surprised because he had not been there 90 days yet, and usually you had to wait that long to get a raise. Shawn told me that Store Manager Fruge had told him he was going to get his raise early because he was doing such a good job running the forklift. Shawn told me he was going to be making $6.50 or $7.00 per hour. I complained to Assistant Manager Boswell that it was not fair for Shawn to be making more than I was and to be getting a raise so soon after he started working at Wal-Mart. I argued that I had been working there at least six months longer

than Shawn and had more responsibility, but I had yet to get my first raise and I should not be making at least a dollar less per hour than Shawn was. Boswell responded that giving raises was Store Manager Fruge's decision and there was nothing he could do about it. It was not until May 1996, at the time of my first annual evaluation, that I got a 35 cent per hour raise to $5.50/hour.

5. During my first year at Wal-Mart, as my knowledge and skills increased, I became more ambitious and decided to pursue a long-term career with Wal-Mart. I told Assistant Manager Derek Boswell that I wanted to work my way up to Department Manager, then to Assistant Manager, and eventually to Store Manager. He was very encouraging. He told me to just keep on doing the great job I was doing and "one day it would happen" for me. I continued to expand my knowledge of the store by working in different departments, including men's wear, front end, impulse, claims, receiving, and bakery, and had a very thorough understanding of the functioning of the store. I always got good evaluations.

6. For over a year, I talked to Assistant Manager Boswell very frequently about my desire to get promoted. He continued to be encouraging, but he said it was not his decision. I spoke to Store Manager Fruge about it eight or nine times during the same period. But he just brushed me off. In August 1996 we got a new store manager, Arthur Keeley. I started asking him right away about getting a raise and about getting promoted. He told me he would have to watch me work for a while to get a sense of my abilities and performance.

7. In February 1997, Store Manager Keeley gave me a 25-cent merit raise and a 50-cent regular

raise. My pay was raised to $6.25/hour starting with my first paycheck in March 1997. At my two-year evaluation in May 1997 my pay was raised another 25 cents per hour to $6.50. Then in July 1997, I got promoted to Department Manager of Greeting Cards. Store Manager Keeley said I would have to wait 30 days before I got the raise that went along with this promotion. When I asked him about the raise again after 30 days, he told me the rules had changed, and I would have to wait 90 days. Unfortunately, he was transferred out of the store before I got the raise.

8. Our next store manager was O'Neal Clark. He transferred me to impulse in September 1997, but I was no longer a Department Manager. At the same time, our store was being upgraded to be a Supercenter. I spoke to Store Manager Clark about my desire for promotion to Assistant Manager at least three or four times during the year he was at our store. He told me that from what he could see I was doing a great job, but that promotion recommendations had to come from the Assistant Managers and Co-Managers. In September 1998, he promoted me back to Department Manager, but he never promoted me to Assistant Manager.

9. It was very frustrating to see new male employees hired into the store, being paid higher starting wages than I was making as an experienced employee, being given raises quicker than I got them, and sometimes being promoted faster than I was. For example, Richard (Richie) Lundquist was hired in June 1997 as a sales associate in grocery. He had about the same amount of experience as I did (he had been working at a grocery store before coming to work for Wal-Mart). Richie bragged to me about how much he was making, which was several dollars an

hour more than I was being paid. About three months after Richie was hired, he was promoted to Department Manager and given a raise. I know this because Richie frequently talked about it in front of me with other male employees such as Frank Luther, Jeff [Last Name Unknown] and Charles Morris. About a year after that, Richie was promoted to Manager of Grocery and he got another raise. Again, I know this because he talked about it in front of me with his friends at the store. Later in 1998, Richie was transferred to the general merchandise part of the store (he told me this was because he wanted to learn about other parts of the store because the Store Manager was preparing him for promotion to management) and became Department Manager of Stationery for awhile and then was moved to Department Manager of Chemicals. In April 2000, Richie entered the manager training program and then became an Assistant Manager at our store several months later. Richie was given these promotions and raises despite the fact that his work was not always up to Wal-Mart expectations. For example, after Richie was transferred from stationery to chemicals, I was moved from impulse to stationery by Co-Manager Vince Bower and Assistant Manager Sam [Last Name Unknown]. I asked Sam why I was being moved to stationery, especially after I had succeeded in significantly reducing the shrink from the impulse and high theft items. Sam replied that Co-Manager Vince Bower and Assistant Manager Frank Caffrey knew that Richie was screwing up in stationery and they needed to get him out of that department because inventory was coming up. They needed somebody to clean up stationery and that is why I was transferred to that department.

10. Another example of a male employee who was promoted to Assistant Manager who had less experience than me is Charles Morris. He had been hired at the Bradenton store about the same time I was. He was in maintenance–the floor shine man. In July 1997, he was promoted from maintenance to Department Manager of Paper Goods and Chemicals. He had no experience whatsoever on the floor, stocking shelves, ordering and checking in merchandise, updating prices, helping customers, or any of the other things required to run a department. I was asked to and had to train him on these many tasks because he had no idea how to do the job. He knew nothing about our labeling system, the Telxon, the Wal-Mart "Smart" system, or anything else. After about two months he was made Department Manager of Grocery when the store converted to a Supercenter. Then, before the end of 1998, he was promoted again, this time to Assistant Manager. Even though I knew much more than he did about how to run a department and many other things about Wal-Mart, he got promoted and I did not. I complained to Assistant Manager Sam [Last Name Unknown], to Assistant Manager Derek Boswell and to District Manager Joe Crider. Joe Crider told me he would have to check with my managers about why I was not being promoted. He later told me that my managers had told him I was not being promoted because my performance was not up to par and they did not think I was ready for it.

11. The Bradenton store was a training store, which meant that management trainees were sent there to learn about various aspects of running a Wal-Mart store. There were usually four 13-week training sessions every year. Each training session enrolled between six and 15 manager trainees. Dur-

ing the two and a half years I worked at the Bradenton store after it became a Supercenter, I saw no more than three women come through to be trained. I was never permitted to apply for the training program.

12. I left Wal-Mart in March, 2000. I am now an Assistant Manager at a Dollar Tree store. I love my job and would not trade it for anything. My talents in retail have finally been recognized and appreciated.

13. I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Florida that the foregoing is true and correct.

This Declaration was signed by me on April the 9th, 2003 at Palmetto Florida.

/s/ Jenny Williams
Jenny Williams

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF LORIE WILLIAMS IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Lorie Williams, declare

1. I make this statement on the basis of my personal knowledge and, if called as a witness, could and would testify competently to the facts herein.

2. While employed by Wal-Mart, I have also used the name Lorie Waldrop. Prior to my employment with Wal-Mart I worked briefly as a cook. I graduated from a two-year vocational school in 1986 and received a certificate in accounting. I started working for Wal-Mart in 1991. I was 26 years old. When I began working with Wal-Mart, I hoped to have a steady and stable career.

3. I began working for a Wal-Mart Store in Collierville, Tennessee in May 1991 as a part-time

sales associate in Electronics making $4.35 an hour. Within a few months, I began working full-time in Night Receiving. I worked in Night Receiving until I went out on maternity leave in March 1993. When I returned from maternity leave, I went to Electronics as a sales associate.

4. While I was working as a support manager in 1995, Store Manager Wes Grab regularly pulled me and female Assistant Manager Renee Hall aside to criticize us. He often told us we were worthless and no good at our jobs. I never saw Store Manager Grab pull aside male employees to admonish them in this manner. I told Co-Manager Brenda Haynes about these incidents and she recommended I speak with District Manager Richard Wezner. I spoke with Mr. Wezner and he told me he would look into it and get back to me. I never heard from him about these incidents again. After having spoken with two members of management with no response, I felt the open door had closed.

5. In 1996, I became the front end manager. With no training, I was single-handedly responsible for hiring door greeters, cart pushers, over sixty new cashiers, and preparing the entire Front End in order to transition the Collierville Wal-Mart into a Supercenter. Almost immediately, Co-Manager Doug Ayerst and new Store Manager Robert Hayes (he replaced Wes Grab in 1996) began criticizing the way in which I was managing the front end. They repeatedly complained to me about problems in the front end but did not give me any practical management advice and often gave inconsistent instructions. Store Manager Hayes once told me that the problem was that there were "too many damn women in the front end." On another occasion, Store Manager Hayes and

Co-Manager Jim Belcoff pulled me aside to tell me that I needed to "whiten up [the staff of] the front end." Both of these statements seemed to indicate that they wanted me to stop hiring women and African-American cashiers. When I asked why, they indicated that the staff was "intimidating" to the clientele. I tried to explain that I did not believe this was true and that I was hiring the individuals whom I believed were the most qualified applicants. They were unresponsive.

6. In 1996, while I was front end manager, Store Manager Hayes promoted Robert Beck from bakery manager to assistant manager over the Front End. Mr. Beck had no experience with hiring, scheduling, staff management, or working with cash registers, yet he was supposed to be my direct supervisor and supervisor over the entire front end. I had to train him. Eventually, I ended up completing his responsibilities because he was unable to do them. I completed all the hiring, pay raises, scheduling, associate evaluations, customer service, and other management tasks. Undertaking both sets of responsibilities was exhausting and extremely frustrating for me and I felt I was not receiving any management support for my efforts. At one point, Store Manager Hayes warned me that if any cashiers were caught selling alcohol after hours or on Sundays, he would make sure I went to jail with them. I spoke with Store Manager Hayes and Co-Manager Ayerst about my concerns but they gave me no advice or assistance and continued to complain about problems in the front end. Shortly thereafter, in 1997, I decided to step down. I transferred to a support manager position for a few months, and then as an associate in the Cash Office.

7. In 1996 and 1997, while I was front end manager and while I worked in the Cash Office, I had access to payroll data. I observed that a woman associate, Libby Goff, earned less than at least three male associates even though she had been with Wal-Mart for several years longer than any of them. They were Jim Stewart, James Gibson, and Gary Lewis. I had been told during the hiring process, during orientation by Personnel Manager Jane Switzer, and by management during all of my evaluations that I could be fired for discussing salary issues so I did not reveal this information to anyone.

8. In 1997, I was promoted to photo lab manager. I was recently divorced and alone in caring for my four-year old daughter. I believed this salaried position would provide us the stability that we needed. As a result, I agreed to leave my daughter for two weeks in order to go to a mandatory training in Bentonville, Arkansas. I hoped these efforts would demonstrate my commitment to Wal-Mart and assist in obtaining the management support necessary for this position. I was wrong.

9. As soon as I started in the position, Store Manager Hayes and Co-Manager Ayerst began undermining my authority over the photo lab associates, and even customers. There were several times when I made management decisions concerning photo lab employees but Store Manager Hayes refused to back me up and I was left completely unsupported. In addition, when customers would request illegal copies of copyrighted photographs, I would decline but Co-Managers Belcoff and Ayerst and Store Manager Hayes would disregard my decision, and the law, in order to give them copies. On occasion, a photo machine would fall into disrepair

and despite doing all I could, including fixing some machines myself, calling the correct technical support, and sending away for parts, Co-Manager Ayerst would yell at me about the broken machines. I received no support for my management decisions and was constantly criticized for even the most minor decisions that I did make, such as the orderliness of the camera/camcorder displays and the neatness of the floor (something for which the floor crew was mainly responsible). I spoke with the District Manager of the Photo Department Kelly [last name unknown] but she was not helpful. She never gave me any direct advice or information about ways in which I might be able to improve the department or fix any of the machines. At one point, Store Manager Hayes and Co-Manager Ayerst said, "This is *our* store" and that the District Manager of the Photo Department, Kelly, had no authority over anything. Due to a lack of management support, I stepped down from this position in 1998. A male employee, Kenneth Bartosiewicz, was hired off the street to replace me.

10. In 1998, I agreed to accept a sales associate position in the Tire Lube Express (TLE) department. I was determined to work hard and succeed in this male-dominated area. I worked for three years handling the register, doing customer service behind the counter, putting up stock, as well as changing tires and completing oil changes. In my entire time in the TLE department, I never saw more than four or five women working in this 20-person department. Most of the women were behind the counter. I was one of two women who worked in the service department.

11. Throughout my time at Wal-Mart, all my evaluations were rated "Meets Expectations" or "Exceeds Expectations."

12. In 2000, I witnessed TLE Manager Joyce Moody receive abuse and mistreatment from District Manager of TLE James Harsden. He would constantly check up on her whereabouts, he made critical comments about her medical problems, and generally talked to her and about her with resentment and anger. I did not know why he had such a bad attitude toward Ms. Moody. Shortly thereafter, Ms. Moody transferred to a Wal-Mart store in another state. Male Dale Brechin, who had previously been a service technician, was promoted to her position when she left. I was afraid to report this mistreatment because after all that I had experienced, I feared retaliation and believed that I might be the next target.

13. I had originally been very interested in advancing into a management career at Wal-Mart. However, I observed, and I had been told by several members of management, that relocation was required for entry into the management training program. Because I was caring for a young child, mostly on my own, this was not a possibility for me. This was the main deterrent to pursuing entry into the management training program.

14. I resigned in April 2001 while out on medical leave for diabetes. I now care for my daughter full-time.

I declare under penalty of perjury of the laws of the United States and State of Tennessee that the foregoing is true and correct.

This Declaration was signed by me on April 4, 2003 at Moscow, Tennessee.

/s/ Lorie Williams
Lorie Williams

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES,
PATRICIA SURGESON,
CLEO PAGE,
CHRISTINE KWAPNOSKI,
DEBORAH GUNTER,
KAREN WILLIAMSON
AND EDITH ARANA, on behalf of themselves and all others similarly situated,
Plaintiff,
vs.
WAL-MART STORES, INC.,
Defendant

Case No. C-01-2252 MJJ

DECLARATION OF KAREN WILLIAMSON IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I, Karen Williamson, declare:

1. I make this statement on the basis of my personal knowledge, and, if called as a witness, could and would testify competently to the facts herein.

2. I am 52 year old woman who worked as a sales associate in the Pleasanton, California Wal-Mart store from September 1995 until October 1999. At the time I joined Wal-Mart, I had prior experience working at Safeway as a deli clerk and for a retail establishment "Treasures and Tyme." I worked in a number of departments in the Pleasanton store including shipping and receiving, infants, boys and girls, electronics, housewares, and stationery. I did not request or apply for any of these transfers. Each

time I was moved to a different department, the Store Manager merely informed me of the change.

3. I wanted to become a department manager and possibly move on from there with a career at Wal-Mart. However, there was no formal application process to express my interest in promotion. Instead, I spoke with the Store Managers and Assistant Managers about my desire for promotion. Twice I wrote letters to Store Manager, Lou Malmborg, expressing my wish for promotion. After I sent the first letter, Store Manager Malmborg denied reading it. Store Manager Malmborg acknowledged receipt of the second letter, but brushed aside my interests, indicating that there were no openings at that time. Store Manager Malmborg never provided to me any information about the process of receiving promotions, never told me of the Management Training Program, and never indicated there were any other routes that I could follow to become a manager at Wal-Mart.

4. Sometimes, promotional opportunities were posted but frequently the promotions were determined before there was an opportunity to even apply. For example, the Foods Department Manager position was posted; and I applied, but the very next day a male associate John Shoe was given the position. I was never interviewed for the position nor was I aware of anyone else being interviewed. Other times, the position was just not posted at all. For example, when the position of Department Manager for Health and Beauty Aids Department was open, it was never posted, and so I could not apply. I would have very much liked the opportunity to compete for this position, as I am a licensed cosmetologist. I applied on the computer-based system for at least one

position and was told at the completion of the application process that I had met the preliminary qualifications and a manager would contact me. I was never contacted and received no follow-up as a result of this application at all.

5. I recall a co-worker nicknamed "Jimbo" [last name unknown] was given a promotion to Sporting Goods Department Manager. I heard Assistant Manager Tim Costa tell another manager, Mike Gallardo that it was necessary to give a promotion to Jimbo, as he had just had a baby and needed the money. I never heard any similar concerns for working mothers expressed by any member of management.

6. While I was employed at Wal-Mart, two male sales associates, Eddy Hon Ng and Reuben Rodriguez, were earning more money than I for no apparent reason other than my gender. Eddy and I were hired at or around the same time and he was paid a higher salary than I, although I had prior experience in retail and in the grocery industry. Reuben Rodriguez earned a higher salary than I, although he was hired months after I had been hired and at one point left the company for a period of time. When he returned, he earned a higher salary as a sales associate despite the fact that I had been an employee of Wal-Mart continuously and for a longer period of time.

7. I found that the Open Door did not work and resulted in retaliation. I used the Open Door and spoke to Assistant Manager Chuck and on another occasion to Store Manager Lou Malmborg about the demeaning manner in which Assistant Manager Deborah spoke to me and others. I understood that my concern would be held in confidence

but I do not believe it was. Very soon after speaking with the managers, Deborah began treating me much worse, and soon thereafter gave me written discipline. I also tried using the Open Door without any success by contacting the District Manager after I was terminated. I drove to the offices of District Manager John Scantlin and left a note for him, and, receiving no response, telephoned him two or three times. Wal-Mart's Sundown Rule, about which all employees are trained from their first day, requires that all phone calls from employees or customers be returned on the same day before sundown. After a delay of perhaps three weeks, District Manager Scantlin finally returned my call and said he would look into the circumstances of which I complained. I never heard from him again.

8. If I could be confident that I would not face gender discrimination, I would be interested in applying for management training at Wal-Mart.

I declare under penalty of perjury that the foregoing is true and correct. Executed on 4-3-2003, 2003, at Oroville, CA.

/s/ Karen Williamson

Karen Williamson

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, KAREN WILLIAMSON, on behalf of themselves and all others similarly situated, Plaintiffs, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF JAN WOLSLEGER IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Jan Wolsleger, declare:

1. I am a female from Toquerville, Utah. I worked for Wal-Mart from November 1996 until September 2001 and began working again for Wal-Mart in January 2003.

2. When I first started working for Wal-Mart, I had a history of retail management experience, including supervisory experience at Sav-On Drugs and owning and operating my own crafts store.

3. I was hired at the Wal-Mart Store in American Fork, Utah in November 1996 as the Department Manager of crafts and fabrics. In approximately February 1997, I joined the SWAS (store within a store) team, a salaried position. As a SWAS Team Member, I traveled from store to store all over

the western half of the country remodeling Wal-Mart stores. Each store I helped remodel was set up in a similar fashion. I remodeled stores for approximately a year and nine months, until I joined the Management Training Program in November of 1998.

4. I entered the Management Training Program at the Wal-Mart store in St. George, Utah. When I entered the program, Store Manager Mark Neighbors told me that Wal-Mart started all Manager Trainees at the same rate of pay, and once trainees completed the program, all trainees began their Assistant Manager positions at the same rate of pay as well. I relied on this representation, and believed there was no point in attempting to negotiate a higher salary.

5. When I completed the Management Training Program in January 1999, I became an Assistant Manager at the St. George store where I had trained. As a new Assistant Manager, I was paid approximately $25,500 per year. By December 2000, I was making $29,500 per year.

6. Dan Behymer, a male, began the Management Training Program in December 2000. Unlike me, Mr. Behymer had no retail experience prior to working at Wal-Mart. As a Management Trainee, Wal-Mart paid him over $30,000 per year. When he completed the program in March 2001, he was paid a salary of over $42,000 per year, $16,000 more than the salary Wal-Mart paid me when I became an Assistant Manager and $12,000 more than I was currently making after nearly two years in the position.

7. I was alerted to Mr. Behymer's larger salary because he insisted on telling me what Wal-Mart was paying him. He also told me that I was "being screwed" in my compensation by Wal-Mart. As a re-

sult of this unfair discrepancy I later confronted my Store Manager, Mr. Neighbors, who confirmed that the pay discrepancy indeed existed.

8. In September 2001, I gave Mr. Neighbors my notice that I would be ending my employment with Wal-Mart. I told him that I disagreed with the way that Wal-Mart paid newer male Assistant Managers more money than I was paid. Mr. Neighbors told me that I needed to sell myself better. I reminded him that he was the one who told me that Wal-Mart paid all beginning Assistant Managers the same wage. He responded again by saying, that I had needed to sell myself better to him. He did not deny that newer male Assistant Managers were paid more, nor did he offer any justification for the discrepancy. He did not suggest that I did not work as hard or that I did not have equal competence.

9. On my last day of work in September 2001, I spoke with District Manager Sean Evans for over an hour about my decision to leave Wal-Mart. I told Mr. Evans that I was sick of the men being paid more than me while doing the same job. He told me that neither he nor Mr. Neighbors had the authority to give me a raise. He did not deny that the male Assistant Managers, even those with less experience than me, were being paid more than me. He did not suggest that there was any legitimate reason for this discrepancy. Then, after several more minutes of discussion, he said, "I guess I could offer you $36,000" to stay. This was still less then the men were making. This offer also exposed Mr. Evans' untruthfulness to me just minutes before when he told me he could not control the salaries of assistant managers. I told Mr. Evans I had made up my mind and left.

10. After I left Wal-Mart in September 2001, I worked for several months as an Assistant Manager at Michael's Arts & Crafts store. In January 2003, when I was no longer working at Michael's Arts & Crafts store, District Manager Evans asked me to come back to Wal-Mart as an Assistant Manager. I accepted his offer and returned to the St. George Wal-Mart store, because there were not many retail management jobs available in my area. When I started again at Wal-Mart in January 2003, there were nine male assistant managers and only one other female assistant manager in my store. Currently, as of April 2003, there are a total of three female Assistant Managers, including me, and one male Assistant Manager in my store. The store manager has always been male. I still do not make as much money as Mr. Behymer made when he began working at Wal-Mart as an Assistant Manager.

I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Utah that the foregoing is true and correct.

This Declaration was signed by me on April 3, 2003, at 5:00 PM.

/s/ Jan Wolsleger
Jan Wolsleger

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES,
PATRICIA SURGESON,
CLEO PAGE,
CHRISTINE KWAPNOSKI,
DEBORAH GUNTER,
KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated,

Plaintiff,

vs.

WAL-MART STORES, INC.,

Defendant

Case No. C-01-2252 MJJ

DECLARATION OF WEI WU-EMMERT IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I, Wei Wu-Emmert, declare:

1. I am a woman and a former Wal-Mart employee.

2. I began working for Wal-Mart in approximately October 1994 as a Department Manager of Accessories, Lingerie, Sleepwear and Socks, in a Wal-Mart store in Oxford, Ohio. At that time, I was a graduate student at Miami University of Ohio. I was scheduled to receive a master's degree in clothing retail in December of that year.

3. Over many years, I had developed an interest in clothing retail. I worked as the office manager of the Beijing branch of United Colors of Benetton, where I was responsible for assisting the manager of

the Beijing Branch. I also received a Bachelor of Science degree in fashion design from the Chinese Textile University in Shanghai, China. I left China, where I am from, and emigrated to the United States to learn about the business side of retail.

4. When I interviewed for the job at Wal-Mart, I told Store Manager Kevin Nolen that I was interested in working in retail management, described my education and work experience, and asked what the best position for me would be. He replied that I should take a job as a Department Manager. Based on the Store Manager Nolen's advice, I accepted an hourly position as a department manager.

5. After starting to work at Wal-Mart, I became very excited about working for that company. At store meetings, I heard many managers report that they had begun working as hourly Wal-Mart employees. I was impressed with these reports and thought that I, too, would be able to promote into management.

6. As scheduled, I received my master's degree in December 1994. More than four years later, in February 1999, I resigned from Wal-Mart because I had not been promoted into management.

7. During the four years that I worked for Wal-Mart, I held the positions of Department Manager, Customer Service Manager, and Cash Office employee. I received four annual evaluations from Wal-Mart. On each of these evaluations I was rated either "above standard" or "outstanding."

8. On many occasions, I told Wal-Mart managers that I wanted to be promoted into management. While working in the Oxford, Ohio store, I told Store Manager Kevin Nolen and Store Manager

Chris Hagemeier. I also told the District Manager, whose name I do not recall. Invariably, I received the same response. They praised my work, encouraged me to keep working hard, and told me that there would be opportunities in the future. Not once did any Wal-Mart manager approach me and offer me an opportunity to promote into management. No manager ever told me what I could do to get promoted or how to apply for a management position.

9. On two occasions, in approximately 1995 or 1996, I sent my resume to the Home Office in Bentonville, Arkansas. Because I am from China, I thought that I might have better luck if I applied for a position in Wal-Mart's International Division. In response, I was offered an hourly position, paying approximately $7.00 per hour. I declined the position because I wanted to be promoted into management, not to continue working as an hourly employee.

10. When I was working in the Jonesboro, Arkansas store, I told the Assistant Manager who supervised me that I wanted to be promoted into management. I remember this conversation because I had received a coaching for parking in the wrong place. The store had recently begun enforcing a rule about where employees could park, but I was not aware of that. I told the Assistant Manager that I did not think that I deserved the coaching, and asked that the coaching be removed from my file. I specifically explained that I wanted the coaching to be removed because I was interested in promoting into management. The Assistant Manager did not encourage my interest in management, nor did he give me any information about qualifications or how to apply.

11. I worked in the Cash Office in three different Wal-Mart stores in three states: Ohio, New York and Arkansas. In each store, almost all of the cash office employees with whom I worked were women. I did not receive any new training when I transferred from a store in Ohio to a store in New York, or to a store in Arkansas. Training was not necessary because the procedures used in each of the cash offices were the same.

12. At the time that I resigned from Wal-Mart, I was earning $8.10 per hour. I believe that I earned about $14,000 annually.

13. After I resigned from Wal-Mart, I returned to school to study for a second master's degree, this time in computer science. I decided to change my career from clothing retail to the computer field because working at Wal-Mart discouraged me about my prospects for building a career in retail management. Being new to the United States, I assumed that other retailers were just like Wal-Mart and would not promote women into management. I am very career-oriented and did not want to remain as an hourly employee. I feel that I wasted four years working at Wal-Mart. I presently work for Federal Express as a programmer analyst. I earn an annual salary of $54,000.

14. I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Tennessee that the foregoing is true and correct.

This Declaration was signed by me on April 10th (month and day), 2003, at Memphis Tennessee (city and state).

/s/ Wei Wu-Emmert
Wei Wu-Emmert

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES,
PATRICIA SURGESON,
CLEO PAGE,
CHRISTINE KWAPNOSKI,
DEBORAH GUNTER,
KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated,
Plaintiff,
vs.
WAL-MART STORES, INC.,
Defendant

Case No. C-01-2252 MJJ

DECLARATION OF DETRIX YOUNG IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I, Detrix Young, declare:

1. I make this statement on the basis of my personal knowledge, and, if called as a witness, could and would testify competently to the facts herein.

2. I was employed by Wal-Mart, Inc. from June 1991 until August 2000. I am female. I have never been disciplined, and I received good evaluations.

3. I was hired by Wal-Mart as a cashier at a store in Aiken, South Carolina. I also helped in various departments, primarily to stock goods.

4. After a few months, the head Customer Service Manager ("CSM") began giving me additional

responsibilities. I made change for the cashiers, relieved cashiers when they took breaks, and occasionally relieved a CSM when she needed a break. I observed that most of the cashiers and CSMs were women.

5. Sometime in 1992 or 1993, I wrote that I wanted become a Customer Service Manager ("CSM") at the bottom of one of my evaluations. By that time, I was already doing many of the duties of a CSM, but I was still being paid at the rate of a cashier. I was eager to move up in the company and hoped to have a long and successful career with Wal-Mart.

6. In 1995, I moved to a Supercenter in Aiken, South Carolina because Wal-Mart closed the old store.

7. Shortly after the new store opened, Ms. Donna Washington [nee Brown], who was the head CSM, approached me and told me that there was a CSM position opening. Ms. Washington asked whether I wanted the position. The position was not posted and I did not complete an application for it. Ms. Washington told me I would get a $.50 increase within ninety (90) days, and I said that I was interested. A short time later, she gave me a black book about how to do the job of a CSM and said that I had the job. I was given a badge identifying me as the Customer Service Manager, keys and a supervisor card, and then I shadowed another CSM for a few days to train. I assumed the additional responsibilities of the CSM position, but never received the promised raise. I inquired of Ms. Washington several times, and each time she merely promised to look into the problem with Mr. Ronnie Hill, the Store

Manager, but I heard nothing later. Eventually, I just gave up asking.

9. Sometime in 1998, I wrote on my evaluation that I would like to be promoted to Support Manager. (Attached hereto as Young Exhibit A is a true and correct copy of my 1998 performance evaluation.) I had overheard someone say that the position would be open, so I put it on the evaluation to show my interest. The Assistant Manager at the time, Kevin Stallings, told me during my evaluation that he would look into it. Later, the position of Support Manager became available and was posted in the breakroom. I signed my name to the list of people who were interested in applying. By that time, I had been with the company for seven years and had worked in nearly every department. I was very familiar with the store and the procedures, and I was willing to work at any time, any hour. I really wanted to move up with this company. Despite talking to my Assistant Manager and putting my name on the list, I was never even interviewed. Instead, they promoted a male named John Cooper who had less seniority, less experience, and had not put his name on the list in the breakroom. John Cooper was promoted by the Store Manager, Mr. Glen Flory, with whom he was friendly.

10. Sometime in 1998 or 1999, I attended a store-wide meeting mandated by Home Office in Bentonville, Arkansas where all the store employees are encouraged to raise concerns and issues with management. At that meeting a woman, whose name I believe was Kathleen McDonald asked why the men made more than the women. One of the male Assistant Managers responded that men are working as the heads of their households, while women are

just working for the sake of working. A male Support Manager named Lee [Last Name Unknown] just laughed and did not try to correct the statement. I knew that several of the women who worked at Wal-Mart were single mothers. After I heard that, I decided that I had had enough and that I would give up trying to advance and stay with Wal-Mart long term.

11. In 1999, I found out that a male employee made more than I did, even though I had been there longer. Specifically, one day when I picked up my check, I saw the check of a man named Floyd Anderson. He was working as a stocker in grocery making nearly $2 an hour more than I was, but he had only been there two years, at most. Again, I felt that as a woman, I could not go far with this company.

12. I gladly would have enrolled in the management training program had I been given the opportunity. I was flexible and available to work, and I wanted to move into management. However, I was never given the chance.

13. After being passed over for Support Manager and listening to comments about why women get paid less, I decided that I did not have a fair chance to advance with Wal-Mart. Therefore, I left company in August of 2000.

I declare under penalty of perjury of the laws of the United States and State of South Carolina that the foregoing is true and correct.

This Declaration was signed by me on April 7, 2003, at New Clinton, SC.

/s/ Detrix Young

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, KAREN WILLIAMSON, on behalf of themselves and all others similarly situated, Plaintiffs, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF TAMARA ZUMBRUN IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Tamara Zumbrun, declare:

1. I am a female employee at the Wal-Mart Store in Mountain Home, Idaho. I began working at Wal-Mart in July, 2000. When I applied for the Management Training Program as a result of the January 2003 solicitation of applicants, I was told that there were additional, previously undisclosed requirements that barred me from qualification. I have experienced sexual harassment and retaliation for using the Open Door at Wal-Mart.

2. From the time I applied at Wal-Mart, I was interested in becoming a part of Wal-Mart management. I wrote on my application that I was interested in management positions. See Tamara Zumbrun's Application Supplement, a true and correct copy

hereto attached as Exhibit A. In addition, I told Assistant Manager Eric Wright (male) during my first interview that I was interested in a position as department manager and that I had interest in other management positions. In my second interview, I told Co-Manager Steve Payne (male) that I was interested in management positions.

3. My first job at Wal-Mart was to help with store setup, because the Mountain Home store had not yet opened. After setup was complete, I became an overnight stocker.

4. In October 2000, I received my 90-day performance evaluation from Assistant Manager Skip Davis (male). I told Mr. Davis during this evaluation that I wanted to join management.

5. In January, 2001, I applied for a position as team lead for ICS with the hope that the position would lead to an opportunity to join the Management Training Program. Assistant Manager Skip Davis conducted the interview. He asked several gender-specific questions, including, "Being a female, what makes you more qualified for this job than a male employee?" In addition, I was told by Skip Davis that the ICS staff is mostly male and they might have a problem with a female boss. For over an hour, Mr. Davis required me to justify why he should give the promotion to a female instead of a male. Then he a chose a male employee, Tony Whitten, for the position.

6. In February, 2001, I transferred to a cashier position. Co-Manager Steve Payne was my supervisor. Mr. Payne did not address female employees by their first names. Instead, he referred to female employees, including me, as "Babe," "Baby Doll," or

"Baby." In contrast, he addressed male employees by their first names.

7. One night when Mr. Payne referred to a female co-worker as "Babe," I told him that his comment offended me. Mr. Payne only rolled his eyes and walk away.

8. I tried to use the Open Door to address my concerns of gender discrimination and sexual harassment. I contacted Assistant Manager Don Grist in September 2001, to again raise my concerns about Mr. Payne's sexual harassment and Mr. Davis' gender-specific questions. I told Mr. Grist that every time Mr. Payne talks to a female employee, he calls her "Babe," "Baby-Doll," or "Baby." Mr. Grist said that someday Mr. Payne would get in trouble for that, but did nothing to address the problem. I am unaware of any coaching or action taken as a result of my use of the Open Door. Mr. Payne and a co-worker Fred Hack (male) continued to call me and other females "Babe". Because the Open Door failed me, I began to look for an opportunity to move to another department.

9. Shortly after speaking to Assistant Manager Don Grist, I began receiving different treatment at Wal-Mart. I was disciplined for minor violations for which male employees were not ordinarily disciplined. On September 22, 2001 I received a coaching for profanity when I used the word "damn" in the employee break room. I routinely heard male employees use far worse profanity in front of management and customers while they were outside together on cigarette breaks. In addition, I heard Tony Whitten call a female employee, Bobby Dimick a "f***ing bitch," and he did not receive a coaching. in fact, within months he was promoted to department

manager of ICS, the position for which I had applied and interviewed. in October 2001, I was given a "decision day," the most severe discipline at Wal-Mart short of termination, for misjudging the timing of my paycheck deposit, which resulted in one of my personal checks failing to clear at Wal-Mart. Don Kingsley, a male employee, bounced eight checks before he was even coached, a less severe form of discipline. Another male, Kim Cummings, also bounced a check at Wal-Mart but he was not given a decision day.

10. According to Wal-Mart policy, as a result of the decision day I was ineligible for promotion to any position for one year.

11. After I received my September coaching I asked my Customer Service Manager (CSM), Joyce Frye, for a merit raise, and she said that it would be no problem. However, Tammy Epley, the other lead CSM later told me that it was not possible for me to get a merit raise because I had an active written coaching in my file.

12. The Photo Center was very short staffed when I arrived, and so we all had to work very hard to keep up with the workload. All of the Associates at the Photo Lab were female, except for one. He was on a leave of absence. Another female employee, Christian Compton, and I joined together to ask for a merit raise from our Co-Manager Jim Payne. Mr. Payne just laughed at us.

13. In October 2002, I was promoted to lab specialist in the Photo Center. For this promotion, I was supposed to receive a 25 cent raise, according to my Assistant Manager in the Photo Lab, Laura Sauer. As of April 2003, I still have not received the raise.

14. In January 2003, there was a flyer placed by the time clock in our store advertising the Management Training Program. According to the flyer, any employee could apply for a position in the Management Training Program. The application period was for a limited time, approximately one week or a little less. In my two and one half years at Wal-Mart, I had never known of any other opportunity to apply for the Management Training Program. As I had been interested in joining management from the commencement of my employment at Wal-Mart, I applied. I completed the application over the pipeline, Wal-Mart's computerized information network which has online applications for some job positions. I met all of the prerequisites for the program.

15. My Store Manager, Pat Cochran, interviewed me for the position on March 6, 2003. He told me that I was not ready to become a Management Trainee. He told me that I needed to spend some time as a department manger and then as a Support Manager first. Mr. Cochran told me that I had another two years of employment at Wal-Mart before I would be ready. Meanwhile, according to the pipeline application, I had met all the requirements necessary to apply for the position. I had not been asked on my application about whether I had held positions as a department manager or Support Manager.

16. Mr. Cochran further elaborated and said that I needed experience with the Telzon, Wal-Mart's handheld inventory and pricing computer, and that I needed experience with modular set-up, which is building and displaying items on Wal-Mart display units. I had experience in both of these areas. I reminded Mr. Cochran that I used the Telzon everyday in the Photo Center and reminded him that my first

job at Wal-Mart was to set-up the modulars. That did not change his mind. He continued to tell me that it would be another two years before I would be qualified for the Management Training Program.

17. Throughout my interview Mr. Cochran asked me if I was willing to relocate to enter the Management Training Program. Every time he asked me, I told him yes, but he continued to ask.

18. Despite this discouragement from Store Manager Cochran, I continue to be interested in joining the Management Training Program al Wal-Mart. I have received no information from Wal-Mart indicating if there will be another opportunity to apply for the program. I have received no encouragement from Store Manager Cochran, and he has not made any effort to provide to me the experience he stated I needed before I could be trained to be a Wal-Mart manager.

19. As of March 2003 I am still working in the photo lab at Wal-Mart. Of approximately eight Assistant Mangers in our store, only three are female. When the store opened in the late summer of 2000, only one Assistant Manager in the store, out of eight, was female.

I have personal knowledge of each and every fact set forth in the Declaration, and if called to testify as a witness in this matter, I could and would competently testify to each of these facts.

I declare under penalty of perjury of the laws of the United States and State of Idaho that the foregoing is true and correct.

This Declaration was signed by me on April 14, 2003, in the city of Mtn. Home, Idaho.

/s/ Tamara Zumbrun
Tamara Zumbrun

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiffs, v. WAL-MART STORES, INC., Defendant.	Case No. C-01-2252-MJJ **DECLARATION OF WEI MING BOGARDUS IN SUPPORT OF WAL-MART STORES, INC.'S OPPOSITION TO MOTION FOR CLASS CERTIFICATION** Date: July 25, 2003 Time: 10:00 a.m. Courtroom: 11, 19th Floor Judge: Martin J. Jenkins Complaint Filed: June 8, 2001 Trial Date: None Set

DECLARATION OF WEI MING BOGARDUS

I, Wei Ming Bogardus, declare:

1. I started as a Cashier at Wal-Mart Discount Store in Dubois, Pennsylvania (Store 1769) in 1993 while I was in high school. I am now twenty-eight years old and the Store Manager of the State College, Pennsylvania Supercenter (Store 1640). My personal goal was to become a Store Manager when I was 30. As I further describe below, I have been mentored,

counseled, guided and advised by many members of management at Wal-Mart. Through hard work, and the guidance and support of my managers, I became a Store Manager two years shy of my target date.

2. In the Fall of 1993, I started college at Pennsylvania State University and transferred to Store 1640 in State College, Pennsylvania as a Sales Associate in Stationery. Store 1640 was a Division 1 store at this time. My managers at Store 1640 were very flexible and allowed me to work around my school schedule. Though they were willing to let me work part-time, I decided that I wanted to work full-time so that I could earn more money and get more experience. I had great leaders and supervisors at Store 1640. I truly believe that I am a Store Manager today because of these great leaders. Originally, I intended to go to law school after college. I chose not to do so because I loved working with the people at Wal-Mart and felt optimistic that I could someday achieve my goal of running my own store.

3. When I was an hourly associate, many of my Assistant Managers encouraged me to seek out a management position. One of the individuals that was instrumental in my career at Wal-Mart was Jean Paul LeGuen, my Assistant Manager while I was at Store 1640. In 1996, there was a exceptional period of time when I was working extremely hard because it was back-to-college time and there were no other Wal-Mart stores in the area at this time. In recognition of my efforts, Jean recommended me for the Associate of the Month award. My picture was displayed at the front of the store and I got a lot of recognition from higher level managers. After this, my District Manager, Scott Snow, and Regional Vice

President ("RVP"), Castural Thompson, were constantly thanking me for doing a great job.

4. Another one of my Assistant Managers at Store 1640, Matt Heddings, also helped me advance at Wal-Mart. He did so by constantly communicating with me about my performance and spending a lot of time teaching me about areas that went above and beyond the duties of a Sales Associate. For example, Matt taught me how to operate the Telzon computer, order merchandise, and review return sheets.

5. While I was at Store 1640, I found out about the Summer Internship Program (the "Internship Program") through my supervisors and through store meetings that I attended. The Internship Program is a truncated version of the Assistant Manager Trainee Program that trains associates to become Assistant Managers while attending college. I was very much interested in participating in this program. In 1996, Jean recommended me as a candidate for the Internship Program. My Store Manager, Greg Anstett, and District Manager, Scott Snow, subsequently interviewed me for the Internship Program. Both encouraged me to enter the program and informed me that participating in it could open the door to promotions to high level positions down the road. I started the Internship Program at Store 2230, which was only a few miles from Store 1640.

6. In 1997, I obtained a B.A. in English Literature from Penn State. Shortly thereafter, I completed the Internship Program. After completing the program, I asked Mark Roberts, my Regional Personnel Manager ("RPM"), to promote me to an Assistant Manager position to Store 2230, the store at which I trained. In the Summer of 1997, Mark promoted me to that position.

7. To diversify my Wal-Mart experience, I subsequently decided to work at several other Wal-Mart locations as an Assistant Manager. I worked at the Terre Haute, Indiana Store from August 1998 to January 1999; the Ledgewood, New Jersey Store from January 1999 to July 1999; the Franklin, New Jersey Store from July 1999 to August 1999; the Cranberry Township, Pennsylvania Store from August 1999 to July 2000; the Pittsburgh, Pennsylvania Store from July 2000 to August 2000; the Clarion, Pennsylvania Store from August 2000 to August 2001; the New Castle, Pennsylvania Store from August 2001 to June 2002; and the Butler, Pennsylvania Store from June 2002 to November 2002.

8. While I was an Assistant Manager, many of my managers supported and mentored me. One of my best mentors was my Co-Manager at the Cranberry Store, Robert Harrer. There was a point while I was working at the Cranberry Store when I grew unhappy. My unhappiness was not with management, but with my own performance. At that time, I was in charge of Lawn & Garden at the Cranberry Store. The position was difficult because the Cranberry Store was in an affluent metropolitan area and that spring Lowe's, Target and Home Depot stores opened simultaneously nearby. Competing with these stores was frustrating and challenging. Due to these frustrations, I considered leaving Wal-Mart. Though I never mentioned my displeasure to anyone at work, Robert asked me if I was happy with my job. I confided in him that I was not completely happy. After we spoke, Robert started spending a lot of time counseling me. He told me that I had too much talent to quit and encouraged me to be patient. He made me realize that there would be a light at the end of the tunnel. He was right. A short time later, in the

Summer of 2000, District Manager Snow told me that he had an opening in his district and that he would be happy if I moved to one of his stores. I graciously accepted his offer and started working at the Pittsburgh, Pennsylvania Store in July 2000.

9. My District Manager while I was working as an Assistant Manager in the Clarion, Pennsylvania Store, Terry Nannie, was also a tremendous mentor. In 2001, he asked me what I wanted to do with the Company. I told him that I was interested in working in Grocery. I wanted to work in Grocery so that I could diversify my experience and progress toward my goal of becoming a Store Manager. A week after expressing my preference, Terry transferred me to the New Castle, Pennsylvania store (the highest volume store in Terry's district), and had me run the food section of that store. Terry's help did not end there. He was very generous with his time. He constantly taught me things that Assistant Managers did not normally deal with. He also constantly counseled me about my career. Terry's help really prepared me to move to the Store-Manager level. In early 2002, Terry also made me Assistant Manager of the Quarter and placed me in the Rising Star Program.

10. In June 2002, Terry made me a Training Assistant at a Supercenter that was setting up for its Grand Opening in Butler, Pennsylvania. While I was at Butler, Terry taught me many things that helped me advance. For instance, he taught me how to review and analyze profit and loss statements and general ledgers. He also toured the store with me and instructed me about issues in the entire store, and not just the areas I was responsible over.

11. About five months later, I bid for a Co-Manager position on the General Merchandise side of the New Castle Store. In November 2002, District Manager Terry and RVP, Steve Maloney, promoted me into that position.

12. While I was an Assistant Manager and Co-Manager at the New Castle Store, my Store Manager, Dave Williams, also spent a lot of time teaching me about how to run a store. He provided me with the tools and information that I needed to be a successful Store Manager. He allowed me to perform functions that Store Managers generally do. For instance, he taught me how to review reports and schedules and determine whether we were overstaffing or understaffing. Assistant Managers normally look at schedules and reports for their area of the store. Dave gave me the opportunity to do this for the entire store. He also taught me the reasons for making certain scheduling adjustments and how to make those adjustments. Dave also taught me how to forecast sales, a task Assistant Managers do not normally do.

13. A few months later, RVP Maloney, told me about an opening for Store Manager at Store 1640, where I worked during college, and told me that that I should apply. I bid for the position and received an interview with RVP Maloney. The following week, about three hours after my interview with the District Manager, Dan Hilderhoff, I was announced as the new Store Manager at the Divisional Meeting in Kansas City, Missouri.

14. In 2002, RVP Maloney picked me to be a Leadership Express Candidate. This is a program where the RVP mentors select candidates and places them on special projects (*e.g.*, participating in college

recruiting for management positions). Because I am a Leadership Express Candidate, RVP Maloney calls me once a week to check to make sure that I have everything I need and to answer any of my questions. My District and Regional managers are the best group of people and are always willing to help and advise me whenever I need it.

15. Training and promotional opportunities here have been and are discussed during daily and weekly store meetings at every store in which I worked. These meetings are open to all associates and are conducted during all shifts. The meeting notes are posted near the time clocks for people who do not have the opportunity to attend the meetings.

16. As a Store Manager, I decide what to pay associates in my store, and I make those decisions in a nondiscriminatory way. My pay and promotion decisions are based solely on an associate's level of performance.

17. My hard work and effort with Wal-Mart have paid off. Just last week, during our Shareholders Meeting, I was honored to receive the Sam Walton Hero Award.

18. I have personal knowledge of the facts contained in this Declaration. If called and sworn as a witness, I would testify competently to those facts.

19. I make this Declaration entirely of my own free will and choice. No promises of benefits or threats have been made to me to persuade me to sign it.

Executed this 11th day of June 2003, at Reynoldsville, Pennsylvania.

/s/ Wei Ming Bogardus
Wei Ming Bogardus

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

BETTY DUKES,
PATRICIA SURGESON,
CLEO PAGE,
CHRISTINE
KWAPNOSKI,
DEBORAH GUNTER,
KAREN WILLIAMSON
AND EDITH ARANA,
on behalf of themselves
and all others similarly
situated,

Plaintiffs.

vs.

WAL-MART STORES,
INC.

Defendant.

CASE NO. C-01-2252
MJJ

DECLARATION OF JOAN G. HAWORTH, PH.D. IN SUPPORT OF DEFENDANT WAL-MART STORES, INC.'S OPPOSITION TO CLASS CERTIFICATION

Date: July 25, 2003
Time: 10:00 a.m.
Courtroom: 11, 19th Floor
Judge: Martin F. Jenkins
Complaint Filed: June 8, 2001
Trial Date: None Set

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Executive Summary

1. Counsel for Defendant in the matter of Dukes, et al. v. Wal-Mart Stores, Inc. asked the professional staff of ERS Group to analyze employment data provided or available to the plaintiffs in this matter and to review and comment on the analysis and conclusions of plaintiffs' experts, Richard Drogin, Ph.D. and Marc Bendick, Ph.D. In this declaration I repeat the opinions that were provided to plaintiffs' counsel in my April report and my deposition. Where I believed it would be helpful for the Court to understand the context in which these opinions were reached I provided additional explanations and background discussions. I have also responded to some of the "flaws" alleged by plaintiffs' experts' rebuttals where I believed the Court might be misled if I did not respond.

2. The Third Amended Complaint shows that the issues in this matter focus on promotion and compensation. The Plaintiffs' Motion for Class Certification focused their claims on the hourly promotions to the Support Manager position starting December 27, 1998, salaried promotions, hourly compensation, and salaried compensation. Consequently, we have slightly rearranged the content and format of my original report to make it more useful for the Court in light of their Motion. My opinions, however, have not changed.

3. We also conducted additional analyses to provide the Court background for understanding the issues raised in the plaintiffs' rebuttal reports. In addition, I have appended results of some analyses that were previously conducted for a more extensive period but are now limited to the period described in Plaintiffs' Motion for Class Certification (after De-

cember 26, 1998). Specifically these additional sections of the declaration are:

- Starting on ¶ 84 we discuss our analysis of the job posting database for Support Manager selections during the time period 1999-2002 in response to Dr. Drogin's criticism of our use of the job posting data for hourly jobs.
- Starting on ¶ 91 we discuss our analysis of the job posting database for departments whose female representation is less than the company-wide average to address Dr. Drogin's remarks about department segregation.
- Starting on ¶ 114 we discuss our analysis of the Assistant Manager Trainee database where the pool of eligible employees is defined as those who met the minimum qualifications for the job in response to plaintiffs' concern that we may have used an inappropriate pool in our analysis of the selections for Assistant Manager Trainees.
- Starting on ¶ 116 we discuss our analysis of the Management Career Selection (MCS) database for the time period 1999-2002 to address Dr. Drogin's criticism of our use of the posting data for salaried jobs.
- Starting on ¶ 132 we discuss our analysis of the MCS database by store size category that contradicts the analysis prepared by Dr. Drogin in his Response to our Report.
- Starting on ¶ 214 we discuss our analysis of hourly pay rates that include Department Managers and other previously excluded as-

sociates to show that our conclusions are not affected by their exclusion.

- Starting on ¶ 216 we discuss our analysis of job, department and store assignments to address assertions by plaintiffs' experts that these variables may be "tainted."
- Starting on ¶ 217 we discuss our analysis of current and starting pay rates – also to address plaintiffs' experts assertions that this variable may be "tainted."

4. My conclusions, based on our analysis and research, can be summarized as follows:

- The claims of the named plaintiffs are not typical of women associates at Wal-Mart. Their job histories show different pay and promotion situations than we have found from our analysis of these processes across the firm.
- Promotions: A reliable study of promotion decisions by Store Managers compares the percent female among those who were promoted and those who actually applied for the job. Dr. Drogin's study of promotions compared the percent female of all associates in a job and store and did not reject those who had not applied for the job. The data show that people who did not apply for each job usually have a different gender composition than those who did express their interest for the positions. Therefore, Dr. Drogin's promotion analysis is incorrect and misleading. In our analysis I compared the percent female among associates who applied for each job to those promoted and found that the percent of

women at Wal-Mart stores who are promoted is at least equal to, and usually statistically significantly greater than, the percent of women who applied for the jobs.

1. For hourly management jobs the percent female among the applications was 68.3% and the percent of those promoted who were women was 70.4%. The hourly position of Support Manager had an applicant pool that was 46.1% female and 47.2% of those selected were women.
2. For salaried management positions – approximately 12% of those applying for Store Manager were women and 17% of those promoted were women. Likewise, women were 17% of Co-Manager applicants and 25% of those promoted. For posted Assistant Manager positions the percent female among applications was 24.2% and the percent female promoted was 28%.
3. Approximately 44% of the Assistant Manager Trainee applicants in the first 2003 posting were women and those selected were 59% female. Approximately 41% of the Assistant Manager Trainee applicants in the second 2003 posting were women and those selected were 47% female.

- Hourly Pay Rates: Both Dr. Drogin and I used "multiple regression analyses" in our study of hourly employees' pay rates. We differ in what we estimated and the variables we considered important in identifying similarly situated associates.

1. I estimated the difference in pay rates between men and women for each decision maker and examined the extent of any pattern of those differences. Since Wal-Mart's policy is to push pay decisions down to the Store Manager (or District Manager in the case of Specialty Departments) the store-by-store estimates of pay differences that I estimated reflect the way Wal-Mart actually operates. This is a company that relies on its Store Managers to set the specific wage rates of each store's employees.
2. I included in my estimated regression equations adjustments for grocery jobs, department, current and first pay group (which Dr. Drogin agreed was not a tainted variable), night shift premium, holding a secondary job, on a leave of absence, as well as some form of the variables Dr. Drogin included.
3. I found that more than 90% of the stores had no pay rate differences between men and women that were statistically significant. That is, over 90% of the stores had no statistical difference in men's and women's pay rates. Some of the remaining stores favored women; others favored men.

- Dr. Drogin created a model that could not consider whether there were differences among the decision-makers – the Store Managers for hourly decisions or District Managers for salaried decisions – because he did not provide for that answer in his model. Instead he estimated a difference in pay rates that assumed that Wal-Mart was a company with a single decision-maker who sets pay rates for all employees, contrary to testimony, policy documents and our statistical tests.

- He excluded important variables in his pay model – like hours worked – when he analyzed total earnings and night shift premium (that are sometimes built into the employee base rate), pay group and department. The result of excluding many of these major variables is an estimate that ignores pay differences in the labor market for different types of jobs and shifts. This estimate does not compare similarly situated associates because, for example, women work fewer hours, are less likely to work night shift, prefer to work in different departments than men as a group, etc. and men, on average, work more hours, are more likely to work night shift and work in different departments.

- Dr. Drogin estimated a result that cannot tell us the extent to which adverse pay decisions were made by Store Managers in most of the stores or, conversely, occurred, if at all, among only a small proportion of the Store Managers.

- Salaried Compensation – Men and women Store Managers at Wal-Mart and General Managers at Sam's Clubs also appear to be paid similarly when the available appropriate characteristics are included in the model.

- None of these results are consistent with a common pattern of promotion and pay decisions adverse to women associates at Wal-Mart.

Qualifications

5. I am the Chairman and CEO of ERS Group, a SourceCorp company, which specializes in the economic and statistical analysis of employment discrimination cases and other matters. I have testified for both plaintiffs and defendants in over 65 employment cases, including *Huguley v. General Motors Corp., EEOC v. Sears, Roebuck & Co., Penk v. Oregon State Board of Higher Education, Walter J. Thomas v. James Baker, III, Secretary, Department of State and AFCSME v. County of Nassau.* I am a frequent presenter and participant in programs and mock trials for such groups as the American Bar Association, the Defense Research Institute, and the Practicing Law Institute.

6. I have authored over 30 publications and research papers, in economic, statistical and legal journals such as the American Economic Review, Proceedings of the American Statistical Association, Notre Dame Lawyer, and Employee Relations Law Journal. Many of my articles focus on the areas of employment discrimination, comparable worth and the economic status of women. I am a former tenured faculty member in the Department of Economics at Florida State University and was the Director of the Census Processing Center. I am past Chair of the American Economic Association's Committee on the Status of Women in the Economics Profession and have served on the board of that committee for many years.

Level of Analysis

7. The decisions on how hourly Wal-Mart associates are assigned, paid, promoted within a store and scheduled are made at the store level with oversight for exceptions at the district level. Thomas Coughlin, President and CEO of Wal-Mart Stores, Supercenters, Neighborhood Markets, and Sam's Clubs, described the philosophy of management at Wal-Mart Stores: "We push down to the manager of the facility level, the responsibility to run those stores right." As a consequence, analysis of these decisions is logically performed at the store level. As I discuss in great detail in the compensation section of this declaration, there are also statistical reasons that compel performing hourly compensation analyses at the store level.

8. Furthermore, only by examining the Store Manager decisions store-by-store can the Court determine whether all of the stores, districts or regions make the same type of decisions with respect to gender. Our analysis of promotions and compensation is summarized at the store level and, in some cases, the job or department level, in order to provide the basis for my opinion that there is not a common pattern of decision-making in this company. These focused analyses also contradict Dr. Drogin's claims that Wal-Mart segregates women into particular positions, departments or stores through its promotion practices.

Promotion

9. In our analysis we relied upon the databases that contain information on who applied to and were selected for the hourly and salaried positions in question to specifically examine most of the promotion questions at issue in this case. Wal-Mart has

continuously maintained these data for years. We believe that these applicant flow data files provide the best measure of those who are interested in being selected to these jobs because they contain information on who applied to and were selected for the hourly and salaried positions in question. Although these databases were provided to plaintiffs' expert, Dr. Drogin, and he performed initial analyses of the data (provided in back-up materials) he still chose to ignore both the data and the results of his analysis in reaching his conclusions regarding promotion. Instead, plaintiffs' expert, Dr. Drogin, created his own definition of who would be interested in these positions and also created his own definition of which moves reflected an associate promotion.

10. The results of our promotion analyses, using the applicant flow data, consistently show that when you consider the positions for which people have actually applied, women are being selected in a manner that is either gender-neutral or statistically significantly in favor of females.

Hourly Job Posting

11. When we examined data for approximately 530,000 applications for 104,091 positions in the hourly job posting system from December 27, 1998 through September 30, 2002, we found that statistically significantly more female Wal-Mart associates were promoted into hourly management positions than predicted by their applications to these positions. Only 5 of the 2,694 stores had a difference between the number of women promoted that was lower than predicted by women's presence among the applicants at a statistically significant level (e.g., a difference that is inconsistent with random chance). When we examine these results by store we find that

more than 90% of the stores show no gender difference in the promotion decisions to hourly management and office positions. These results are not consistent with plaintiffs' claim that there is a common pattern of promotion decisions adverse to women in the Wal-Mart stores.

12. When we examine only the Support Manager applications and offers in the job posting data, we find that the results are consistently favorable to women. Women were promoted at a statistically significantly greater rate than would have been predicted given their representation among those who applied for the position. Between December 27, 1998 and 2002, there were approximately 41,000 applications for about 6,800 Support Manager openings. Women made up 46.1% of those who applied but received 47.2% of the offers made (79 more than predicted by their share of each posting). This is a difference that is favorable to women and statistically significant.

Effect of Promotion Decisions on Departmental Segregation

13. The plaintiffs claim that Wal-Mart creates and exacerbates departmental segregation by underselecting females who have applied to "male" departments. However, the applicant flow data do not support this conclusion. When we examine only departments whose female representation is below 64% – which is the company-wide female representation that Dr. Drogin calculated, more women were selected than predicted by women's share of applications in the hourly job posting system and there were more departments with extra women promoted than there were departments with a shortfall in female promotions.

Management Career Selection Promotion System

14. Our analysis of promotions into salaried management positions found that statistically significantly more women were promoted into these positions than predicted by their application rate in the online Management Career Selection (MCS) system. Approximately 4,000 offers were made to men and women who applied through MCS for Store Manager, Co-Manager and Assistant Manager. For Store Manager, Co-Manager and Assistant Manager positions, the proportion of offers women received was higher than their representation among the applications for these positions.

15. We determined that women are not restricted to smaller stores when they are promoted to Store Manager position. Whether we define store size based on the top third, middle or bottom third in each type of Wal-Mart store, or we define the small stores as those with less than 60,000 square feet (as Dr. Drogin did), there were statistically significantly more women promoted than predicted by their application rate in ***both*** the smaller stores and the larger stores. Thus, female Store Managers are not channeled into smaller stores, as the plaintiffs claim.

Assistant Manager Trainee Positions

16. We also examined the most recent data on store associates nationwide, who expressed an interest in admission to the Assistant Manager Trainee ("AMT") (also referred to as manager-in-training or management-in-training) position and found that

44% of these bidding associates were women.[1] This proportion is not much different from the proportion of women in Wal-Mart Discount Stores and Supercenters promoted to the AMT position from December 28, 1998 through March 2002 (40.4%). It is also similar to the percent female among Officials and Manager in firms that are in industries related to Wal-Mart industries as of 1999 (37%). This suggests that the percent women among the Assistant Manager Trainee applicants is a reasonable proxy for the proportion of women predicted to be among managers in this organization in recent years.

Plaintiffs' Claim that the Application Data are Biased is Unfounded

17. The officially maintained MCS applicant flow data that we used in analyzing promotions contain the records of the management jobs that were posted, the applications of associates who expressed their interest in the posted positions and the offers actually made for such positions as Store Manager. The Global PeopleSoft job history data that Dr. Drogin used lack this type of information. Even though not all of the potential promotions are included in the MCS data, a comparison of these two data systems reveals no salient reason why Dr. Drogin should have completely ignored the MCS applicant flow data as he chose to do.

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[1] After I prepared my report and gave my deposition in this case, Wal-Mart had another Assistant Manager Trainee posting. This time, 41% of the bidding associates were women. *See* Declaration of David A. Scott.

18. The female representation among those receiving offers when they responded to an MCS posting in that system was nearly identical to the female representation among the moves to the same positions that are identified by Dr. Drogin in the Global PeopleSoft job history data (that include promotions to jobs not posted, demotions and lateral moves). For example, the percent women among the offers to Store Manager in the MCS posting system was 16.9% while the percent women among those promoted according to the Global PeopleSoft data was 17.6%. For each of the three major jobs posted – Store Manager, Assistant Manager and Co-Manager – the representation of women winning promotions to such jobs was statistically the same, whether or not the change in job was posted in MCS or recorded only in Global PeopleSoft. These results show that the MCS data reflect the similar participation of men and women in these promotions and does not appear to be a skewed sample of promotion data. Ignoring that information when there is no evidence that the decisions made for posted positions had a different female composition than the decisions recorded in associates' job histories, is a fatal flaw in plaintiffs' analysis of promotions.

The Claim that All Hourly Associates in a Job and Store Should be Considered for Promotions is Unfounded

19. Dr. Drogin's assumption in his promotion analysis, that men and women are "similarly situated" simply by virtue of the fact that they are in the same job and store or district, is not reasonable because it ignores individual preferences expressed by the actual applicants. For example, we find that Store Manager and Co-Manager positions generally

require relocation. Among the applicants for Store Manager and for Co-Manager the men were statistically significantly more likely than women to relocate from one region to another. Women and men did not apply for these positions at the same rate as they are present in the workforce, so the assumption that the percent female in the same job and district is representative of the applicants for these positions is not correct. Likewise, we find statistically different female representation in applications for Automotive positions than in applications for positions in Toys. The assumption that the female representation of those interested in and qualified for the same positions would be the same as their representation among all employees in a particular job and store or district is not supported by these and other applicant flow data.

Hourly Pay Rates and Hourly Compensation

20. As is the case with promotions, it is also very important when analyzing compensation to build a statistical model that reflects as closely as possible the compensation decision-making structure. As noted earlier, Wal-Mart Stores, Inc. pushes the decision-making on pay issues for hourly associates down to the Store Managers. * * *

21. When we build a pay model that includes the important variables for which there are data and estimate the model separately for each store, we find that over 90% of the stores have no statistically significant difference in hourly pay rates between female and male associates with similar work-related characteristics. This is true in Wal-Mart Discount stores, Neighborhood Market stores, and Supercenters (divided into Grocery and non-Grocery), as well as Sam's Clubs. Some of the remaining stores

had statistically significantly higher pay rates for men and some stores had statistically significantly higher pay rates for women.

22. As will be discussed later in this declaration, these results are consistent regardless of whether we include or exclude Department Managers, include or exclude all hourly employees with unusual pay situations (like those who were once salaried or had been recently demoted), or whether we prepare the summary of the data by sub-divisions (e.g. general merchandise, grocery, optical, tire & lube) or by store type.

23. Dr. Drogin's compensation models implicitly assume that there is one decision-maker for hourly employees who determines the compensation levels for all hourly employees (Wal-Mart, Sam's, Neighborhood Markets and Supercenters) across the country. He also assumes that the single measure of pay difference he estimates is the measure of difference that is relevant. In fact, however, this measure of difference tells us nothing about the pattern of decisions across stores. In this case we see that 90% of the Store Managers have made pay decisions that are not statistically significantly different between women and men. Dr. Drogin includes a "store" variable in his model, but these variables only tell us whether pay rates are generally higher (or lower) in each store and do not tell us anything about pay differences between women and men in each store. His model clearly differs from the decision-making process described in the deposition testimony, declarations, and corporate guidelines that have been presented in this case and suffers from the statistical problem of "aggregation bias" (putting all data sets

into one model even though they are dissimilar with respect to the decisions analyzed).

24. If an analyst wants to include all the associates in one analysis by creating only one equation for all stores, it is necessary to conduct a statistical test called a "Chow" test to determine whether the compensation decisions are based on the same variables, weighted the same way in all stores (as Dr. Drogin's analysis assumes and would have you believe) or whether these compensation decisions differ across stores. Dr. Drogin did not perform this test or any other test of the validity of his "one decision-maker" assumption. When we performed a test of that assumption, we found that the Chow test "failed" – meaning that the hourly pay rate of female and male associates at Wal-Mart differed among the stores in such a way that the pay rates could not be properly analyzed by combining all the stores. However, when each grocery/non-grocery division group in each store is analyzed separately, as we did, the differences in compensation structures among the stores can be examined and the results used to determine whether there is a common pattern of pay differences adverse to women among the stores or whether these pay differences only show up in some stores. As noted above, we found that more than 90% of the stores had pay differences that were statistically insignificant and the remaining stores either paid women less than men or paid men less than women at a statistically significant level.

25. Dr. Drogin's pay model is not consistent with Wal-Mart's compensation and organizational policies. * * *, and his model does not pass the statistical test that would permit us to combine all of the data into one equation (using the "Chow" test).

In sum, his pay model does not result in sufficiently similar equations among the stores that they can be combined into one equation. This means that his estimates of differences in pay between men and women are meaningless because he did combine all the Wal-Mart associates' data into one equation without accounting for those structural differences in his model. Consequently, he cannot tell us whether the earnings difference he finds reflect a common pattern of pay differences across all Wal-Mart retail stores or are only unfavorable in a small proportion of the stores because he has not constructed a model that can provide that information.

26. Dr. Drogin also produced an alternative estimate in his Response to our Report which purports to aggregate the store-by-store equations into a single measure of pay difference. He testified in his deposition that he simply treated the gender coefficients as "independent variables" and calculated the difference as one would if combining independent variables. Once again, however, Dr. Drogin has ignored the fact that these coefficients are estimated for stores with diverse pay criteria who weigh those criteria in different ways. As will be discussed later in this declaration, that estimated pay difference is also meaningless because these coefficients are not from similar distributions.[2]

27. Dr. Drogin's compensation analyses also suffer from a second fundamental error. In addition to estimating a single equation when that model is not supported by the data ("aggregation bias"), he

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[2] This problem is a form of "Simpson's Paradox."

omits variables that have a significant influence on compensation levels (e.g., department, shift) from his models – that is "omitted variables bias." For example, when analyzing total compensation he fails to include the hours worked by individual associates. As women in the workforce generally work fewer hours than men, this omission inappropriately increases his estimates of adverse pay rates for women. Other omitted variables have similar effects whenever they are related to gender.

28. The variables that Dr. Drogin omitted include many different factors that Store Managers consider. For example, these improperly omitted variables include night shift differentials, department, and hours worked in his total compensation models. Wal-Mart's hourly pay rates are set in accordance with the pay structure that is implemented independently by managers in each store. Total compensation for hourly employees can vary within a pay class at any store because of differences in many different employment-related factors, such as part-time work, prior experience, performance, schedules, specific skills (e.g., meat or fresh produce knowledge) and specific certifications. Associates may be paid more than the stated pay class range if they have special skills, related work experience, etc. Thus, it is not surprising that the statistical test for comparability found that the stores had different compensation decision criteria because they are in different labor markets, have different skill and experience needs and have different managerial philosophies as to what factors are important to compensate.

29. Dr. Drogin's analysis of hourly pay rates that combines all the associates in various stores, districts and regions into one statistical model for all

of the Wal-Mart Discount stores, Neighborhood Market stores, Supercenters and Sam's Clubs (or just for Sam's Clubs) violates the statistical principles of data analysis, is inconsistent with the guidelines and policies of Wal-Mart and omits variables that are part of the criteria by which pay decisions are made by Store Managers. The results are estimates that fail to meet professional statistical criteria and also fail to reflect the decision process at Wal-Mart.

Salaried Compensation

30. Dr. Drogin's compensation models for the salaried workforce combine all management positions into one equation, despite the fact that they are paid pursuant to very different pay plans, depending on their job title, store characteristics, and store performance. Because their compensation differs for more reasons than simply the job title, the variables in Dr. Drogin's single equation are insufficient to account for the diversity in compensation plans by job and by store type.

31. The compensation of associates in Wal-Mart's retail salaried positions (Store Manager, Co-Manager, Assistant Manager and corresponding positions at Sam's Clubs) is based on different compensation plans that vary with the job and the circumstances of the store. Generally these plans involve different incentive structures with a calculated threshold that impacts the managers' compensation. In addition to these incentive structures and threshold measures (for which we do not have data at this time), other factors affect salaried managers' pay in some positions. These include type and amount of managerial experience, difficulty of a specific store assignment, willingness to relocate, grocery experi-

ence and other special skills. Data for many of these factors are also unavailable at this time.

32. Despite the fact that data for many of the most critical variables that define incentive structures and store circumstances are not available at this time, we did estimate compensation for Store Managers at Wal-Mart and General Managers at Sam's Clubs separately and found no adverse statistical difference between men and women. The model includes a variable for store size and number of associates in an effort to capture the scope of the manager's responsibilities but it does not capture the profitability of the store or changes in the store performance over the past year. Estimates for the other positions are not yet sufficiently reliable and complete to determine whether there are adverse differences by gender.

33. Dr. Drogin's salaried compensation analyses, however, created an over-generalized picture of the workforce that obscured legitimate differences among associates because he omits relevant and important factors from his model that are known to affect pay decisions at Wal-Mart and, as in hourly pay, combines diverse compensation structures. These flaws result in inaccurate and overstated gender pay differences and meaningless results that cannot tell us what the situation is for each salaried job or for each type of store (Wal-Mart or Sam's Clubs).

Summary of Conclusions

34. The claims of the named plaintiffs are not typical of women associates at Wal-Mart. Their job histories show different pay and promotion situations than we have found in our analysis of these processes across the firm.

35. The promotion of women at Wal-Mart stores is favorable to women or consistent with a neutral process. This is true for promotion decisions made in the stores for hourly management jobs and at higher levels for salaried Store Manager positions, as well as selections for the Assistant Manager Trainee position in 2003.

36. At more than 90% of the stores, the hourly pay rates are not statistically significantly different between men and women – regardless of store type. Women are paid more in some of the stores in which there is a statistically significant difference and men are paid more in others.

37. Men and women Store Managers at Wal-Mart and General Managers at Sam's Clubs also appear to be paid similarly when the available appropriate characteristics are included in the model.

38. None of these results are consistent with a common pattern of promotion and pay decisions adverse to women associates at Wal-Mart.

39. Dr. Drogin's promotion analysis fails to incorporate the clearly relevant information on female and male associates' interest in job openings at Wal-Mart. This failure results in a flawed promotion analysis. His compensation analysis suffers from two flaws – (i) the aggregation bias that resulted from combining all the data for all associates in all stores into one equation that failed to recognize the differences in the pay model among the stores, and (ii) omitted variables bias. As a consequence, his compensation analysis does not properly reflect the compensation system at Wal-Mart and incorrectly identifies pay differences between men and women as if they were present in all stores. Dr. Bendick

does not provide a promotion analysis or a compensation analysis.

I. Introduction

A. Assignment and Summary of Findings

40. Counsel for Defendant in the matter of Dukes, et al. v. Wal-Mart Stores, Inc. asked the professional staff of ERS Group to review and analyze data provided or available to plaintiffs in this matter and to form opinions on issues relevant to class certification. This declaration contains a summary of our analyses and conclusions, the basis of those conclusions and a description of the documents and data sets used to form those opinions. My curriculum vita is found in Appendix A to this declaration.[3]

41. The applicant flow data show more women promoted than predicted by their applicant flow representation. There is no statistical difference in the proportion of women promoted compared to their applicant flow in over 90% of all stores. Further, we found no statistical difference between men's and women's pay rates in more than 90% of the stores when job-related variables are included in the model. These results are not consistent with a common pattern of decision-making adverse to women across Wal-Mart stores with respect to promotions or pay.

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[3] Paul F. White, Ph.D. led the ERS Group staff who worked with me in preparing the analyses and other materials for this declaration.

B. Data and Documents Used or Affecting our Opinions

42. The documents and data reviewed for this matter are listed in Appendix B. The materials provided by Wal-Mart's counsel consist primarily of four types – legal documents pertaining to this case, company documents (including policy statements, personnel documents, and support material for understanding data files), electronic personnel and employment data, and depositions and declarations. Additional materials were obtained from public sources or from backup materials provided by plaintiffs' experts.

C. Report Structure

43. Section II contains a description of the Wal-Mart organization that provides the basis for my opinions as to what variables and models are appropriate. The promotion policies and procedures, as well as the results of our promotion analyses, follow in Section III, along with my comments on Dr. Drogin's and Dr. Bendick's analyses related to promotions.

44. Section IV contains a discussion of Multiple Regression analysis and the statistical tests that were used to determine whether or not the compensation models could be estimated across all the stores or needed to be estimated store-by-store. In Section V we describe the basis for the inclusion of the variables we use in our compensation model for hourly associates, the basis for analyzing grocery associates separately from other associates, and the results of estimating those models for the Wal-Mart stores and Sam's Clubs. This Section includes a response to the claim by plaintiffs' experts that the variables we include in our hourly pay rate models are "tainted" and

to other criticisms of our analysis that they make. Section VI contains a similar discussion for management compensation – including a discussion of the variables that might be necessary for a proper compensation analysis. Section VII provides a discussion of Dr. Drogin's hourly and salaried associates' compensation analysis. Section VIII contains a more expanded discussion of Dr. Bendick's external "availability" benchmark, and the last section, Section IX, contains a summary of all of these results, as well as my conclusions regarding the absence of a common pattern of promotion and pay decisions adverse to women, among the various Wal-Mart stores and Sam's Clubs.

II. Description of Wal-Mart Retail Organization

45. Wal-Mart Stores, Inc., with principal offices in Bentonville, Arkansas, is a large business with domestic and international operations. It operates retail discount stores in three business concept formats known as Wal-Mart Discount Stores, Wal-Mart Supercenters, and Neighborhood Markets, as well as operating in a wholesale, general merchandise and bulk grocery format known as Sam's Clubs. The first Wal-Mart Discount store was opened in 1962. In 1983, the Sam's Club wholesale concept, which offers low-margin pricing of bulk-packaged products to Club members at prices below those of discount retailers, was added. Small businesses are particularly targeted as a membership base for the Clubs. In 1988, Supercenters were added, which combine the discount general merchandise retail operation of a Wal-Mart discount store with a grocery operation. Then, in 1998, the Neighborhood Markets were introduced, which provide a smaller, more convenient

shopping venue for customers who are primarily interested in the retail grocery operation.

46. Wal-Mart retail and wholesale operations have expanded rapidly, both in the number of actual facilities and in the business formats. By January, 2002, Wal-Mart Stores, Inc. was operating a total of 3,244 facilities in the fifty states – 1,647 Discount stores, 1,066 Supercenters, 500 Sam's Clubs, and 31 Neighborhood Markets.[4]

47. The operations and merchandising of some types of products offered by Wal-Mart are organized as separate functions with their own management structure[5] and their own profit and loss statements and accountability, although the sales function occurs under the roof of the four types of facilities identified above. These are referred to within Wal-Mart as Specialty Divisions, and include Tire and Lube Express, Optical (Vision Centers), One-Hour Photo, Pharmacy, and Shoes and Jewelry. In a Supercenter with a Vision Center, for example, the sales associates, optical technicians, opticians, and the Optical Department (Vision Center) Manager will be located in the Supercenter. The Vision Center will pay an annual rent to the Supercenter in which it is located but the Vision Center Manager will not report directly to the Store Manager of the Supercenter. In-

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[4] Form 10-K for Wal-Mart Stores, Inc. for fiscal year ending January 31, 2002, p. 2.

[5] "Within a regular Wal-Mart Store there could be as many as five different management reporting structures." Deposition of Kevin Harper, dated March 12, 2002 ("K. Harper Depo."), p. 32:14-16. Discussion of the five structures continues on pp. 32-40 of Mr. Harper's Deposition.

stead, the Manager of this Specialty Division will report outside the store to a District Manager in Wal-Mart's Optical Division.

A. Organizational and Reporting Structure of Wal-Mart, Inc.

48. Wal-Mart is organized into several Divisions, each with its own profit and loss statement and with its own management structure. Of interest in this matter are Division 1 (the Wal-Mart Discount, Supercenter, and Neighborhood Market stores), Division 18 (Sam's Clubs), and the Specialty Divisions (One-Hour Photo, Optical, Pharmacy, Shoes and Jewelry, and Tire and Lube Express ("TLE")).[6]

49. Some of the Specialty Divisions (Optical, Pharmacy, and One-Hour Photo) have sales departments located in both Division 1 (Wal-Mart) stores and in Division 18 (Sam's Clubs). The Shoes and Jewelry and the TLE Specialty Divisions operate only in Division 1 stores. Any shoes and jewelry carried by Sam's Clubs are part of its own merchandise

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[6] There are two other smaller Specialty Divisions - Hearing (Division 32) and Wireless Services (Division 45). There are other divisions that are part of Wal-Mart – including Division 8 - Wal-Mart Radio Grill, Division 20 - Supercenter Admin & Buying, Division 24 - Supercenter Meat, Division 25 - Supercenter Produce, Division 26 - Supercenter Dairy/Frozen, Division 27 - Supercenter Bakery/Bread, Division 28 - Supercenter Grocery. Sam's Club also has other divisions within it, including Division 59 – Sam's Gas Station, and Division 64 – Sam's Club Floral. These "divisions" do not have separate reporting structures but work within Wal-Mart (Division 1) and Sam's Club (Division 18) as separate Profit and Loss centers. K. Harper Depo., p. 90:15-22.

business, not separate business functions. The TLE Division does not operate in Sam's Clubs. Some Clubs have a Tire Mounting Area ("TMA") and operate a gasoline department (like a gasoline service station) but these, again, are operated as part of the Sam's Club business structure.

50. Within Wal-Mart Supercenters, there is a further division of reporting and responsibility between grocery and non-grocery departments. Supercenters have Co-Manager positions, who report to the Store Manager, but oversee grocery departments. Co-Managers are typically hired from outside of Wal-Mart through the Co-Manager-in-Training program in order to obtain employees with prior food experience.[7]

1. Responsibilities by Level

51. Each of the Division 1 stores (Wal-Mart Discount stores and Supercenters) has a Store Manager who is viewed within the Wal-Mart organization as being an individual business entrepreneur.[8] The Store Manager is responsible for hiring and promot-

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[7] See K. Harper Depo., pp. 155:3-156:7, 151:6-152:17.

[8] See the Deposition of Thomas M. Coughlin III, President and CEO of Wal-Mart Stores, Supercenters, Neighborhood Markets, and Sam's Clubs ("Coughlin Depo."), pp. 117:15 – 119:113. For example, "Sam always really ran an entrepreneurial-type company and have had a great belief that you could push authority down and get the kind of response from your leaders at store level to make those kinds of decisions." pp. 119:9-13. *See also*, "We push down to the manager of the facility level, the responsibility to run those stores right." p. 114:19-21.

ing hourly employees and setting their pay.[9] Each Store Manager has discretion to select and evaluate the factors on which to base pay rates for each of the positions[10] and to select the merchandise that the Store will feature. The Division 1 stores report to Division 1 District Managers. In Division 1, there are generally six to eight stores in a District. The 398 Districts are organized into Regions, so that each District Manager reports to a Regional Manager (or Regional Vice President). In Division 1 there are about 35 regions, with 80-85 stores per Region.

52. The Regional Vice Presidents report to Divisional Vice Presidents. In Division 1, the Regions are grouped into six sub-Divisions managed by Senior Vice Presidents (referred to in Wal-Mart lingo as "Divisionals"), who in turn report to the Chief Operating Officer for Wal-Mart Stores.

53. In the Sam's Club Division there are no Districts. The Clubs are grouped into about 60 regions, with the managers of the Clubs (General Managers) in each region reporting to a Director of Operations. The regions are grouped into five (formerly six) sub-Divisions that together comprise Division 18.

54. The six sub-Divisions of Division 1 are A (west and southwest), B (southeast), D (northeast), E (northwest and some central), T (middle of the U.S.), and U (middle east—Tennessee, Carolinas, Ken-

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[9] Coughlin Depo., pp. 117:15 – 119:113; Deposition of Kenneth S. Shatz, ("Shatz Depo."), pp. 51:24 – 53:4, 66:6 – 69:5, 84:8 – 85:6.

[10] Store Manager Declarations.

tucky, and Indiana). All sub-Divisions have six regions except Division T, which has five. For Sam's Club, the five current sub-Divisions are A (Southwest, middle and Pacific Northwest including HI and AK), B (Midsouth including TX, AR, LA, AL), C (IL, IN, OH), D (East Coast from VA north), and F (East Coast south of VA).

55. In the Specialty Divisions, the Specialty Department Manager within either a Wal-Mart store or a Sam's Club reports directly to a District Manager for that specialty group; and the Districts are grouped geographically into Regions that report to a Divisional Manager. The Specialty Divisions have fewer districts and regions than Divisions 1 or 18, and the number varies among the Specialty Divisions.

56. Each of these seven business divisions (Wal-Mart Division 1, Sam's Club and the other Specialty Divisions) operates as a separate business function, serving a different market from the others and with staffing requirements unique to its product. The Sam's Clubs serve a different target market than the Wal-Mart stores. The Pharmacy and Optical departments may have specialized occupational skill requirements. The Specialty Divisions generally provide services and, therefore, need an associate to be available to serve each customer. This changes the cost structure compared to the Division 1 and Division 18 store operations, where customers generally obtain their merchandise from the shelves.[11]

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[11] K. Harper Depo., pp. 218:22-220:2.

2. Reporting Relationships

57. The Wal-Mart Discount Stores and Supercenters in Division 1 are organized into departments generally supervised by a Department Manager. The Neighborhood Markets do not have departments. At Sam's Clubs, the lowest supervised unit is called a team rather than a department, and the supervisor is called a Team Leader. The highest hourly positions in the stores, excluding Assistant Manager Trainees, are the managers of these departments.[12] The Neighborhood Markets are organized into areas which are supervised by salaried Assistant Managers.

58. The managers of the Specialty Group Departments (generally salaried employees) report directly to their District Managers, with a dotted line relationship to the Store Manager or General Manager (the Manager of a Sam's Club). Managers of departments that are part of the Wal-Mart or Sam's Club Divisions report to in-store salaried managers.

3. Decision-making at Wal-Mart

59. Thomas Coughlin, President and CEO of Wal-Mart Stores, Supercenters, Neighborhood Markets, and Sam's Clubs, described the philosophy of management at Wal-Mart stores. "We push down to the manager of the facility level, the responsibility to run those stores right."[13] This latitude includes the

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[12] This includes the job titles Department Manager, sometimes Support Manager, Team Leader, and Area Manager. Note that Assistant Manager Trainees are also hourly workers and that some Department Managers are salaried.

[13] Coughlin Depo., p. 114:19-21.

ability of Store Managers to pay their employees at levels that are consistent with the store's labor market.[14] The Store Managers decide how many hourly associates should be assigned to any particular area and job code.[15] They have flexibility in determining the responsibilities given to associates.[16] They may also deviate from the recommended management work schedules (a recommended management schedule which also shows the breakdown of management responsibility within the store) when it is appropriate for their store.[17] As is well known, they have the authority to hire and promote hourly employees as well as to delegate those decisions to Co-Managers and Assistant Managers.[18] Further, Store Managers (or General Managers at Sam's Clubs) make Department Manager and Team Leader selections.[19]

a. Higher Level Management Decisions

60. The consequence of pushing the decision-making process to the Store Managers is that higher management levels may be brought in when Store Managers want to make decisions that are not typically delegated to the Stores. The next highest level,

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[14] Store Manager Declarations.

[15] K. Harper Depo., pp. 101:17 - 102:14.

[16] K. Harper Depo., pp. 46:23 – 47:4, 92:9-11.

[17] K. Harper Depo., pp. 104:24 - 106:24.

[18] K. Harper Depo., pp. 136: 7-18 , 156:14 - 157:21.

[19] Deposition of Kimberly Weaver, ("Weaver Depo."), p. 61:7 – 16; Deposition of Mark Bosler, ("Bosler Depo."), pp. 56:24 – 57:10.

to whom the Store Managers report, is the District Manager. Decisions at the district level also vary according to the desires and needs of the Regional Managers. For example, in Specialty groups, each District Manager sets the compensation for the Specialty Division managers reporting to her (or him).[20] The District Managers in the Wal-Mart and Sam's Clubs divisions decide who will be admitted into the Management-in-Training program in the district. The specific criteria used to select these candidates vary with the District Manager – including factors such as extensive retail background, college education, retail supervisory experience, grocery management experience, etc.[21] The District Managers review the Store Managers' decisions in filling store management positions to be sure such criteria as the minimum required level of the performance evaluation are met, or that there is some reason not to meet a particular criterion.[22]

b. Regional Management

61. Each region gives its District Managers different levels of decision-making authority. Some have had different guidelines for promoting associates to Assistant Manager. The group of people who decide on the policy or guidelines for a region might also vary by region.[23]

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[20] K. Harper Depo., pp. 210:16 – 211:13.

[21] Deposition of Lisa Heilman, ("Heilman Depo."), pp. 105:18-106:11, 107:9 – 109:2.

[22] Heilman Depo., p. 146.

[23] Heilman Depo., pp. 91:1-4, 92:14-18, 95:21 – 96:2, 263:6-14.

62. The Regional Personnel Manager ("RPM") and the Regional Manager decide who the District Manager will confer with in making the decision to approve entry into the Assistant Management Trainee program. As noted above, the District Manager is ultimately responsible for deciding who to admit into the Assistant Manager Trainee program.[24]

63. An example of the varied approval process is the hiring process for the First in Line Candidate Selection program. The District Manager or the Regional Personnel Manager interviews the candidates for these positions, but whether or not the Regional Personnel Manager approves the candidates will vary by region.[25]

c. Divisional Management Decisions

64. Like other Wal-Mart guidelines, those concerning decisions about salaried positions are guidelines only and exceptions with respect to salaried employees are approved in each sub-division. Evaluations are also conducted differently in different sub-divisions.[26]

65. Exhibit 311 to the deposition of Lisa Heilman is a memo from RPMs to Store Managers in Division A of the Wal-Mart discount stores and Supercenters. On Bates 200404, titled "Assistant Managers Rotation Plan," it says "All Assistant Managers must have rotated through the outlined areas and

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[24] Heilman Depo., p. 108:9-12.

[25] Heilman Depo., p. 249:6-10.

[26] Deposition of Melinda Hass, ("Hass Depo."), p. 40:7-9.

meet the minimum length of time criteria before being considered for promotion."[27] The minimum service length and rotation, a policy at pertinent times of sub-Division A, was not a policy for all discount stores and Supercenters in Division 1. Thus, Sylvester Johnson, RPM of Wal-Mart Region 26, knows of Assistant Managers who have been promoted to Store Manager who have not rotated to every area of the store.[28]

66. Likewise, the position responsible for making the decision to promote someone to Store Manager varies. Some Divisional Vice Presidents want to be involved. Other "Divisional" Vice Presidents leave the decision at the Regional level.[29]

III. Promotion at Wal-Mart

67. In this section we consider the promotion process at Wal-Mart and the data available to assess the use of that process. We also present the results of the analysis of that data and discuss our critique of Dr. Bendick's and Dr. Drogin's promotion analyses.

68. The employees who work for Wal-Mart have widely differing career aspirations. When assessing the promotion process, it is important to identify those employees who wish to advance into jobs that

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[27] Heilman Depo., pp. 233:11 - 234:8. The rotation areas are consistent with what she has seen, but the minimum time requirements were unique to Division A.

[28] Deposition of Sylvester Johnson, ("S. Johnson Depo."), p. 193:2-4.

[29] Heilman Depo., pp. 262-264.

carry more responsibility.[30] Wal-Mart's job posting process offers information on the characteristics of associates who express interest in promotion, the specific types of jobs in which they are interested and the characteristics of those associates who are selected for promotion. These data are the most useful in evaluating whether or not Wal-Mart's promotion process favors certain associates over others. Our analysis of the promotion process shows that the vast majority of hourly and salaried posted positions were filled in a gender-neutral manner or women were selected more often than would have been predicted in a gender-neutral process.

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[30] * * * Designated class members and plaintiff Williamson expressed that they or others they know were not interested in management positions due to the longer work hours, schedules, and/or the potential travel requirements. For example, designated class member Gayle Kellems' deposition (pp. 43:18-44:1) addresses this issue:

> Q So what was your first response to Mr. Staton when he approached you about joining the management training program?
> A That I wasn't interested.
>
> Q Did you tell him why not?
> A I told him I didn't – my children were little and I didn't feel I could work those kind of hours at that time.
>
> Q What kind of hours?
> A The hours that would be required of management.

Other individuals (some of whom are named plaintiffs) testified to the fact that some people were not interested in management jobs either because of the long hours or because of the possibility of relocating. See, for example, depositions of Christine Kwapnoski (pp. 287:7-288:18 and 301:13-302:6), Karen Williamson (pp. 199:1-200:19), Geanette Bell (pp. 85:7-86:12), Frances Jackson (pp. 133:19-134:4), Katheryn Johnson (pp. 247:8-248:9), and Angela Horton (pp. 242:2-243:1 and 244:12-16).

A. Methodological Background

69. Plaintiffs' experts have determined in this case that applicant flow data should not be used to analyze promotions. Instead, Dr. Bendick attempted to develop a benchmark of managers at 20 companies outside of Wal-Mart so that he could infer whether promotion decisions were neutral by comparing this external benchmark against the total number of managers on Wal-Mart's EEO-1 reports. Dr. Drogin, on the other hand, chose to arbitrarily define a source of applicants (all associates in a particular job and store (or job and district)) and use the female representation of that arbitrary source to compare to the composition of promoted associates. These attempts to analyze promotions are flawed. Dr. Bendick's analysis does not provide an analysis of promotion at all. Dr. Drogin's analysis does not reflect the process used and has defined an applicant pool with a female representation that is generally larger than the actual applicant pools reflected by Wal-Mart's posting data.

1. Plaintiffs' Expert's Use of Applicant Flow Data in Previous Cases in this District

70. Plaintiffs' expert, Dr. Bendick, opined before this District in 1997:

> One common way to establish a standard of availability is to tabulate the representation of the group of interest (in this case, women) among actual applicants for employment. In the absence of factors skewing the group's

> representation among applicants. Labor economists favor such a standard because it reflects a variety of factors affecting the attractiveness of the job, such as the exact location of the work site and the precise nature of the jobs being offered, that are difficult to model with data from sources such as Census data. However, it is not possible to use such "applicant flow" data unless the employer has systematically retained records of applications received, including the gender of applicants.

(Bendick Depo. Ex. 9, his report in Butler, et al. v. Home Depot, Inc., Case C 94 4335 (SI), C95 2182 (SI), N.D. Cal., 3/20/97, pp. 2-3.)

71. Dr. Bendick's Supplemental and Rebuttal report in that same case is noteworthy with respect to two points. First, Dr. Bendick criticized the employer's expert for presenting an availability that "does not reflect the vast majority of *actual* sales associate hiring at Home Depot" and opined that it therefore was "not a reasonable standard of availability."[31] Second, Dr. Bendick informed the court that he was able to produce "a more refined standard of availability" from a partial sample of 1,121 *actual* Home Depot job applications he had, than he could from the less refined availability he had been able to produce using Census data.[32]

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[31] Deposition of Marc Bendick, Jr., ("Bendick Depo."), Ex. 12, p. 9 (emphasis added).

[32] Bendick Depo., Ex. 12, pp. 2-3, 8 (emphasis added).

72. Here, Wal-Mart has systematically retained records of about 580,000 actual applications received for hourly promotions and about 56,000 electronic expressions of interest in promotion to salaried management jobs since 1997, and its databases reflect the gender of most of those applicants. In addition, Wal-Mart's first 2003 Assistant Manager Trainee job posting generated approximately 30,000 candidates for advancement to the training program leading to promotion into salaried management, and their gender also is known.[33] The gender composition of the applicants to Assistant Manager Trainee data in 2003 (44% female in the first posting and 41% female in the second) is close to the percent females among the applicants for one of the feeder jobs - Support Manager (46%) - for the entire period.

2. Plaintiffs' Experts Omitted Applicant Flow Analysis from their Reports in This Case

73. Plaintiffs' experts, Drs. Bendick and Drogin, had these records of *actual* applicants for promotion at Wal-Mart, and Dr. Drogin analyzed the records in detail, although he did not report the results in his report. According to records found in his computer back-up and authenticated by him at his deposition, Dr. Drogin found that women were selected at a higher rate than their rate of application. Stated differently, the female representation among bidders is consistently less than the proportion of offers women associates received for the salaried jobs that Dr.

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[33] A second posting for Wal-Mart discount stores and Supercenters in April – May 2003 generated approximately 11,500 applicants. *See* Declaration of David A. Scott, ¶ 41.

Drogin analyzed using the posting data from MCS.[34] A copy of that table is presented below:

E. A summary of MCS bids is given below. The percentage of women bidding for Store Manager is around 11%. Based on preliminary Peoplesoft promotion studies, the feeder pools foro Store Manager are approximately 20%.

SUMMARY OF MCS DATA

mcsl.su.topped

source:
020319.in/MCS/10.fpar.out

				BIDS					OFFERS				
DIV	MCS JOB	MCS job title	YEAR	Total	Women	% Wom vs. Men	no sex	% no sex	Total	Women	% Wom vs. Men	no sex	% no sex
1	1001	Store Mgr-Div. 1	1997	566	59	10.4	1	0.2	34	6	17.6	1	0.0
1	1001	Store Mgr-Div. 1	1998	8807	1036	11.8	18	0.2	779	117	15.1	18	0.3
1	1001	Store Mgr-Div. 1	1999	10121	1157	11.5	22	0.2	933	140	15.0	22	0.2
1	1001	Store Mgr-Div. 1	2000	9088	1159	12.8	6	0.1	968	164	16.9	6	0.0

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[34] Drogin Depo. Ex. 8.

1	1001	Store Mgr-Div. 1	2001	10585	1373	13.0	6	0.1	1011	182	18.0	6	0.1
1	1001	Store Mgr-Div. 1	2002	1832	217	11.9	14	0.8	99	17	17.2	14	0.0
1	1003	Co-Mgr-Div. 1	1998	89	4	4.5	0	0.0	10	3	30.0	0	0.0
1	1003	Co-Mgr-Div. 1	1999	238	26	10.9	0	0.0	10	0	0.0	0	0.0
1	1003	Co-Mgr-Div. 1	2000	508	83	16.3	0	0.0	60	12	20.0	0	0.0
1	1003	Co-Mgr-Div. 1	2001	650	91	14.0	0	0.0	71	18	25.4	0	0.0
1	1003	Co-Mgr-Div. 1	2002	95	21	22.1	0	0.0	9	2	22.2	0	0.0
1	1114	Asst Mgr	1998	121	26	21.5	0	0.0	20	6	30.0	0	0.0
1	1114	Asst Mgr	1999	111	27	24.3	0	0.0	24	2	8.3	0	0.0
1	1114	Asst Mgr	2000	255	69	27.2	1	0.4	51	16	31.4	1	0.0
1	1114	Asst Mgr	2001	150	46	30.9	1	0.7	56	19	33.9	1	0.0
1	1114	Asst Mgr	2002	4	0	0.0	0	0.0	2	0	0.0	0	0.0

74. As Dr. Drogin's table shows, the percentage of women among those offered management positions is consistently *greater* than the percentage of women among those who bid for each of the positions. For example, in 2001, 13% of the applicants for Store Manager were women, while 18% of those offered Store Manager jobs were women. 14% of the applicants for Co-Manager in 2001 were women, while 25.4% of the offers went to women. And, 30.9% of

the Assistant Manager applicants and 33.9% of those offered positions were women. Year after year, Dr. Drogin's analysis shows that overall, women are selected at more favorable rates than men. Although Drs. Bendick and Drogin had this most relevant information, they omitted all of it from their reports.

B. Job Posting for Promotion to Hourly Positions

1. The Posting Process and Data

75. As noted earlier, Wal-Mart associates are primarily hourly employees and a large proportion of those employees are employed on a full-time basis. When opportunities for advancement to hourly supervisory and office hourly positions become available, Store Managers generally now post the vacancy in the Job Posting system so that interested associates *within the store in which the vacancy exists* can apply for the opportunity if they are interested.[35] A position is not posted if it is going to be filled by a lateral move, but if that lateral move creates a vacancy that will not be filled laterally, then the new

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[35] *See generally* Job Announcements Company Policy, last revised 1/21/01, as printed from Wal-Mart Pipeline (WMHO 217434-217435); Job Announcements Company Policy as printed on 4/3/00 from Wal-Mart Pipeline (WMHO 153522-153523); Job Announcement Commitment (WMHO 128544); Job Announcements/Selection Training Guide, Company Policy, JA 101 dated August 1996 (WMHO 377845-377847); SMART, Job Announcements/Selection Training Guide, JA 201-205, dated August 1996 (WMHO 377848-377854); CBL, Job Announcements Training Guide, JA 301-305 (WMHO 377855-377862) (collectively referred to as "Job Announcement Materials").

opening is generally posted.[36] Hourly associates use the CBL (Computer-Based Learning) computers on which they are trained to see the postings and to apply for the positions they desire.[37] Associates can learn of postings in stores other than their own by visiting those stores or contacting the store management of the other store if they are interested in relocating.[38] All employees with at least 6 months in their current position are eligible to "post" (*i.e.*, apply in response to a job posting) for a vacancy, as long as they do not have any documented "coaching" (*i.e.*, disciplinary memo) in the last 12 months and their last evaluation was not below standard.[39]

76. In 2003, an additional call went out to all Wal-Mart hourly associates informing them of a nation-wide opportunity to express an interest for positions as an Assistant Manager Trainee. This position is a promotion for hourly associates to a 16- or 17-week training program that usually leads to placement as a salaried Assistant Manager upon successful completion of the program. The response to this call is also available for our analysis and is described in a separate section below.

77. Suffice to say, there is considerable information available on Wal-Mart Discount Store and

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[36] Job Announcement Materials at WMHO 217434, 153522-153523, 128544 & 377846; Sam's Clubs: Deposition of Dawn Miller, Exh. 355 (WMHO 384141).

[37] Job Announcement Materials at WMHO 377855-377862.

[38] Interview of Don Swann.

[39] Job Announcement Materials at WMHO 217434, 153522, 128544, 377846 & 377861.

Supercenter associates who expressed an interest in hourly positions and the Assistant Manager Trainee program, as well as the selection results of those postings. The rest of this section focuses on the Job Posting prior to the 2003 request for interested applicants to the Assistant Manager Trainee position.

C. Implementation of the Job Posting System

78. This Job Posting System is a system that was (and is) used by associates and managers in most of the stores on a frequent basis – especially between 1998 and the present. On average, using the entire set of job posting data women constituted 68% of the applicants for these postings for higher-level hourly jobs and received 70% of the offers. The Job Posting System has non-blank entries for about 2,700 stores with approximately 530,000 applications that match known associates between December 28, 1998 and September 30, 2002.[40] The available data show that during this period, the average store had

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[40] The number of applications from December 28, 1998 through September 30, 2002 is the following: 1998 (937), 1999 (71,280), 2000 (133,009), 2001 (180,763), and 2002 (148,275). The plaintiff's hourly promotion claims, as expressed in their motion for class certification (filed after my report and deposition) now have redefined boundaries. Their class certification motion indicated that they are seeking certification with respect to events from December 26, 1998 on and are particularly focused on promotions to Support Manager. Therefore, we have produced only the promotions that fit within that time frame but using exactly the same methodology as before. The promotion analysis results from my original report (covering a longer period of time) are contained in Appendix C-1 through C-6 and F-1.

198 applications in its posting data and made an average of 39 offers for closed postings. Almost 45% of the stores had 50 or more postings and more than 85% of the stores had more than 10 postings in the Job Posting System in this period.

79. In order to determine whether these promotions are consistent with a gender-neutral process, we compare the gender composition of those who applied for each position to the gender composition of the offers made. We perform this analysis for each posting and then sum the results of the postings. The next section describes the data available and the results of the analysis of that data.

D. Description of the Job Posting Data

80. The posting system data had entries for 28 different job codes – including many job codes that had more than 5,000 applicants when all the stores were examined. The jobs in the posting data included Department Manager (101), Support Manager (1050), Customer Service Manager (510), Lead Customer Service Manager (511), Grocery Reclamation Manager (603), Personnel and Training (606), and Training Coordinator (607).[41] The Store Managers used this system to inform associates about vacancies in the relevant hourly managerial or relevant higher-level hourly jobs.

81. As noted above, there were many applicants for the posted hourly positions. Approximately 88% of the positions had more than one applicant and over 60% of the positions had more than 3 appli-

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[41] WMHO 733699-733705.

cants. In fact, 42% had more than 5 applicants and 15% of the hourly positions had more than 10 applicants. The associates participated actively in this job posting system. The average number of applicants for a posting was about 5 and, for the most popular jobs (listed in the prior paragraph) there were, on average, between 4 and 7 applicants for each posting. For example, across all the stores there were 296,674 applicants for vacant Department Manager/Team Leader (101) positions and 59,493 offers made from December 28, 1998 through September 30, 2002. There are approximately 2,000 vacancies for Department Manager (903), that attracted almost 10,000 applicants. The Support Manager vacancies had 41,005 applicants and approximately 7,000 offers (an average of more than 5 applicants per opening).

E. Methodology for Analyzing the Offers for Posted Hourly Positions

82. The applicants for each job posting are evaluated, interviewed and, in some cases, offered a position. * * *[42] In order to properly determine whether the selections for these posted vacancies were made in a gender-neutral manner, the postings in each store are analyzed separately. For example, if the gender composition of the candidates for positions in a store was 60% female (3 of the 5 candidates were women), then we would predict that the selected individuals had a 60% chance of being a woman and a 40% chance of being a man.

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[42] * * *

83. For each store, we determined whether the selections made from each job posting were gender-neutral. We calculated the difference between the predicted number of offers to women and the actual number and then calculated the probability that the observed difference could have occurred by random chance. If the probability of occurring by chance is less than 5%, then the observed difference between the actual and predicted number of female selections is considered to be statistically significant.[43]

F. Job Posting Results for Support Managers December 28, 1998 through September 30, 2002

84. As noted previously, Plaintiffs' Motion for Class Certification redefined the time period for which they were seeking class certification and focused on promotions to Support Manager. Therefore, we examine here the selections of Support Managers for positions filled from December 28, 1998 through September 30, 2002. The below table shows that

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[43] Social scientists and statisticians have used a criteria of less than 5% or less than 1% probability of occurring by chance ("greater than two or three standard deviations") to categorize a result as "statistically significant" for over 75 years. See, for example, Statistics by Freedman, Pisani, and Purves. Courts adopted this standard in voting rights cases (*e.g.*, Castaneda v. Partida, 430 U.S. 482, 97 S. Ct. 1272 (1977)) and carried the standard over to equal employment issues in such cases as Hazelwood School District v. U.S., 433 U.S. 299, 308 n.14 (1977) and Teamsters v. U.S., 431 U.S. 324; 97 S. Ct. 1843 (1977). *See also*, EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633 (4th Cir. 1983), where the Court indicated that only a difference greater than 3 standard deviations confirms an inference of adverse disparity.

there were 41,005 applications for 6,831 Support Manager offers during this time frame. In each full calendar year, there were more women selected than would have been predicted given their representation among those who applied for these positions. As shown in the table below, every year shows more women selected for the Support Manager openings than predicted. Overall, the database shows 3,225 women who were offered Support Manager positions from December 28, 1998 through September 30, 2002. This is 79 more than predicted by female representation among the bidders – a difference that is statistically significant at more than 2.44 standard deviations.

85. Plaintiffs' expert, Dr. Drogin, does not have any basis to believe that the female composition of those who bid for the posted Support Manager positions is any different from the interested applicant flow for the Support Manager jobs that were not posted.[44]

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[44] Drogin Depo., pp. 619:12 – 620:6.

Results of Promotion Decisions for Support Manager Vacancies in the Job Posting System by Year, Across All Stores, Controlling for Posting from December 28, 1998 through September 30, 2002

Year	# of Requests	% of Female Among Requests	Number of Offers			% of Female Among Offers	Predicted # of Female Offers	Difference†	# of Standard Deviations
			Total	Male	Female				
1998	83	50.5%	17	10	7	41.2%	8.59	-1.6	-0.61
1999	4,842	53.1%	883	403	480	54.4%	469.2	10.8	0.94
2000	10,301	49.1%	1,738	850	888	51.1%	852.9	35.1	2.08 **
2001	13,854	45.1%	2,123	1,153	970	45.7%	956.5	13.5	0.72
2002	11,925	41.5%	2,070	1,190	880	42.5%	859.0	21.0	1.18
Overall	41,005	46.1%	6,831	3,606	3,225	47.2%	3,146.1	78.9	2.44 **

† A positive number in this column indicates that there are more female were selected than predicted

* Statistically significant

** Statistically significant in favor of females

G. All Hourly Job Posting Results by Store

86. We can also examine this analysis of promotion decisions by looking at the sum of all the decisions made for the positions posted for each store. The sum of all of these decisions for each store helps us to determine whether or not all the stores have a similar overall result. This examination shows us that there were 2,694 stores in which offers were made during the time period described in plaintiffs' Motion for Class Certification. Of the stores in which offers were made, more women were selected than predicted by women's presence in the applicant pools in 1,692 stores. There were statistically significantly more women offered positions during this period in 67 of these stores. There were 814 stores in which more men were selected than predicted and in only 5 of those stores were more men selected than women at a statistically significant level. Overall, approximately 1,785 *more* women were selected than predicted by their application rate – a result that is statistically significant and represents more than 22 standard deviations in favor of females. These results are not adverse to women and there is not a pattern of shortfalls in offers to women across all the stores.

Results of Promotion Decisions for Vacancies in the Job Posting System Across All Stores, Controlling for Posting from December 28, 1998 through September 30, 2002

Number of Stores	Average Difference Between Actual and Predicted Number of Female Selections	Number of Stores where Female Selections are Less than Predicted	Number Statistically Significant	Number of Stores where Female Selections are More than Predicted	Number Statistically Significant
2,694	0.7	814	5	1,692	67

87. There is a difference in selection rates among the stores, with some over-selecting men and some over-selecting women. On average, women were over-selected in the job postings by almost one person per store. But the variation among the stores results in some stores selecting even more women and others selecting fewer. These results are consistent with the fact that decisions are made at the store level by thousands of different Store Managers. The results of the individual store analyses can be found in Appendix G-1.

H. All Hourly Job Posting Results by Job

88. The analysis of job postings provides even more information when we sort the job postings by job code. There were 27 job codes for which offers were made – most of which were either hourly man-

agement or office positions. In 23 of the 27 job codes, more women were selected than predicted by their presence among the applicants for these postings. In twelve of these job codes, Wal-Mart made statistically significantly more offers to women than predicted. The jobs for which more women were selected than predicted included Department Manager/Team Leader, Support Manager, and Grocery Reclamation. There were three job codes in which fewer women were selected than their applications for these postings would have predicted. Only one of these (the TLE Service Manager) was statistically significantly adverse to women. The results for each job code are presented below. In this – as well as in other tables in this report – we have used a double asterisk to identify analyses in which *more* women were promoted than predicted and the results were statistically significant.[45]

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[45] A single asterisk identifies analyses in which *more* men were promoted than predicted and the results were statistically significantly adverse.

Results of Promotion Decisions for Vacancies in the Job Posting System by Job Code, Across All Stores, Controlling for Posting from December 28, 1998 through September 30, 2002

				# of Offers							
Job #	Job Title	Total # of Requests	% Female Among Requests	Total	Male	Female	% Female Among Offers	Predicted # of Female Offers	Difference†	# of Standard Deviations	
101	Dept Mgr/Team Leader	290,674	66.7%	59,493	18,681	40,812	68.6%	39,650	1,162	14.39	**
102	Team Assoc	11	0.0%	0	0	0	0.0%	0	0		
104	Pay Coord	551	50.1%	154	74	80	51.9%	77	3	0.69	
461	ISC Team Ldr	4,844	33.8%	1,085	706	379	34.9%	366	13	0.97	
466	DSD Receiving/Claims	14,387	68.2%	2,482	749	1,733	69.8%	1,693	40	2.22	**
510	Customer Serv Mgr	78,443	78.7%	15,700	2,888	12,812	81.6%	12,362	450	11.87	**
511	Lead Customer Serv Mgr	4,567	86.3%	1,036	127	909	87.7%	883	26	3.17	**
513	Mall Customer Serv Mgr	306	78.6%	37	5	32	86.5%	29	3	1.32	
666	Office Assoc	1,366	84.3%	290	32	258	89.0%	244	14	2.87	**
901	Inventory Audit Team/VPC Clerk	2,830	88.6%	456	47	409	89.7%	404	5	0.95	

602	Invoice Clk	3.557	87.4%	552	48	504	91.3%	482	22	3.96	**
603	Groc. Reclamation	10.131	78.1%	1.969	363	1,606	81.6%	1.539	68	5.17	**
604	Cash Office	32.768	83.8%	6.541	851	5,690	87.0%	5,482	208	9.56	**
606	Personnel/Trng Coord	10.411	83.5%	1.775	212	1.563	88.1%	1.482	81	6.73	**
607	Trng Coord	7.529	81.2%	1,016	147	869	85.5%	825	44	4.83	**
610	District Asst	501	80.8%	49	6	43	87.8%	40	3	1.32	
811	TLE Express Mgr	82	64.4%	23	9	14	60.9%	15	-1	(0.32)	
813	CA TLE Mgr/ TLE Mgr	1.363	41.9%	395	225	170	43.0%	165	5	0.69	
814	TLE Serv Mgr	1.499	13.1%	326	302	24	7.4%	43	-19	(3.92)	*
841	Staff Pharm	109	84.4%	12	2	10	83.3%	10	0	0.36	
842	OTC Mgr	4,492	81.4%	891	132	759	85.2%	725	34	4.13	**

851	Vision Mgr	90	62.2%	13	4	9	69.2%	8	1	0.36	
854	Vision Mgr MTP Non-Cert	586	80.9%	74	13	61	82.4%	60	1	0.29	
903	Dept Mgr	9,362	45.8%	1,997	1,097	900	45.1%	915	-15	(1.06)	
910	Lead Assoc	3,128	50.7%	723	353	370	51.2%	366	4	0.39	
911	Lead Assoc	594	40.8%	132	76	56	42.4%	54	2	0.62	
1050	Support Mgr	41,005	46.1%	6,831	3,606	3,225	47.2%	3,146	79	2.44	**
1090	Groc Mgr	231	77.2%	39	7	32	82.1%	30	2	0.37	
Overall		529,656	68.3%	104,091	30,762	73,329	70.4%	71,106	2,223	21.44	**

‡ A positive number in this column indicates that there are more female selections than predicted

* Statistically significant

** Statistically significant in favor of females

89. These data show that even for significant hourly management positions – like Support Manager, Department Manager/Team Leader, and Customer Service Manager – there were more positions filled by women than predicted from their representations among the applications for those positions. This is true, too, for the Support Manager position, which seemed to Dr. Drogin to be a significant hourly management position.[46]

I. All Hourly Job Posting Results by Department

90. In addition to examining these posting analyses by store and by job we also examined whether there were any patterns adverse to women by department within the store. The results of the analysis of offers made in the stores varied by the department in which the vacancy was posted, as shown in the table below. Some departments had more opportunities than others but the postings in most departments resulted in more women being promoted than predicted by their application rate. In 52 of the 74 departments, the number of offers to women were more than predicted by their application rate and 28 (54%) of these were statistically significantly more favorable than the predicted number. Two departments show no difference between the predicted and actual number of women promoted. The remaining 20 departments showed fewer offers to women than predicted but only six of these were statistically significantly different from the predicted number.

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[46] Drogin Report, p. 32.

Results of Promotion Decisions for Vacancies in the Job Posting System by Department Code from December 28, 1998 through September 30, 2002

Dept Code	Department Name↓	Number of Requests	Percent Female Among Requests	Number of Offers			Percent Female Among Offers	Predicted Number of Female Offers	Difference†	Number of Standard Deviations
				Total	Male	Female				
1	CANDY, TOBACCO, COOKIES	17,631	61.7%	3,389	1,252	2,137	63.1%	2,090	47	2.13 **
2	HEALTH AND BEAUTY AIDS	11,576	86.2%	2,189	236	1,953	89.2%	1,887	66.4	5.34 **
3	STATIONARY AND BOOKS	15,621	74.6%	3,173	558	2,615	79.3%	2,464	150.9	8.66 **
4	HOUSEHOLD PAPER GOODS	21,069	57.0%	3,843	1,676	2,167	56.4%	2,199	-32.4	-1.32
5	PLAYERS AND ELECTRONICS	12,496	51.5%	2,367	1,082	1,285	54.3%	1,220	65.2	3.66 **
6	CAMERAS AND SUPPLIES	1,241	61.0%	189	70	119	63.0%	115	3.8	0.74
7	TOYS	12,016	63.5%	2,628	826	1,702	64.8%	1,605	97.2	5.26 **
8	PETS AND SUPPLIES	19,167	47.7%	3,743	2,036	1,707	45.6%	1,784	-77.3	-3.25 *
9	SPORTING GOODS	10,338	41.9%	2,249	1,291	958	42.6%	941	16.6	0.93
10	AUTOMOTIVE	18,806	40.0%	3,799	2,266	1,533	40.4%	1,521	12.4	0.56
11	HARDWARE	13,640	43.2%	2,908	1,680	1,228	42.2%	1,257	-28.8	-1.41
14	HOUSEWARES	14,061	69.6%	2,649	673	1,976	74.6%	1,840	135.7	7.37 **
16	HORTICULTURE AND ACCESS	10,288	50.6%	2,359	1,160	1,199	50.8%	1,192	7.1	0.37
17	HOME FURNISHINGS	10,894	47.9%	2,110	1,165	945	44.8%	1,011	-65.8	-3.92 *
19	PIECE GOODS	6,198	90.6%	1,360	70	1,290	94.9%	1,232	57.7	7.40 **
20	DOMESTIC GOODS	4,173	67.7%	756	225	531	70.2%	512	19.6	1.83
21	CURTAINS AND DRAPES	9,413	73.2%	1,913	451	1,462	76.4%	1,400	61.7	3.77 **
23	MENS WEAR	9,542	82.5%	2,046	274	1,772	86.6%	1,688	83.6	6.54 **
24	BOYS WEAR	6,164	88.4%	978	81	897	91.7%	864	32.8	4.90 **
25	SHOES	7,043	77.1%	1,319	236	1,083	82.1%	1,016	66.7	5.98 **
26	INFANTS/TODDLERS	12,124	89.7%	2,421	174	2,247	92.8%	2,171	75.6	6.52 **
27	HOSIERY	9,963	93.0%	2,241	92	2,149	95.9%	2,085	64.5	7.07 **
32	JEWELRY	7,681	88.6%	1,504	115	1,389	92.4%	1,333	56.2	6.16 **
33	GIRLS WEAR, 4-6x AND 7-14	2,116	91.3%	398	24	374	94.0%	363	10.6	3.00 **
34	LADIES SPORTSWEAR	6,091	93.5%	1,381	56	1,325	95.9%	1,291	34.3	5.30 **
37	TBO SERVICE	1,499	13.1%	326	302	24	7.4%	43	-18.7	-3.92 *
39	SNACK BAR	5,587	74.3%	1,331	301	1,030	77.4%	989	41.5	3.71 **
40	PHARMACY	6,609	79.4%	1,303	217	1,086	83.3%	1,035	51.4	4.89 **
44	PIECE GOODS	1,929	90.3%	424	31	393	92.7%	383	10.3	2.47 **
46	HEALTH AND BEAUTY AIDS	9,209	91.8%	1,633	84	1,549	94.9%	1,499	49.9	6.24 **

Dept Code	Department Name	Number of Requests	Percent Female Among Requests	Number of Offers			Percent Female Among Offers	Predicted Number of Female Offers	Difference†	Number of Standard Deviations
				Total	Male	Female				
49	OPTICAL PROFESSIONAL	646	78.1%	87	17	70	80.5%	68	2.0	0.94
77	LARGE APPLIANCES	198	52.2%	19	11	8	42.1%	10	-1.9	-0.97
80	SERVICE DELI	1,390	64.1%	329	101	228	69.3%	211	17.2	3.24 **
81	COMMERCIAL BREAD	59	37.7%	11	7	4	36.4%	4	-0.2	0.54
82	IMPULSE MERCHANDISE	5,847	75.0%	1,968	396	1,572	79.9%	1,477	95.2	6.37 **
83	SEAFOOD	156	59.2%	53	18	35	66.0%	31	3.6	1.93
84	FLORAL	601	89.3%	124	8	116	93.5%	111	5.3	2.67 **
86	PHOTO LAB	927	65.6%	143	44	99	69.2%	94	5.2	1.26
87	WIRELESS	179	47.9%	14	8	6	42.9%	7	-0.7	0.14
90	DAIRY PRODUCTS	4,575	37.9%	958	622	336	35.1%	363	-27.4	-2.61 *
91	FROZEN FOODS	3,848	32.6%	864	578	286	33.1%	282	4.5	0.46
92	GROCERY DRY GOODS	3,686	40.7%	686	426	260	37.9%	279	-19.2	-2.14 *
93	MEAT	975	30.4%	253	181	72	28.5%	77	-4.9	-0.91
94	PRODUCE	1,358	37.2%	293	196	97	33.1%	109	-12.0	-2.28 *
96	LIQUOR, WINE, BEER	49	79.2%	5	1	4	80.0%	4	0.0	0.01
97	PREPACK DELI	44	61.7%	10	4	6	60.0%	6	-0.2	-0.44
98	BAKERY	1,352	73.5%	291	71	220	75.6%	214	6.0	1.23
240	MANAGEMENT	66	30.3%	26	18	8	30.8%	8	0.1	0.33
255	MANAGEMENT	44	33.3%	15	11	4	26.7%	5	-1.1	-0.68
260	MANAGEMENT	34	4.8%	6	6	0	0.0%	0	-0.3	-0.47
286	MANAGEMENT	95	23.2%	26	21	5	19.2%	6	-1.0	-0.52
281	DIV 28 BACK OFFICE	234	85.7%	40	4	36	90.0%	34	1.7	0.79
288	DIV 28 RECEIVING	1,114	64.2%	166	52	114	68.7%	107	7.4	1.45
901	OVERNIGHT ASSOCIATES	3,197	43.2%	471	280	191	40.6%	203	-12.3	-1.56
903	OVERNIGHT ASSOCIATES	47,959	75.4%	9,848	2,140	7,708	78.3%	7,422	285.1	9.15 **
910	BACK OFFICE	20,737	81.0%	5,240	807	4,433	84.6%	4,243	189.9	9.03 **
917	MERCH ZONE 7	86	55.8%	15	5	10	66.7%	8	1.7	0.73
920	MERCHANDISE ZONE 10	110	45.0%	21	11	10	47.6%	9	0.6	0.24
921	DIV 61	258	42.5%	43	21	22	51.2%	18	3.7	1.62
922	MERCHANDISE ZONE 2	3	100.0%	1	0	1	100.0%	1	0.0	0.00
923	MERCHANDISE ZONE 3	12	33.3%	4	2	2	50.0%	1	0.7	0.36
924	MERCHANDISE ZONE 4	89	36.0%	21	14	7	33.3%	8	-0.6	-0.33

Dept Code	Department Name‡	Number of Requests	Percent Female Among Requests	Number of Offers			Percent Female Among Offers	Predicted Number of Female Offers	Difference†	Number of Standard Deviations
				Total	Male	Female				
925	MERCHANDISE ZONE 5	25	80.0%	7	2	5	71.4%	6	-0.6	-0.20
926	MERCHANDISE ZONE 6	12	50.0%	2	1	1	50.0%	1	0.0	0.00
927	MERCHANDISE ZONE 7	56	64.3%	21	7	14	66.7%	14	0.5	0.06
928	MERCHANDISE ZONE 8	66	41.0%	12	7	5	41.7%	5	0.1	-0.44
929	MERCHANDISE ZONE 9	139	50.0%	40	19	21	52.5%	20	1.0	0.29
930	DAY RECEIVING	8,409	45.4%	1,689	903	786	46.5%	766	19.9	1.23
980	FRONT END	583	81.7%	128	23	105	82.0%	105	0.5	-0.01
990	FRONT END	38,066	79.8%	7,539	1,335	6,204	82.3%	6,017	187.4	7.40 **
991	BACK OFFICE	39,616	84.4%	7,358	895	6,463	87.8%	6,211	252.3	11.30 **
993	MANAGEMENT	28,448	50.8%	4,624	2,167	2,457	53.1%	2,350	107.2	3.56 **
994	RECEIVING	9,748	69.3%	1,712	500	1,212	70.8%	1,187	25.2	1.74
997	CHECKOUT MDSE	690	56.2%	139	57	82	59.0%	78	3.8	1.01
Overall		529,888	68.3%	104,091	30,762	73,329	70.4%	71,106	2,223	21.44 **

‡ Source of Department Names: See PS_W_WORK_AREA_GL.XLS per email correspondence from Alison Marshall to Brad Seligman on April 17, 2002

† A positive number in this column indicates that there are more female selections than predicted

* Statistically significant

** Statistically significant in favor of females

J. All Hourly Job Posting Results for "Male" Departments

91. The plaintiffs claim that the job posting process encourages and exacerbates departmental differences in female representation. Dr. Drogin presented employment data by department in his report that showed that women were 64% of all associates in departments with 5,000 associates or more.[47] We examined the hourly job posting results for the departments in that list in which the percent women was less than 64%. The below table shows that when we limit the analysis to these "male" departments, females were offered positions at a rate that is not statistically significantly different than predicted by the rate at which women apply to posted positions in these departments. Of the 17 departments with a female representation less than 64%, three (3) resulted in females being selected at a rate significantly greater than their application rate and five (5) departments showed female selections significantly lower than their application rate. For 9 departments, the results were neutral. As such, it is not surprising that the overall result is gender-neutral at 1.15 standard deviations but there were 77 more female selections than predicted in this group of "male" departments. This result does not support the argument that women are kept out of departments with proportionately fewer women than the "average" department through the Job Posting system.

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[47] The departments with at least 5,000 employees and a female representation rate less than the company-wide average were identified from Table 14 of Dr. Drogin's February 2003 report.

Results of Promotion Decisions for Vacancies in the Job Posting System by Department Code – Departments with Female Representation Less than Company-Wide Average from December 28, 1998 through September 30, 2002

Dept Code	Department Name[1]	Number of Requests	Percent Female Among Requests	Number of Offers			Percent Female Among Offers	Predicted Number of Female Offers	Difference[2]	Number of Standard Deviations
				Total	Male	Female				
1	CANDY, TOBACCO, COOKIES	17,631	61.7%	3,339	1,202	2,137	63.1%	2,090	47	2.11 **
4	HOUSEHOLD PAPER GOODS	21,088	57.9%	3,843	1,686	2,157	56.1%	2,180	-22.4	-1.32
6	PLAYERS AND ELECTRONICS	12,994	51.6%	2,387	1,092	1,296	54.3%	1,233	63.2	3.06 **
7	TOYS	12,618	62.5%	2,528	826	1,702	67.3%	1,606	97.2	3.20 **
8	PETS AND SUPPLIES	29,157	47.7%	3,740	2,033	1,707	45.6%	1,784	-77.3	-2.25 *
9	SPORTING GOODS	20,338	41.7%	2,249	1,281	968	43.0%	941	26.6	0.90
10	AUTOMOTIVE	18,889	40.7%	3,799	2,288	1,511	40.4%	1,533	-22.4	-0.65
11	HARDWARE	13,640	41.2%	2,968	1,668	1,228	41.2%	1,257	-28.8	-1.41
16	HORTICULTURE AND ACCESS	19,288	60.6%	2,359	1,166	1,193	50.8%	1,192	7.1	0.27
17	TSO SERVICE	1,406	13.1%	326	302	24	7.4%	43	-18.7	-2.92 *
90	DAIRY PRODUCTS	4,818	37.9%	968	622	335	35.1%	363	-27.4	-2.81 *
92	GROCERY DRY GOODS	2,486	40.7%	686	455	230	37.9%	279	-38.9	-2.14 *
93	MEAT	978	30.4%	253	181	72	28.5%	77	-5.0	-0.54
94	PRODUCE	1,308	37.2%	253	176	77	32.1%	103	-22.5	-2.24 *
298	DIV 28 RECEIVING	1,114	56.2%	196	82	118	58.7%	107	7.5	1.08
930	DAY RECEIVING	8,426	45.4%	980	583	396	40.8%	438	-39.9	-2.25
994	RECEIVING	9,748	69.3%	1,712	500	1,212	70.8%	1,187	25.2	1.74
Overall		66,728	55.3%	33,208	16,451	16,857	50.6%	16,729	77.6	1.15

[1] Source of Department Names: See PX W WORK AREA CODES per email correspondence from Alison Marshall to Brad Seligman on April 17, 2002.

[2] A positive number in this column indicates that there are more female selections than predicted.

* Statistically significant

** Statistically significant in favor of females

92. The finding that there is no significant difference between the actual and predicted number of female selections for departments in which the female representation is lower than 64.0% indicates that there is no evidence to suggest that females are being channeled away from male departments. In fact, these results suggest that females are being selected at a rate consistent with the rate at which they apply to positions in these departments. Proportionately fewer women choose to apply to some departments than others.

K. All Hourly Job Posting Results by Job and Department

93. In some situations at Wal-Mart the same job code may have a different description and different responsibilities depending upon the department for which the position was being filled. Therefore, in order to be certain that our analysis by job code was not contaminated by combining all the openings for the job, regardless of department, we also conducted an analysis of offers controlling for department and job code simultaneously. This permits us to examine, for example, all of the department manager offers made, but separately by department. The results of this analysis are consistent with those discussed above. For the hourly job posting process, there were 38 department/job code combinations with a statistically significant result in *favor* of women, compared to only 5 department/job code combinations that were statistically significantly adverse to women. Overall, women were offered more of the positions in 72 of the 105 job code/department

combinations than predicted by their representation among those who applied for the positions.[48] As noted above, more than half of these 72 "female-favorable" job code/department combinations were statistically significantly favorable to women.

Results of Statistical Analysis of Job Posting Aggregated to the Job Code/Department Combination Level From December 28, 1998 through September 30, 2002[49]

Number of Department/Job Code Combinations	Number of Department/Job Code Combinations with Results	Average Difference Between Actual and Predicted Number of Female Selections	Number of Department/ Job Code Combinations where Female Selections are Less than Predicted	Number Statistically Significant	Number of Department/ Job Code Combinations where Female Selections are More than Predicted	Number Statistically Significant
109	105	20.4	33	5	72	38

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[48] The detailed calculations for each department/job code combination are found in Appendix D-1.

[49] The total of positive and negative results may not always equal the number of stores, or the number of stores with results, because some stores show zero difference between males and females.

94. When all of the job postings for all the stores in all districts and all regions are all aggregated, there are 2,223 *more* female job offers than expected in a gender-neutral process when controlling for department and job code. This favorable result for females is highly statistically significant at 21.44 standard deviations. The probability that a favorable result such as this would occur by chance is less than 1 in 1 trillion. These results do not support the claim that the job posting system reflects a decision process that is adverse to women. They also are not consistent with the claim that departmental decision-making creates adverse results for women.

L. Department Mobility

95. While it is certainly the case that hourly employees apply for promotions to positions within their current department, most hourly promotions involve some kind of cross-department move. We know that 80% of all Job Postings applications are for jobs outside the applicant's current department consistent with an open system at Wal-Mart that allows associates to move to areas that interest them. There are, of course, opportunities for advancement within each employee's own department, too. For example, about 67% of the applicants for hourly supervisory jobs in Department 990 (Front End) applied for positions within that same department. In the aggregate, men (at 80.5%) are more likely than women (at 79.4%) to apply for a job outside their own department. However, while this difference is statistically significant, it is also relatively small in magnitude. There are significant differences in these cross-department application rates from one department to another. For example, in 16 of the 74 departments women apply for cross-department posi-

tions at a rate statistically significantly higher than men. There are 8 departments in which men applied to positions in a department different from the one that they are in at a statistically significant level. Women are more likely than men in certain departments to post to other departments. Women post to other departments at a higher rate than men when they are in Players and Electronics, Sporting Goods, and Produce. Men are more likely than women in the same department to post out of their department if it is the Front End, Health and Beauty Aids, or Domestic Goods. Preferences for certain departments are not the same for men and women associates.

Department Mobility by Gender among Applications in the Job Posting System from December 28, 1998 through September 30, 2002

Dept #	Department Name	Number of Applications Total	Male	Female	Number of Cross Department Applications Total	Male	Female	Percent Male	Percent Female	Probability	
1	CANDY, TOBACCO, COOKIES	17,667	6,796	10,871	15,669	6,120	9,549	90.1%	88.0%	<.0001	*
2	HEALTH AND BEAUTY AIDS	11,648	1,852	9,796	9,891	1,678	8,213	93.1%	86.1%	<.0001	*
3	STATIONARY AND BOOKS	15,520	4,291	11,229	13,664	3,626	10,038	72.6%	89.1%	<.0001	*
4	HOUSEHOLD PAPER GOODS	21,076	9,028	12,048	19,565	8,277	11,288	91.9%	93.7%	<.0001	**
5	PLAYERS AND ELECTRONICS	12,467	6,132	6,335	9,849	4,908	4,941	71.6%	78.2%	0.0258	**
6	CAMERAS AND SUPPLIES	1,241	492	749	0	0	0	0.0%	0.0%		
7	TOYS	12,018	4,586	7,432	10,427	4,110	6,317	89.6%	85.0%	<.0001	*
8	PETS AND SUPPLIES	19,158	10,067	9,091	17,106	8,985	8,121	89.2%	89.3%	0.8441	
9	SPORTING GOODS	10,340	6,068	4,272	7,852	4,547	3,305	74.9%	77.4%	0.0044	**
10	AUTOMOTIVE	18,809	11,241	7,568	14,577	8,398	6,179	74.7%	81.2%	<.0001	**
12	HARDWARE	13,664	7,704	5,960	11,618	6,402	5,216	83.1%	88.0%	<.0001	**
14	HOUSEWARES	14,050	4,438	9,612	12,726	4,010	8,716	90.4%	90.7%	<.0001	*
16	HORTICULTURE AND ACCESS	10,296	5,118	5,178	7,833	3,751	4,082	73.3%	78.8%	<.0001	**
17	HOME FURNISHINGS	10,850	5,599	5,251	10,320	5,207	5,113	94.0%	98.8%	0.0219	

Dept #	Department Name‡	Number of Applications Total	Male	Female	Number of Cross Department Applications Total	Male	Female	Percent Male	Percent Female	Probability	
19	PIECE GOODS	6,498	992	5,506	4,895	641	4,254	64.6%	77.3%	<.0001	*
20	DOMESTIC GOODS	4,175	1,365	2,810	3,646	1,249	2,397	91.5%	85.3%	<.0001	*
21	CURTAINS AND DRAPES	9,410	2,596	6,814	8,889	2,457	6,432	94.6%	94.4%	0.6332	
23	MENS WEAR	9,543	1,760	7,783	8,402	1,624	6,778	92.3%	87.1%	<.0001	*
24	BOYS WEAR	5,217	672	4,545	4,834	607	4,227	90.1%	93.0%	0.0111	
25	SHOES	7,039	1,668	5,371	6,127	1,396	4,731	83.7%	88.1%	<.0001	*
26	INFANTS/ TODDLERS	12,128	1,384	10,744	10,729	1,294	9,435	93.5%	87.8%	<.0001	*
27	HOSIERY	9,957	783	9,174	8,799	715	8,084	91.3%	88.1%	0.1874	
32	JEWELRY	7,579	1,017	6,562	5,625	913	4,712	89.8%	71.8%	<.0001	*
33	GIRLS WEAR, 4-6x AND 7-14	2,114	190	1,924	2,007	171	1,836	90.0%	95.4%	0.0011	**
34	LADIES SPORTSWEAR	6,090	438	5,652	5,290	402	4,888	91.8%	86.5%	0.0017	*
37	TBO SERVICE	1,496	1,246	250	619	435	184	34.9%	73.6%	<.0001	**
39	SNACK BAR	5,991	1,264	4,727	4,421	1,257	3,164	86.8%	76.1%	<.0001	*
40	PHARMACY	6,592	1,447	5,145	5,370	1,274	4,096	88.0%	79.6%	<.0001	*
44	PIECE GOODS	1,928	230	1,698	1,568	213	1,355	92.6%	79.8%	<.0001	*
46	HEALTH AND BEAUTY AIDS	9,207	774	8,433	7,593	708	6,885	91.5%	81.6%	<.0001	*
49	OPTICAL PROFESSIONAL	865	182	683	813	171	642	94.0%	93.8%	0.7628	
77	LARGE APPLIANCES	168	85	83	142	72	70	84.7%	84.3%	0.9474	

Dept #	Department Name[1]	Number of Applications Total	Male	Female	Number of Cross Department Applications Total	Male	Female	Percent Male	Percent Female	Probability	
80	SERVICE DELI	1,540	669	871	414	180	234	26.8%	26.9%	0.0001	*
81	COMMERCIAL BREAD	59	27	32	0	0	0	0.0%	0.0%	—	
82	IMPULSE MERCHANDISE	9,847	2,554	7,293	9,089	2,361	6,728	92.4%	92.3%	0.7661	
83	SEAFOOD	156	79	77	124	63	61	79.7%	79.2%	0.9372	
84	FLORAL	691	125	566	0	0	0	0.0%	0.0%		
86	PHOTO LAB	926	342	584	655	268	387	78.4%	66.3%	<.0001	*
87	WIRELESS	180	71	109	155	65	90	91.5%	82.6%	0.1986	
90	DAIRY PRODUCTS	4,576	2,826	1,750	1,480	902	578	31.9%	33.0%	0.4351	
91	FROZEN FOODS	3,849	2,416	1,433	1,470	884	586	36.6%	40.9%	0.0079	**
92	GROCERY DRY GOODS	3,680	2,179	1,501	2,988	1,725	1,263	79.2%	84.1%	0.0001	**
93	MEAT	975	629	346	488	289	199	45.9%	57.5%	0.0006	**
94	PRODUCE	1,307	804	503	848	450	398	56.0%	79.1%	<.0001	**
96	LIQUOR, WINE, BEER	49	21	28	45	19	26	90.5%	92.9%	0.7032	
97	PREPACK DELI	44	26	18	0	0	0	0.0%	0.0%	—	
98	BAKERY	1,301	384	917	699	273	426	71.1%	46.5%	<.0001	*
240	MANAGEMENT	60	36	24	36	23	13	63.9%	54.2%	0.4514	
250	MANAGEMENT	44	27	17	35	19	16	70.4%	94.1%	0.0572	
260	MANAGEMENT	34	27	7	23	17	6	63.0%	85.7%	0.2516	
280	MANAGEMENT	95	65	30	81	55	26	84.6%	86.7%	0.7932	

M. 2003 Assistant Manager Trainee Program Selections

1. Introduction[50]

96. In January 2003, Wal-Mart announced at meetings of associates at every shift in all the stores that hourly Wal-Mart and Sam's Club associates who were interested in promotion to the Assistant Manager Trainee program (also known as "AMT") could apply for openings to be filled during February and March 2003. Each store also posted posters reminding associates to apply. During the seven-day application period – spanning the two "work weeks" in which the posting was open – there were 30,430 associate applications. 44% of those applicants for Trainee positions at Wal-Mart Discount stores and Supercenters were women; 41% of applicants for Trainee positions at Sam's Club were women; and women were 44% in the first posting and 41% in the second of all applicants from every store type at Wal-Mart.

97. The percentage of females who voluntarily expressed interest in promotion to Assistant Manager Trainee positions (44% in the first posting and 41% in the second),[51] is similar to the proportion of women (41%) among those promoted into the Assis-

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[50] The description of the Management Trainee Application Process comes from the Wal-Mart documents attached as Appendix C-7 to this declaration.

[51] Women comprised 41% of the 11,037 employees applying for the second Assistant Manager Trainee posting in April – May 2003. *See* Declaration of David A. Scott, ¶ 14.

tant Manager Trainee positions in the five years prior to the inception of this program.

2. The Application Process

98. Wal-Mart and Sam's Club stores asked the associates who expressed interest in the Assistant Manager Trainee position to complete a questionnaire designed to collect information on their job preferences for advancement to the Assistant Manager Trainee position. The questionnaire, called the "Assistant Manager Job Preference Survey," was available to all hourly Wal-Mart associates and provided an opportunity for them to express their interest in moving into Wal-Mart store management. The questionnaire was distributed and collected electronically and the resulting data are referred to as the Management-in-Training job posting data (AMT data).

99. The questionnaire consists of three sections. First, the Management Trainee and Assistant Manager job requirements are listed and the applicant indicates whether or not she/he has the ability to perform the essential functions of the position. The second section contains five minimum criteria questions:

- You must have 1 year of retail experience with the company and/or a prior employer.
- You must be in your current position a minimum of 6 months.
- You must have a minimum evaluation rating of meets expectations.
- You must NOT have an active written coaching in your personnel file.
- You must be 100% current on your training.

100. In order for the associate to be accepted as a "qualified" management candidate, he or she must answer in the affirmative to all of the questions in these first two sections. As one would expect, rejection of any of the position requirements or failure to meet the minimum criteria for the job means the associate is not offered a management position. The final section of the questionnaire contains general questions of the applicant, such as language skills, education level, retail management experience, and grocery experience.

3. Analysis of Assistant Manager Trainee Selections

101. The 30,430 Assistant Manager Trainee applications in the first posting came from 18 different job divisions, 99 different job department/division combinations, and 157 different job code/division combinations. Tables in Appendix C-8 and C-9 present the counts and female representation of applications overall, by job division, by job department/division combination, and by job code/division combination.

102. The representation of female applicants varied greatly among the job divisions from which applicants came. For the job divisions from which at least 100 applicants came, the range of female representation among the applicants went from 15.9% (Supercenter – Dairy/Frozen) to 93.1% (Wal-Mart Jewelry).

Counts of Assistant Manager Trainee Applicants by Job Division

Job Division	Job Division Name	Total	# of Males	# of Females	% Female
1	WAL-MART STORES	20,361	10,624	9,737	47.8%
6	TIRE & LUBE EXPRESS	645	517	128	19.8%
8	WAL-MART RADIO GRILL	175	43	132	75.4%
10	WAL-MART PHARMACY	228	70	158	69.3%
11	WAL-MART JEWELRY	260	18	242	93.1%
15	WAL-MART SHOES	230	82	148	64.3%
18	SAMS CLUB	2,574	1,525	1,049	40.8%
24	SUPERCENTER-MEAT	1,102	704	398	36.1%
25	SUPERCENTER-PRODUCE	765	640	125	16.3%
26	SUPERCENTER-DAIRY/FROZEN	1,114	937	177	15.9%
27	SUPERCENTER-BAKERY/BREAD	481	127	354	73.6%
28	SUPERCENTER-GROCERY	1,977	1,496	481	24.3%
30	OPTICAL CENTER	110	40	70	63.6%
31	PHOTO CENTER	359	171	188	52.4%
32	HEARING CENTERS	14	12	2	14.3%
45	WIRELESS SERVICE CENTERS	21	12	9	42.9%
59	SAMS GAS STATIONS	11	9	2	18.2%
64	SAMS CLUB FLORAL	3	0	3	100.0%
Overall		30,430	17,027	13,403	44.0%

103. For Wal-Mart Discount stores and Supercenters, the female representation among applicants in the first posting was 44% and was 41% in the second posting, while the female representation among the Sam's Club job division (Division 18) was 41%. However, the overall representation among applicants for the Assistant Manager Trainee program was 44% female in the first posting and 41% in the second posting.

104. There were a total of 1,392 offers made as part of this process in the first posting.[52] Of those who received offers, 824 (or 59.2%) were female. For all Wal-Mart stores, there were a total of 1,154 offers, of which 714 (or 61.9%) went to females. For Sam's Clubs, there were 238 offers, of which 110 (or 46.2%) went to females. In the second posting, which is only for Wal-Mart Discount Stores and Super-Centers, there were a total of 150 offers, of which 70 (46.7%) went to females.

4. Selection Results for Wal-Mart (Div. 1) and Sam's

105. The descriptive statistics in the prior paragraphs were supplemented with a statistical analysis of the AMT data to determine if statistically significantly different numbers of men and women received management training offers. We found that women were selected, (*i.e.*, offered management trainee posi-

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[52] An "Offer" is defined as anyone whose status was one of the following: Offer Accepted, Offer Declined, Offer Pending, and Offer Pending RPM Approved. Tables in Appendix C-10 and C-11 present the detailed statistical results of these analyses for the first posting.

tions) at a statistically significantly greater rate than would be predicted based on their representation among those who expressed interest. The table below presents the results of this analysis.[53]

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[53] As in other tables in this declaration "**" represents a statistically significant result in favor of females where as "*" represents a statistically significant result adverse to females.

Analysis of Assistant Manager Trainee Selections[54]

	Total Number of Applicants	Total Number of Selections	Percent Female Applicants	Female Selections: Number Predicted	Female Selections: Actual Number of Selections	Female Selections: Difference	Female Selections: Variance	Female Selections: Number of Standard Deviations	
Overall No Controls	30,643	1,884	44.0%	613.1	824	210.9	327.26	11.66	**
WAL-MART STORES	20,9[illegible]	982	43.1%	423.2	575	151.8	211.24	10.72	**
TIRE & LUBE EXPRESS	545	15	16.9%	2.5	7	4.5	2.10	2.10	**
WAL-MART RADIO GRILL	175	7	75.4%	5.3	6	0.7	1.30	0.64	
WAL-MART PHARMACY	224	4	64.3%	2.6	3	0.4	1.62	0.36	
WAL-MART JEWELRY	290	20	93.1%	18.6	19	0.6	1.33	0.56	
WAL-MART SHOES	235	6	58.3%	3.5	4	0.5	1.52	0.32	
SAM'S CLUB	2,574	211	40.8%	86.5	99	12.5	51.??	1.75	
SUPERCENTER MEAT	1,179	44	30.1%	13.3	22	9.1	9.??	2.92	**
SUPERCENTER DELI/SNACK	703	21	17.2%	3.6	2	1.6	2.99	0.92	
SUPERCENTER DAIRY/FROZEN	1,114	41	15.4%	6.3	12	5.7	5.34	2.50	**
SUPERCENTER BAKERY/BREAD	681	31	73.6%	22.8	25	2.2	6.02	0.90	
SUPERCENTER GROCERY	1,367	82	24.6%	20.2	34	13.8	15.22	3.54	**
OPTICAL CENTER	190	5	63.6%	3.2	1	2.2	1.17	2.01	*

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[54] Because applicants for the Assistant Manager Trainee program are free to express interest from any area in the country and generally are relocated out of their stores to enter the program, it is appropriate to aggregate results in this situation. Interview of Don Swann

	Total Number of Applicants	Total Number of Selections	Percent Female Applicants	Female Selections: Number Predicted	Female Selections: Actual Number of Selections	Female Selections: Difference	Female Selections: Variance	Female Selections: Number of Standard Deviations	
PHOTO CENTER	360	12	52.4%	6.3	6	-0.3	2.90	-0.17	
HEARING CENTERS	14	0	14.3%	0.0	0	0.0	0.00	—	
WIRELESS SERVICE CENTERS	21	1	42.9%	0.4	0	-0.4	0.24	-0.87	
SAMS GAS STATIONS	11	1	18.2%	0.2	0	-0.2	0.15	-0.47	
SAMS CLUB FLORAL	3	1	100.0%	1.0	1	0.0	0.00		
Wal-Mart	27,457	1,154	44.4%	512.1	714	201.9	272.89	12.22	**
Sam's Club	2,073	238	41.0%	97.6	110	12.4	52.98	1.71	
M-H Aggregation of Wal-Mart and Sam's	30,430	1,392	43.8%	609.7	824	214.3	325.87	11.87	**

† A positive number in this column indicates that there are more female selections than predicted

‡ The probability from the fisher's exact test indicates that this result is not statistically significant

* Statistically significant

** Statistically significant in favor of females

106. As the above table shows, overall (without examining each of the divisions separately) a gender-neutral process predicted there would be 613 female selections in the first posting. Instead, 824 women were offered management positions. The difference between actual and expected female selections is statistically significant in favor of females at a level of 11.66 standard deviations.

107. In every job division except "Optical Center" women were selected at a rate that was greater than predicted by their application rate or consistent with their share of the applications submitted. These results reflect the fact that the gender composition of applicants varied among the job divisions but, nevertheless, we find 5 out of the 18 job divisions with more women selected at a statistically significant rate than predicted and all but one of the rest consistent with a gender-neutral selection process.

108. For Wal-Mart applicants, the neutral model predicts 512 women selected for the program even though 714 women were offered this entry-level management position. The difference between the actual and expected female selections at Wal-Mart is also statistically significant in favor of females at a level of 12.22 standard deviations.

109. For Sam's Club applicants, 98 female selections to the program were predicted and 110 women were offered the entry-level management position. While the difference between actual and expected female selections is not statistically significant (1.71 standard deviations), females were still selected at a rate greater than their representation among interested candidates.

110. When we aggregate the analysis across the various job divisions, but still control for job division,

we find that the results still highly favor women, with 199 more women selected than predicted and a difference that is greater than 11 standard deviations in favor of women from the predicted result.

5. Results by Job Department/Store Type, and Job Code/Store Type

111. Since the female representation among applicants differs greatly based on the job department and job of the applicant, we also conducted analyses in which we looked at all the applicants for each store type by the job and by the department from which the applicant came.

112. We can examine applications from each job department as well as from each specific job code. With the exception of Sam's Club selections controlling for job code (which are gender-neutral), the results favor women and the probability that the aggregated results would have occurred by chance is very small (e.g., statistically significant). The tables below present these results.

Assistant Manager Trainee Analysis, by Store Type Controlling for Job Department[55]

	Number of Departments	Number of Departments With Results	Average Difference Between Actual and Predicted Number of Female Selections	Number of Departments where Female Selections are Less than Predicted	Number Statistically Significant	Number of Departments where Female Selections are More than Predicted	Number Statistically Significant
Wal-mart	69	56	2.2	10	2	46	13
Sam's Clubs	30	20	0.5	11	1	9	3

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[55] The total of positive and negative results may not always equal the number of departments, or the number of departments with results, because some departments show zero difference between males and females.

Assistant Manager Trainee Analysis, by Store Type Controlling for Job Code[56]

	Number of Job Codes	Number of Job Codes With Results	Average Difference Between Actual and Predicted Number of Female Selections	Number of Job Codes where Female Selections are Less than Predicted	Number Statistically Significant	Number of Job Codes where Female Selections are More than Predicted	Number Statistically Significant
Wal-Mart	91	47	1.6	16	0	31	7
Sam's Clubs	66	35	0.2	16	0	19	2

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[56] The total of positive and negative results may not always equal the number of job codes, or the number of job codes with results, because some job codes show zero difference between males and females.

113. The results of the analysis of the Assistant Manager Trainee database are consistent with the results of the Job Posting and the MCS analyses in the sense that Wal-Mart's promotion patterns are statistically significantly *favorable* to women when compared to the female representation among those who express interest in the positions.

6. Selections of Qualified Applicants for the Assistant Manager Trainee Program

114. In the above analyses, the pool of employees eligible to be selected was defined as anyone who had applied to this Assistant Manager Trainee program. We conducted additional analyses on the Assistant Manager Trainee database where the pool of eligible employees is defined as those who passed the five minimum qualifications and eleven job requirement questions described above.

115. Women were 43.6% of all the qualified applicants for the Assistant Manager Trainee program in the first posting. In the Wal-Mart Division 1 stores, women make up 47.5% of the applicants who are qualified. For Sam's Clubs, the female representation among those who are qualified is 40.6%. Our analysis of selections for the AMT program from the pool of qualified employees produced results that are also consistent with the results described in the earlier analyses. Women are selected at a rate that is statistically significantly greater than predicted by their representation among the applicants. The details of the statistical analyses are contained in Appendix D-2 through D-6 of this declaration.

N. Selections for Management Positions from the MCS Data

116. Wal-Mart's salaried associates may also indicate their interest in management vacancies using the Management Career Selection (MCS) process that allows salaried managers to apply for openings in Co-Manager, Store Manager, District Manager and, occasionally, Assistant Manager openings. Most Assistant Manager positions are filled by placement of Assistant Manager Trainees who have completed their training program and not through promotion from other positions.[57]

117. The Management Career Selection affords an opportunity for managers who are interested in an open salaried position to have the opportunity to discuss and learn about the position. This enhances the ability of Wal-Mart to promote from within.[58] Management is responsible for maintaining the integrity of the system, following up on the postings and encouraging qualified candidates from their area of responsibility. Interested associates examine the postings, criteria and assessment through the CBL. The positions are posted for interest throughout the company but candidates must meet specific criteria to be considered. All applicants who wish to be considered for a promotion or transfer will be required to use the MCS.

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[57] Heilman Depo., p.165:13-19.

[58] This description of the program comes from "Management Career Selection Training Guide" (WMHO 158471- WMHO 158476).

1. Results of MCS Job Application Process

118. For the entire time period covered by this database, the data show that almost 56,000 applications were submitted for more than 5,300 openings for which an offer was made during the period from November 10, 1997 to October 17, 2002. Approximately 90% of the postings had more than 2 applications per vacancy and the average number of applications per vacancy (for all postings) was greater than 10. This average number of applications for each opening varied from one job to another. For example, an average of approximately 13 applications were made for the average Supercenter Store Manager posting but approximately 3 applications were made for each Assistant Manager posting.

119. Between December 27, 1998 through October 17, 2002, there were over 46,000 applications to more than 4,400 salaried management positions in the MCS database. The table below shows the results of my statistical analysis of female selections to salaried management positions for this time period. The table shows that females were selected at a statistically significantly greater rate than predicted from their representation among those who applied. This result holds true for each full calendar year and when the results for each year are aggregated. Overall, there were almost 200 *more* female selections than predicted – a difference that is statistically significant at 9.81 standard deviations.

Analysis of Selections from Management Job Postings by Year from December 27, 1998 through October 17, 2002

	Number of Applicants			Number of Offers							
Year	Total	Male	Female	Total	Male	Female	% Female Among Applicants	% Female Among Offers	Predicted # of Female Offers	Difference†	# of Standard Deviations
1998	98	90	8	4	3	1	8.2%	25.0%	0.58	0.42	0.00
1999	11,083	9,821	1,262	1,023	871	152	11.4%	14.9%	124.7	27.3	2.90 **
2000	10,600	9,195	1,405	1,163	949	214	13.3%	18.4%	169.2	44.8	4.27 **
2001	12,681	11,015	1,666	1,309	1,066	243	13.1%	18.6%	192.3	50.7	4.64 **
2002	11,540	9,982	1,558	949	739	213	13.5%	22.4%	139.0	74.0	7.66 **
Overall	46,002	40,103	5,899	4,448	3,625	823	12.8%	18.5%	625.8	197.2	9.81 **

†A positive number in this column indicates that there are more female selections than predicted.

* Statistically significant

** Statistically significant in favor of females

120. These same analyses may be organized by job to determine whether the selections for each job were consistent with the respective gender application rates for the postings. In every job but three, women were selected at or greater than their representation in the postings would have predicted. The table below shows that positions of District Manager (for Division 1), Store Manager (for Division 1, including Supercenters) and Co-Manager (for Supercenters) all had statistically significantly *more* women selected than would be predicted by their application rate. In only three jobs (Tire and Lube District Manager, Vision Center Regional, and Internal Audit) were women selected at a slightly lower rate than predicted. The difference between the predicted and actual number for these three jobs taken together was 2 women. In all three cases, this difference was not statistically significantly different from a neutral selection process.[59]

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[59] My first report conducted this same analysis for the entire time period covered by the MCS database. The results are consistent with those discussed above. The table containing these results is found in Appendix C-12.

Analysis of Selections from Management Job Postings by Job from December 27, 1998 through October 17, 2002

		Number of Applicants			Number of Offers			Percent Female Among Applicants	Percent Female Among Offers	Expected Number of Female Offers	Difference	Number of Standard Deviations
Job	Job Name	Total	Male	Female	Total	Male	Female					
1	District Manager-Div. 1	1,896	1,806	90	185	162	23	4.7%	12.4%	10.5	12.5	4.35 **
2	Store Manager Div. 1	24,926	21,411	3,515	2,544	2,043	501	14.1%	19.7%	378.3	122.7	7.72 **
3	International Assignments	46	27	19	0	0	0	41.3%	0.0%	0.0	0.0	0.00
4	International Fresh Setup	1	1	0	0	0	0	0.0%	0.0%	0.0	0.0	0.00
5	Assistant Manager	491	372	119	162	117	45	24.2%	27.8%	40.8	4.2	1.12
6	Store Mgr-Supercenter	13,895	12,600	1,295	1,055	928	127	9.3%	12.0%	100.9	26.1	2.82 **
7	Co-Mgr Supercenter	1,542	1,281	261	170	126	44	16.9%	25.9%	28.4	15.6	3.56 **
8	Meat Mgr-Supercenter	6	6	0	0	0	0	0.0%	0.0%	0.0	0.0	0.00
9	Produce Mgr-Supercenter	2	2	0	0	0	0	0.0%	0.0%	0.0	0.0	0.00

Job	Job Name	Number of Applicants			Number of Offers			Percent Female Among Applicants	Percent Female Among Offers	Expected Number of Female Offers	Difference	Number of Standard Deviations
		Total	Male	Female	Total	Male	Female					
13	Real Estate Manager Trainee	38	33	5	2	1	1	13.2%	50.0%	0.2	0.8	0.84
14	Real Estate Manager	16	13	3	0	0	0	18.8%	0.0%	0.0	0.0	0.00
15	Co-Mgr-Div. 1	755	607	148	68	53	15	19.6%	22.1%	13.6	1.4	0.28
17	TLE District Manager	677	621	56	79	75	4	8.3%	5.1%	5.4	-1.4	-0.45
18	District Manager-Jewelry/Shoes	645	421	224	76	43	33	34.7%	43.4%	26.5	6.5	1.66
19	Vision Center DM	28	21	7	0	0	0	25.0%	0.0%	0.0	0.0	0.00
20	Vision Center Regional	50	47	3	1	1	0	6.0%	0.0%	0.1	0.1	0.00
21	Photo Center DM	91	77	14	9	4	5	15.4%	55.6%	1.9	3.1	2.29 **
23	Pharmacy DM	706	590	116	93	69	24	16.4%	25.8%	18.7	5.3	1.55
25	Internal Audit	8	7	1	2	2	0	12.5%	0.0%	0.3	-0.3	0.00
26	TLE Manager	5	5	0	1	1	0	0.0%	0.0%	0.0	0.0	0.00
27	College Recruiting	76	53	23	1	0	1	30.3%	100.0%	0.3	0.7	0.32
Overall		46,062	40,163	5,899	4,448	3,625	823	12.8%	18.5%	625.8	197.2	9.8.

† A positive number in this column indicates that there are more female selections than predicted.

* Statistically significant

** Statistically significant in favor of females

121. These results show that there are no statistically significant selection decisions adverse to women across all the postings for any of the salaried jobs posted. In fact, for most of the salaried managerial positions, women are selected at a statistically significantly *higher* rate than predicted by their application rate for those positions.

2. Applicant Preferences for Mobility by Gender

122. The MCS data also permit us to examine whether there are gender differences in the willingness of applicants to post for positions in regions other than their own. We found that 63.3% of male applications and 50.2% of female applications are made to regions that are different from the region in which they worked at the time of their application. The difference in the region mobility rates between women and men is statistically significant: men show a greater willingness and interest in relocation. When we look at the analogous proportions by MCS Job Slot we also find several statistically significant differences between the male and female proportions, including both Store Manager Job-Slots and both Co-Manager Job-Slots.

123. The table below shows the comparison of the percentage of females who choose to apply to jobs outside the region to the percentage of males who choose to apply outside of the region. There is a statistically significant relationship between gender and whether or not someone applies to a different region for the following jobs: Co-Manager-Supercenter, Co-Manager-Div. 1, Store Manager-Div. 1, Store Man-

ager-Supercenter, District Manager-Div. 1, and District Manager-Jewelry/Shoes.[60]

Analysis of Cross Region Applications by Job from December 27, 1998 through October 17, 2002

Job	Total Number of Applications		Number of Applications Outside of Current Region		Percent of Applications Outside of Current Region		Probability
	Male	Female	Male	Female	Male	Female	
Asst Manager	372	119	319	96	85.8%	80.7%	0.1823
Co-Mgr-Div. 1	607	148	381	68	62.8%	45.9%	0.0002
Co-Mgr-Supercenter	1,381	261	905	127	65.5%	48.7%	0.0000 *
College Recruiting	53	23	52	22	98.1%	95.7%	0.5381
District Manager-Div. 1	1,809	90	1,420	51	78.5%	56.7%	0.0000 *
District Manager-Jewelry/Shoes	421	224	299	132	71.0%	58.9%	0.0019 *
Internal Audit	7	1	7	1	100.0%	100.0%	--
Int'l Assignments	27	19	27	19	100.0%	100.0%	--
Int'l Fresh Setup	1	0	1	0	100.0%	0.0%	--

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[60] The chi-square test produces a probability value which indicates the probability that our observed outcome could have occurred by random chance. A probability of occurring by chance of less than 0.05 (or 5.00%) is considered statistically significant.

Meat Mgr Supercenter	5	0	3	0	60.0%	0.0%	--
Pharmacy DM	590	116	561	112	95.1%	96.6%	0.4938
Photo Center DM	77	14	75	13	97.4%	92.9%	0.3809
Produce Mgr Supercenter	2	0	2	0	100.0%	0.0%	--
Real Estate Manager	13	3	12	3	92.3%	100.0%	0.6198
Real Estate Manager Trainee	33	5	33	5	100.0%	100.0%	--
Store Manager-Div. 1	21,411	3,515	12,809	1,612	59.8%	45.9%	0.0000 *
Store Manager-Supercenter	12,600	1,295	7,818	636	62.0%	49.1%	0.0000 *
TLE District Manager	621	56	601	56	96.8%	100.0%	0.1728
TLE Manager	5	0	4	0	80.0%	0.0%	
Vision Center DM	21	7	21	7	100.0%	100.0%	--
Vision Center Regional	47	3	47	3	100.0%	100.0%	
Overall	40,103	5,899	25,397	2,963	63.3%	50.2%	0.0000 *

* Statistically Significant

124. In every instance where the difference in cross-region application rates is statistically significant, the percentage female was less than the percentage male among those seeking a position outside of their current region.[61] These data support the fact that even women and men who apply for managerial positions do not have the same preferences for certain types of jobs when moving from one region to another is required.

3. Comparison of Selections in MCS and Selections in Global PeopleSoft

125. In his report, Dr. Drogin, plaintiffs' expert, dismissed the use of the MCS data because he believed the data to be incomplete and he questioned whether the system was unbiased. In Tables 20 and 21 of his report, he compares the counts of moves in the MCS system to the counts of moves he found in the Global PeopleSoft database. Although the MCS counts for the jobs included in Dr. Drogin's tables are close to the counts of moves in the Global PeopleSoft database for Store Manager, he dismisses this finding because he believes, apparently, that the application system is biased, although he did not substantiate this belief in his report.[62]

126. In order to understand whether or not the MCS was biased, as Dr. Drogin claimed, we compared the gender composition for the three major

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[61] My first report conducted this same analysis for the entire time period covered by the MCS database. The results are consistent with those discussed above. The table containing these results is found in Appendix C-13.

[62] Drogin Depo., pp. 222-223; 236-237.

"jobs" from the MCS database to the gender composition for the analogous moves in Global PeopleSoft data. If women are selected at the same rate in both sets of data then it does not seem reasonable to claim that the selections in the MCS data were biased or the application rate is not representative of female/male interest without evidence that the applications were systematically understating women's interest in those jobs in some way. I have not seen any support for that proposition.

127. For the purpose of this comparison, we concentrate on the jobs with the most selections (excluding District Manager).[63] These are:

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[63] In the MCS data we identify all moves that meet three criteria. First, the "offer indicator" must be equal to "Y." Second, the job slot must equal one of 5 job slot values corresponding to Store Manager, Co-Manager, or Assistant Manager. (Job Slots 2 and 6 are associated with Store Manager. Job slots 7 and 16 are associated with Co Manager. Job slot 5 is associated with Assistant Manager.) Third, the date range is restricted to a beginning date of 12/27/98 and an ending date of March 8, 2002 (the last effective date in the GPS data used by both parties for their analyses).

Moves in GPS are selected based on four criteria. First, the employee moves from one store to another, or his or her "action code" or "action reason" is equal to "PRO." Second, only jobs within Division 1 are included. Third, we only include job codes which correspond to Store Managers, Co Managers, and Assistant Managers, while the pool is restricted to cases associated with Division 1. (While MCS has the "job slot" variable, GPS utilizes the "job code.") We selected the job codes which were subsets of the 3 "job slots" and used those to select the three types of Managers in our GPS pool. For example: the job codes 40000, 40100, 40200 and 40400 all correspond to the MCS job slots 2 (Store Manager Div. 1) and 6 (Store Man – Supercen-

- Store Manager - Div. 1 and Supercenter
- Co-Manager - Div. 1 and Supercenter
- Assistant Manager - Div. 1 and Supercenter

128. The table below presents the gender composition of those who were selected for these jobs by gender for both MCS (jobs filled through bids) and Global PeopleSoft (all salaried jobs filled, whether posted or not) for the period December 27, 1998 through March 8, 2002.

[Footnote continued from previous page]

ter)). Fourth, the effective date of the move lies between Dec. 27, 1998 and Mar. 8, 2002. Nov. 24, 1997 is the first date on which an offer and an acceptance was made in the MCS database. Mar. 8, 2002 is the last effective date in the GPS database used by the parties in this case for their analysis.

Comparison of Moves, Management Career Selection Data versus Global PeopleSoft Data from December 27, 1998 through March 8, 2002

	# of Moves per Management Career Selection Data				# of Moves per Global PeopleSoft Data				
Job Slot	Total	Male	Female	% Female Among MCS Moves	Total	Male	Female	% Female Among GPS Moves	# of Standard Deviations
Store Manager	3,050	25,536	514	16.9%	3,333	2,747	586	17.6%	0.77
Assistant Manager	135	97	38	28.1%	32,585	21,382	11,203	34.4%	1.61
Co-Manager	151	119	32	21.2%	5,884	4,588	1,296	22.0%	0.25

129. The data show that females constituted 16.9% of the moves into Store Manager positions filled through the MCS database, compared to 17.6% of the moves in the Global PeopleSoft data. A test of proportions indicates that this difference in percentages is not statistically significant. The selection rates for the Co-Manager position are nearly identical (21.2% and 22.0%). In none of these three jobs is the gender distribution among moves statistically significantly different between the two databases.

130. There are many reasons why the number of moves in the Global PeopleSoft database might not be the same as those in the posting system. The Assistant Manager position, as noted earlier, is generally filled by Assistant Manager Trainees and those moves would not be entered into the MCS process. Likewise, many of the moves into Co-Manager are lateral moves or moves by Store Managers in smaller stores so they may also not be included in the posting system.

131. The issue in this matter should be whether or not the differences between these two lists are affecting the gender distribution of the successful candidates. As noted above, there are no statistically significant differences in the gender distributions of the selections identified in the MCS data and recorded in the job histories. These results support our belief that the MCS database is a reliable source of information and appropriate for purposes of analyz-

ing applicant flow data and the availability of women for these jobs.[64]

4. Results by Store Size

132. Finally, in order to respond to plaintiffs' claim that women are channeled into smaller stores when they are promoted we conducted the same analysis by job opening and job slot and aggregated the results to store size category so that we could determine if women were statistically more or less likely to be selected for stores of a certain size.[65]

133. The store size category variable was constructed using store square foot data made available to both plaintiffs' and defendant's experts by Wal-Mart. For each job slot the range of job opening store sizes was split into 3 equal-in-size sub-ranges. Each job-slot / job opening was assigned a store size category based on which sub-range the job opening store square footage fell into.

134. Our analysis of the promotions for each job slot/job opening was then sorted and aggregated by store size. We found that women were selected at a higher rate than their presence in the postings would have predicted in all three store size categories. In fact, all three store size categories (small, medium,

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[64] The table containing the results for the entire time period covered by MCS is found in Appendix D-7. The results are consistent with those discussed above.

[65] 14.6% of the applications in all of MCS are associated with a job opening store number that did not match to the store square foot table. Most of these mis-matches are associated with District Manager job openings, for which job opening store number is typically missing in MCS.

and large) had statistically significantly more women selected than would be predicted by their application rate. These results show that there are no statistically significant selection decisions adverse to women across all postings and for each job slot store size combination.[66]

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[66] My first report conducted this same analysis for the entire time period covered by the MCS database. The results are consistent with those discussed above. The table containing these results is found in Appendix C-15.

Analysis of Selections from Management Job Postings by Store Size from December 27, 1998 through October 17, 2002

	Number of Applicants			Number of Offers							
Store Size	Total	Male	Female	Total	Male	Female	% Female Among Applicants	% Female Among Offers	Expected # of Female Offers	Difference†	# of Standard Deviations
Small	11,412	9,781	1,631	1,094	844	250	14.3%	22.9%	167.4	82.6	7.72**
Medium	18,331	15,976	2,355	1,880	1,559	321	12.8%	17.1%	273.8	47.2	3.59**
Large	8,996	8,065	931	754	655	99	10.3%	13.1%	77.8	21.2	2.72**
Overall	38,739	33,822	4,917	3,728	3,058	670	12.7%	18.0%	519.0	151.0	8.16**

†A positive number in this column indicates that there are more female selections than predicted.

* Statistically significant

** Statistically significant in favor of females

135. An alternative way to define large and small stores is to use the 60,000 square foot boundary sometimes referred to in Wal-Mart compensation documents to define salary groups for management associates. We assigned each job slot/job opening to one of two size categories – "Large" (60,000 + sq. ft.) or "Small" (less than 60,000 sq. ft.) – and then aggregated the results of the analysis of selections for each job slot/job opening. The result was a total number of female promotions predicted and the actual number promoted for Large stores and Small stores. The table below presents the results of this analysis.

Analysis of Store Manager Selections by An Alternative Store Size from December 27, 1998 through October 17, 2002

	Number of Applicants			Number of Offers								
Store Size	Total	Male	Female	Total	Male	Female	% Female Among Applicants	% Female Among Offers	Predicted # of Female Offers	Difference†	# of Standard Deviations	
<60,000 Square Feet	4,758	4,037	721	503	378	125	15.2%	24.9%	81.1	43.9	5.82	**
60,000+ Square Feet	31,380	27,653	3,727	2,867	2,414	453	11.9%	15.8%	364.6	88.4	5.56	**
Overall	36,138	31,690	4,448	3,370	2,792	578	12.3%	17.2%	445.7	132.3	7.54	**

†A positive number in this column indicates that there are more female selections than predicted.

** Statistically significant in favor of females

136. The results are consistent with the original size measures. In both store size categories and overall, women are selected at a statistically significantly greater rate. For small stores, there were 44 more women selected than predicted by their representation among those who applied for Store Manager positions at smaller stores (for a difference of 5.82 standard deviations in favor of women). For large stores, the difference between actual and predicted female promotions is 88. This difference is also statistically significant at more than 5.56 standard deviations in favor of women.

137. The results of these two analyses do not support the claim that women are being channeled into small stores and that men are being channeled to the large stores.[67]

O. Summary of Promotion Results

138. Our examination of the actual promotion processes used in Wal-Mart for hourly employees and for salaried employees focused on the applicant flow data sets that Wal-Mart keeps in the normal course of business. We examined the hourly job posting data, the Management Candidate Selection process and the 2003 Assistant Manager Trainee data. These data all included information on who expressed interest by bidding/posting for jobs, the jobs that were open, and the selections made for those positions. These analyses of the job posting, Assistant

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[67] My first report conducted this same analysis for the entire time period covered by the MCS database. The results are consistent with those discussed above. The table containing these results is found in Appendix D-7.

Manager Trainee, and MCS data show that women are promoted at a *higher* rate than predicted by their representation among those who applied.

139. The job posting and MCS systems have been used regularly by stores. Approximately 580,000 associates have posted for the higher-level hourly positions and more than 80,000 applications have been submitted by associates for the Assistant Manager Trainee and salaried positions since the beginning of 1997. Our analysis shows that women have fared very well in these systems. Whether we consider the results at a store-by-store level (in which there were some stores with significant adverse results but most significant results favored women), job code level, department level, or nationwide – the results are the same. Women were more likely to receive the promotions they sought than were predicted by their presence among applications when selections are made in a gender-neutral environment.

P. Response to Dr. Richard Drogin's Promotion Analysis

1. Dr. Drogin's Analysis of Promotion

140. Dr. Drogin reported an analysis of promotions to four positions – hourly Support Manager, Management Trainee, and salaried Store Manager and Co-Manager. His analysis ignored pertinent data for these positions and made assumptions that were not consistent with the promotion decision process at Wal-Mart.

- His analysis failed to provide information about promotion decisions at the decision-maker level.

- He ignored all of the applicant flow data collected and maintained by Wal-Mart — including the more than 520,000 applications of associates for hourly management and office positions, the more than 55,000 applications to the Management Candidate Selection program and the 30,000 applications to the January, 2003 Assistant Manager Trainee program and, instead, identified his own "pool" of associates who he believed were "available" for promotion.
- He ignored some of his own analysis that showed that the female percentage of bidders was lower than the female representation among those promoted.
- He also ignored the results of his analysis by region, store type and Specialty Divisions which showed that differences between men and women, when examined at less aggregated levels than the entire company, were largely statistically insignificant.
- He defined promotions based on his definition of a "lower" job from which a promoted person had moved even though those "promotions" included moves that were lateral moves. He also excluded moves that actually were promotions.
- He assumed erroneously that male and female associates in the same job and store (or district) were equally likely to be interested and qualified for the posi-

tion, without regard to the type or amount of their experience, and their interest in or their availability for the position.[68]

2. Dr. Drogin Did Not Provide Information on Whether the Promotion Decisions Had a Common Pattern Across All Decision-Makers

141. All of the promotion analyses produced by Dr. Drogin focused on whether there was a difference between the number of women promoted and the number predicted by their presence in Dr. Drogin's artificial pool. He did not provide any information on what the individual Store Managers' decision patterns were. Instead his analysis was based on incumbents in historical feeder pools and relied on an approximation of who might be interested in each position with no clear indication as to who made the promotion decisions. He provided no promotion results in his report for the individual decision-makers as to whether or not they were adverse to women. As a consequence it is not possible to use his analysis to determine whether there are many Store Managers or District Managers who made promotion decisions with no statistically significant differences between the predicted and actual number of women to be promoted or many Store Managers making decisions adverse to women.

142. Dr. Drogin's promotion analysis, using his inappropriate availability pools for Manager and Co-Manager, presents results that are aggregated across

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[68] Drogin Declaration, p. 27, ¶ 41.

the entire company, even though these decisions are made at the district and region level by District or Regional Managers who operate in separate reporting structures for each store type. Dr. Drogin also makes no effort to determine whether the outcomes of hourly management promotion decisions by Store Managers are sufficiently similar that the decision-making process can be determined to be a common system across all associates, all stores, all districts and all regions.

143. When we examine the hourly promotion data from the job posting system in accordance with the decision-making structure of Wal-Mart we find that over 90% of the stores made promotion decisions that were not statistically significantly adverse to women associates in those stores.

3. Dr. Drogin Ignored All of the Applicant Flow Data for Hourly and Management Jobs in His Report

144. Dr. Drogin ignored all of the actual applicant flow data for the entire period in his Report. Despite the fact that there is a very large set of data for three different posting systems at Wal-Mart, and the fact that the selection decisions made from among those applications are known, Dr. Drogin ignored this rich source of data on such issues as:

- Department Mobility – which showed that both men and women generally applied for positions that were in departments other than their own and also showed that the preference for specific departments varied by gender;
- Interest in Specific Jobs – which showed that men and women applied

for different types of jobs but in almost every case there was *no* statistical difference *adverse* to women between the proportion of women selected and their representation among the bidders; and

- Selections to Store Manager Positions by Store Sizes – which showed that women were selected for Store Manager positions at a greater rate than their share of the applications for positions regardless of whether we examined large stores, mid-size stores or smaller stores.

145. Dr. Drogin believes that the hundreds of thousands of applications and thousands of selections made during the relevant time period were biased because, in part, there were some selections to these positions that were not posted and because he holds the unsubstantiated belief that some of the selections may have been pre-determined by management.[69] He does not know the number of those hypothetical selections. Our review of the data shows that there were *many* decisions made by *many* Store Managers, District Managers and Regional Managers. These decisions resulted in a pattern of promotion decisions that are favorable to women throughout the Wal-Mart system.

146. Applicant flow data provides information for the analysis of promotions that is more useful than information on the gender composition of incumbents in historical feeder pools because the ap-

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[69] Drogin Depo., pp. 65-66, 161, 222-223.

plicant flow data more accurately identifies the actual associates interested in each position and their willingness to move into an opening that is available. Dr. Drogin, himself, has analyzed applicant flow data on occasion.[70] Often, posting systems provide better matches between the qualifications of the candidates and the jobs open because there is more available information on the requirements of the jobs.

147. Dr. Drogin, however, claims that no analysis based on applications can be reliable. He wrote: "These two systems provide no useful data for analyzing promotions into upper level hourly supervisory, and store management positions."[71] We agree that a complete dataset is useful. Here we find a very large sample of data that contains most of the promotion decisions made. It provides substantial and very useful information. There is no reason to believe that these data are not representative of all interested applicants, as described by Dr. Drogin in his deposition.[72] Certainly, there has been no evidence of which we are aware that suggests that the applicant flow data Dr. Drogin and our firm received is biased or so incomplete as to be useless.[73]

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[70] Drogin Depo., pp. 154-155.

[71] Drogin Declaration, ¶ 43, p. 27.

[72] Drogin Depo., pp. 215-216.

[73] In his May, 2003 rebuttal report, Dr. Drogin refers to my article in the *Employee Relations Law Journal* and attempts to make a connection between my opinions in that article and my use of the applicant flow data in this case (page 4 of Dr. Drogin's May, 2003 rebuttal report). However, this quote is taken out of context and misinterpreted by Dr. Drogin. My article states, "information that is collected but never verified or

4. Dr. Drogin Ignored His Own Analysis of The Posting Data Despite the Fact that It Showed that the Percentage of Female Selections was Greater Than the Percentage of Female Bidders for Almost All Jobs

148. Despite the fact that Dr. Drogin's report states that he did not believe that applicant flow data could be used, he nevertheless analyzed these applicant flow data. His results (omitted from his declaration) were consistent with our results – more women were promoted in almost every job when each posting is analyzed and then aggregated.[74]

149. Dr. Drogin attempts to support his view that the data in the Job Posting and the MCS applicant files are incomplete by making a comparison of the moves recorded in the MCS and Job Posting applicant flow data to moves he defined to be promotions in Global PeopleSoft data. In Table 20 of his report, Dr. Drogin presents the number of MCS moves and the number of Global PeopleSoft moves that he defined to be promotions (permitting any move within a two month window to be included). However, when the Global PeopleSoft moves to Store Manager in 1997 were removed from the analysis,

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[Footnote continued from previous page]

checked for accuracy is merely useless." Dr. Drogin attempts to apply this statement to the applicant flow databases in this case. Quite the contrary, I have seen no evidence to suggest that Wal-Mart's applicant flow data (applications and offers) have not been verified or checked for accuracy.

[74] Drogin Depo., pp. 69-73, 234-237. See also ¶¶ 73 and 74 in this declaration.

the data show that fully 92.6% of Global PeopleSoft moves into Store Manager between 1998 and 2002 are also found in MCS. There are very few moves into Store Manager in Global PeopleSoft after 1997 that are not also in the applicant flow data in MCS.

150. Dr. Drogin interprets the moves he finds in Global PeopleSoft, but does not find in MCS or Job Posting, as examples of positions that are filled outside of the posting process.[75] In doing so, Dr. Drogin makes a series of questionable subjective choices. He presumes, without testing, that the Global PeopleSoft data entries are a more reliable data source than MCS for recording of promotions. Yet the likelihood of data entry errors is not known to be different between the two data sets. Certainly thousands of different people (at least one in each store) are responsible for entering information into the Global PeopleSoft database – each in his/her own way.[76] Dr. Drogin's inaccurate definition of a promotion may include examples of associates who fill jobs for which no one applied or are assigned a "holding position" from which they will move as soon as a different job vacancy occurs.[77] It also is likely that he did not include department code in his match criteria although that would be necessary to find jobs that were in the job posting data.

151. Dr. Drogin admits having difficulty in matching the Global PeopleSoft data with MCS and

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[75] Drogin Depo., p. 66.

[76] Drogin Depo., pp. 343-344.

[77] Drogin Depo., pp. 338-339.

Job Posting data for all jobs.[78] He reported that he could find no job posting data for the Co-Manager positions in the MCS data but then admitted that the data was in his backup and identified it when shown Exhibit 8 to his deposition. Yet we find postings for over 240 Co-Manager positions in the MCS data (from October 11, 1997 to October 17, 2002) we received. The corresponding numbers for the period limited to after 1998 is more than 230. We also find over 180 offers made to applicants for Assistant Manager, even though most Assistant Manager openings are filled through the Assistant Manager Trainee program when they are not filled laterally. The corresponding numbers for the period limited to after 1998 is more than 160. Dr. Drogin's table shows 113 promotions to Assistant Manager.

152. Dr. Drogin has rejected the applicant flow data even though it is common practice to prefer applicant flow data over a contrived feeder pool when the data have not been shown to be biased and sufficient data are available. Instead, Dr. Drogin developed *potential* applicant pools and compared the gender composition of the promoted individuals to the percent female in those *potential* applicant pools.

5. Dr. Drogin's Unreported Analyses Were Not Consistent With His Conclusions

a. Dr. Drogin's Unreported Analysis of Promotions by Region

153. The promotion analyses Dr. Drogin conducted using his inappropriate availability pools ap-

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[78] Drogin Depo., pp. 83-88.

parently were performed by region and by region and year, but the details of these analyses at the regional level are not presented in his reports. Because he finds fewer female promotions in the regions than predicted by his benchmark, he determined that there were no differences by region. He failed to note, however, that many of the differences he found in the separate analyses were not statistically different from a robust process of selection and therefore did not support his conclusion that there was a pattern of adverse treatment of women by Wal-Mart.[79]

b. Dr. Drogin's Unreported Analysis of Promotions for Sam's Club and Other Store Types

154. Dr. Drogin conducted a separate analysis of promotions, using his inappropriate availability pools, for each of the four store types – Wal-Mart Discount, Supercenters, Neighborhood Markets and Sam's Clubs,[80] but he only presented the output for his separate analysis of Sam's Club and the combination of all four store types. Dr. Drogin's analysis of promotions into Manager for Sam's Club reveals results that are not statistically significant in most cases by region and year, although results are significant when combined at the regional level across years.[81] Likewise, the results of his analysis of pro-

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[79] As discussed elsewhere, these results show a difference between the predicted and the actual number that is not outside the range one would expect to see if these differences occurred by random chance.

[80] Drogin Depo., pp. 102-104, 190.

[81] See, for example, Drogin's output: prom90.b.5.reg.su

motions into Co-Manager separately for Sam's Club are not significant in most cases by region or by region and year.[82]

155. Dr. Drogin's decision to conduct separate analyses for Sam's Club reflects a recognition that Sam's Clubs have independent reporting structures and very different management structures from other store types like Wal-Mart Discount stores. For example, in paragraph 62 of his Report, he reports very different ratios of Co-Manager to Manager at Wal-Mart Discount versus Sam's Clubs. However, he chose not to report his analysis for the other store types when it would have been appropriate to analyze Wal-Mart Discount separately from Supercenters and Neighborhood Markets. These store types have different criteria for promotions and different promotional opportunities that result from their different scale and range of product lines. For example, Dr. Drogin is aware of the relatively high rate of growth of jobs in food and grocery since 1996,[83] which is likely to generate different promotion opportunities and qualification requirements in Supercenters as compared to Wal-Mart Discount Stores. Nevertheless, and even though he presents Sam's Club results separately elsewhere, he lumps Sam's Club together with other Wal-Mart stores (both those that contain grocers and those that do not) in a single analysis. I see no theoretical or practical justification for this.

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[82] See, for example, Drogin's output: prom90.b.9.reg.su

[83] Drogin Depo., p. 104.

c. Dr. Drogin's Unreported Analysis of Promotions for Specialties

156. Dr. Drogin also conducted an analysis of promotions into Management Trainee positions for at least one of the specialties – Tire and Lube Express (TLE) – although he did not present the results in his report. In most of these undisclosed analyses, he did not find significant adverse results at the regional level, or for each region and year combination.[84] Apparently, Dr. Drogin agrees with us that the different reporting structure and the differing criteria for promotions supports the examination of analyses for each specialty in order to determine whether or not all specialties fit in the same "box." Even his own thinking that led to the separate TLE analysis supports our view that an analysis of the Specialty divisions separately from the rest of Wal-Mart is very important in resolving the class certification issues. Dr. Drogin gives no explanation for not reporting what I believe to be a closer-to-reliable analysis.

d. Large Enough Statistical Samples Will Almost Always Show Statistical Significance, Even if the Observed Differences are Extremely Small

157. The highly statistically significant results that Dr. Drogin discusses in his promotion report must be considered in light of the fact that the groups of Wal-Mart associates in these analyses are so numerous that the results are most likely to be statistically significant when all promotions are

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[84] See Drogin's output: prom90.k.l.reg.su.

combined. This reflects the fact that large numbers of events are more likely to yield statistically significant results than small numbers of events when the analyses are otherwise the same. For example, economist and mathematician, A. H. Studenmund noted, "The mere existence of a large t-score *[number of standard deviations]* for a huge sample has no real substantive significance because if the sample size is large enough, you can reject almost any null hypothesis!"[85] Therefore, when working with very large datasets, it is important to analyze the decisions at the level at which they were made. It is also important, in addition to looking at the statistical significance, to ask whether any identified differences are sufficiently large to have practical significance. Many of the differences shown in Dr. Drogin's backup materials for regions and for region/year combinations are not statistically significant. Since these results were not displayed, it is not possible for the court to determine from his report whether a *pattern* of differences is sufficient under his analysis to warrant a nationwide class.

158. Further examples of results that are consistent with random chance include his analysis of promotions into Manager for Wal-Mart Discount Stores, Supercenters, Sam's Club and Neighborhood Markets, which, when combined are not significant in most cases by region or by region and year.[86] His analysis of promotions into Co-Manager, even for the four store types combined, show no statistically sig-

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[85] Studenmund, A.H. Using Econometrics: A Practical Guide, 2nd Edition, Harper Collins Publishers, 1992, p. 160.

[86] See Drogin's output: prom90.a.5.reg.su.

nificant adverse results for women in any region or in any region/year combinations.[87]

6. The Criteria Used in Dr. Drogin's Analyses Do Not Reflect the Actual Decision Process

a. Dr. Drogin's Definition of Promotion is Inaccurate

159. There are some moves that show a change in job code or have an action or action reason code of "PRO," but may not have been promotions. In addition, some of the moves that are not so coded may be promotions. Dr. Drogin agrees that some of the moves he has identified as promotions – such as moves from Co-Manager of a large store to Manager of a small store, could be lateral moves.[88] This is particularly likely in the count of promotions to Support Manager since many associates move from lateral positions (e.g., Department Manager, pay class 3 to Support Manager, also pay class 3 (and vice versa).[89] Dr. Drogin indicated that promotional moves into Support Manager are not associated with an action or action reason code of "PRO" in the PeopleSoft data so this action code cannot be used to verify whether a move is a promotion.[90]

160. Likewise, some of the moves that Dr. Drogin does not count as promotions may in fact be

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[87] See Drogin's output: prom90.a.9.reg.su.

[88] Drogin Depo., pp. 106-107.

[89] Indeed, Drogin is aware that some Support Managers have no supervisory responsibilities at all. Drogin Depo., p. 108.

[90] Drogin Depo., pp. 98, 108.

promotions. Dr. Drogin acknowledged that moves from a Store Manager of small store to Co-Manager of large store are considered promotions by management[91] and are likely to be promotions but will not be captured by the definition he uses and on which he bases his conclusions.[92] Even though Dr. Drogin chose to analyze moves into Support Manager, he did not analyze moves into other positions such as Department Manager and Customer Service Manager that share the same pay class (3) and level of responsibility. Dr. Drogin did not analyze these jobs because he believed that they were not as likely to be feeder jobs for those entering the Assistant Manager Trainee position.[93] In fact, however, his data show more promotions to the Assistant Manager Trainee position are from Department Manager than Support Manager.

b. Dr. Drogin Assumed that the Overbroad Feeder Pools He Defined Contained Qualified and Interested Associates for the Vacancies to be Filled

161. Dr. Drogin modeled his analysis by determining that the level of aggregation would be based on whether people moved from one store to another (in which case the district would be the unit of analysis).[94] Consequently, his Co-Manager and

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[91] Heilman Depo., pp. 118-120.

[92] Drogin Depo., pp. 106-107.

[93] Drogin Depo., pp. 109-110, 113-114.

[94] Drogin Depo., pp. 54-55.

Store Manager feeder pools include every associate with a similar prior job in the same district simply because these moves often result in a change in store. For the Support Manager, incumbents in the prior job and store of the promoted individuals (if their job was lower than the target job) were the availability pool.

162. Dr. Drogin's analysis of moves into management positions was based on the assumption that any differences between the number of women among the movers and the number predicted by the gender composition of the overbroad "feeder pools" he used would be consistent with adverse impact for female associates, rather than differences in legitimate qualifications and interest. For example, no consideration was given to the prior experience of the associates other than their immediately prior job. Likewise, no consideration was given to the fact that men and women were not equally likely to apply for each of the positions Dr. Drogin analyzed or that women and men might not be equally likely to want to work the same shifts or the same number of hours; nor did Dr. Drogin attempt to model the promotion decision process or analyze the promotions at the level at which the decisions actually were made.

163. The result is that Dr. Drogin assumed that for each of these promotion-related factors – such as prior experience, interest in applying for position, willingness to work the hours and any others that affected the promotion decision – men and women were distributed similarly. The applicant flow data tell us that men and women differ in their application rate. Labor market studies show that there are

generally differences in men's and women's prior experience and hours preferences.[95] These data were ignored by Dr. Drogin in his analysis of promotions to and within management, even though he recognizes that differences between the gender composition of actual applicants and feeder pools can affect the meaningfulness of the results of an analysis based on feeder pools.[96] In fact, as shown in the promotion section, the representation of women in Dr. Drogin's feeder pool is much higher than the female representation in the actual pool of interested applicants for these positions.

c. Dr. Drogin's Assumption of Equal Interest Levels is Inaccurate

164. The use of "feeder pools" presumes equal interest in each opening by gender among the candidates in source pools. Dr. Drogin agrees that interest is one factor that may affect whether a person moves up to salaried positions, but does not believe interest can be easily measured, and did not examine the issue.[97] * * *[98] Table 17 in Dr. Drogin's

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[95] Labor economic analysis has shown that men and women do not work the same number of hours in a week and that men and women's work experiences are not similar. Hecker, Daniel, "How Hours of Work Affect Occupational Earnings," Monthly Labor Review, October 1998, pp. 8-18. Rones, Phillip L., Randy E. Ilg, and Jennifer M. Gardner, "Trends in Hours of Work Since the Mid-1970s," Monthly Labor Review, April 1997, pp. 3-14.

[96] Drogin Depo., pp. 221-222.

[97] Drogin Depo., pp. 50-54, 175, 294-295, 307-309.

[98] * * *

Report shows that those who move into management are likely to move geographically once they enter management positions. These characteristics of a management position may affect its attractiveness to men and women if views on changing residence or working long hours on a flexible schedule are not the same by gender. The data in this case suggest that these preferences are not the same by gender. Dr. Drogin's analysis of promotions fails to incorporate this information.

165. Other individual decision-making criteria – e.g., prior experience, willingness to work in the evening or on the weekend,[99] willingness to change residence etc., were also ignored in Dr. Drogin's analysis. * * *[100] He also ignored other prior experience that might demonstrate a willingness to work evenings and on weekends and ability to work longer hours. These factors are naturally considered in the decision process that determines who will be promoted. Dr. Drogin agrees that conclusions regarding adverse impact in promotions depend on proper specification of relevant control factors in the analysis.[101] In this case, Dr. Drogin's assumptions were not consistent with the actual decision-making process, nor were they accurate. The result is a seriously flawed promotion analysis.

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[99] Drogin Depo., p. 169:13-18.

[100] * * *

[101] Drogin Depo., pp. 36-38.

7. Conclusions Regarding Dr. Drogin's Promotion Analyses

166. The promotion analysis Dr. Drogin produced does not reflect the promotion decision-making processes at work in the Wal-Mart stores and districts. Further, the assumptions on which the analysis is based are inaccurate or unfounded. He produced an arbitrary definition of promotion that both overstates and understates the actual promotions of individuals into management positions. He failed to consider in any way the individual criteria used by Store Managers and District Managers in making these promotion decisions, omitting such factors as amount and type of prior experience, ability to work flexible shifts and long hours, and a willingness to relocate a residence when necessary.

167. He also ignored the data sets that were specifically focused on opportunities for hourly and salaried employees by deciding that there was not any useful information in the applicant flow data, instead creating an artificial applicant pool that grossly overstated the number of women available for promotion. He based that reasoning on his belief that data appeared to be missing (largely because he inaccurately included lateral moves that generally would not have been part of the job posting system), and his assumption that the data may have been biased in some unknown way and its fairness was being challenged. There was no evidence that the data was biased of which I am aware. In fact, there is much evidence that the applicant flow data are consistent with other potential benchmarks and clearly reflected the group of associates who wanted to advance at Wal-Mart. The result of Dr. Drogin's promotion analysis is a seriously flawed model for pro-

motion decisions that fails to describe accurately promotions into and within management.

IV. Compensation

168. It has long been recognized that a comparison of salaries between groups of employees must account for the possibility that systematic, objective, non-discriminatory differences may exist between the groups that reasonably affect their relative salary levels. For example, if it is observed that males have higher salaries than females on average, this salary difference may reflect differences in seniority, education, or other factors that the employer uses to determine pay levels.[102] In order to reach conclusions about differences in pay that are gender based it is important to compare groups of people that are similar with respect to these salary-related factors.

169. As noted in a 1991 article, "simple tabular comparisons are not adequate to show discrimination when a number of qualifications are necessary to determine salary."[103] Before we can determine whether or not there is evidence to support a conclusion of gender discrimination, we must account for the factors used by decision-makers at Wal-Mart to set salary levels and we must account for the different compensation decision-making processes found

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[102] Conway, Delores A. and Harry V. Roberts, "Regression Analyses in Employment Discrimination Cases." Statistics and the Law. Morris H. DeGroot, Stephen E. Fienberg, and Joseph Kadane, eds. p.108. 1986.

[103] Connolly, Catherine. "The Use of Multiple Regression Analysis in Employment Discrimination Cases." Population Research and Policy Review, Volume 10, pp. 117-135. 1991.

throughout the company. In other words, a comparison of salaries across gender groups must compare employees who are "similarly-situated" in terms of qualifications, responsibilities, experience, organizational units, pay class and other factors used at Wal-Mart to set compensation levels. The multiple regression process allows the researcher to identify and make comparisons among people who are similarly-situated.

A. Multiple Regressions – Background

170. The "Multiple Regression Analysis" allows a researcher to observe the relationship between a variable of interest (the "dependent" variable) and factors believed to influence the variable of interest. These potentially influential variables are called the "independent" variables.

171. For example, if a track coach is interested in maximizing the performance of the team's sprinters, he or she would collect data on the time each team member takes to run the sprint distance (the dependent variable). In addition, the coach will collect data on the factors believed to influence the runners' performance (the independent variables). Such factors may be related to diet, sleep, medical history, the number of training miles run, age, body weight, whether or not the runner also engages in weight training, etc. Once this information is collected, it would be interesting to learn, for example, whether weight training improves or hinders sprinting performance (and whether the effect of weight training on performance is statistically significant). If it is determined that moderate amounts of weight training improve a sprinter's performance, then the coach will be able to implement this into his or her training program.

172. However, suppose this person coaches high school, college, and professional runners. It may be the case that the influential factors for one group are not influential for another group (e.g., age affects professionals but does not affect high school runners). It may also be the case that the same factors are influential for all teams, but the degree of influence differs significantly from one group to the next (e.g., weight training improves scores by 4 seconds for high school runners, but it only improves scores by 1 second for college runners). Also, the difference between the high and low running times may be systematically different across groups (e.g., professional runners with substantially lower times than high school runners). If either of these situations occurs, then the coach should not combine the data from the different groups together and conduct a single regression analysis. To combine could produce seriously misleading aggregated results. Instead, the best way to summarize this data, and obtain a true picture of how each independent variable affects these runners, would be for the coach to conduct a separate regression analysis for each group of runners – high school, college, and professional.

173. Suppose also that the coach did not include age in his regression analyses, yet further studies show that age is significantly related to performance. The regressions that do not consider age suffer from a fundamental error in regression analysis called "omitted variable bias," which results in incorrect conclusions being made about the statistical rela-

tionship between the independent variables and the dependent variable.[104]

174. In the context of this lawsuit, multiple regression analyses are often used to determine questions that arise from pay equity issues. The role of the economist is to gain an understanding of the factors that influence associate compensation levels. To do so requires collecting data on the many determinants that factor into the pay decisions at Wal-Mart (these factors are discussed later). *However, determinants of pay may affect different groups of employees in different ways.* Thus, it is simply not sufficient to combine everyone in all of the Wal-Mart store types and the divisions within them together into a single regression without testing whether or not they should be combined in the first place. A thorough analysis requires the economist to determine whether everyone in the database should be analyzed together or whether a separate analysis should be conducted for each subgroup of the data.

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[104] For a discussion of omitted variable bias, see Maddala, G.S., Introduction to Econometrics, Prentice-Hall, Inc., 1992, pp. 161-165. From Reference Manual on Scientific Evidence, 2nd ed, West Group, 2000 "Reference Guide on Multiple Regression," Daniel L. Rubinfeld, p. 188 – "Failure to include a major explanatory variable that is correlated with the variable of interest in a regression model may cause an included variable to be credited with an effect that is actually caused by the excluded variable. In general, omitted variables that are correlated with the dependent variable reduce the probative value of the regression analysis. This may lead to inferences made from regression analyses that do not assist the trier of fact."

B. The Chow Test – Background and Example Using Wal-Mart Data

175. As the above example shows, it is not sufficient to simply throw all the different subsets of the data (i.e., all Wal-Mart, Sam's and Specialty employees) together into a single regression without testing the appropriateness of this aggregation. A statistical test, called a "Chow" test, allows the researcher to determine whether or not different subsets of the data (e.g., stores) can be combined into a single regression.

176. Since 1960[105], the Chow test has been used to determine whether some or all of the variables in the model have different impacts in subsets of data. Because it "sometimes happens that your sample of observations consists of two or more subsamples, and you are uncertain about whether you should run one combined regression or separate regressions for each subsample,"[106] the Chow test is a necessary step in analyzing data with multiple subsamples.[107] Wal-

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[105] Chow, G., "Tests of Equality Between Sets of Coefficients in Two Linear Regressions," *Econometrica*, 28, 1960, pp. 591-605.

[106] Dougherty, Christopher, Introduction to Econometrics, Oxford University Press, 1992, pp. 279-282.

[107] In technical terms, this test is an F-test that examines the hypothesis that some or all of the regression coefficients differ from one subset of observations to another. *See* Econometric Analysis, 1990, MacMillian Publish Company, William H. Green, page 218 for a complete discussion of this test. Other references to the Chow test include: William H. Greene, Econometric Analysis, 3rd edition. New York: Prentice Hall, 1997, pp. 349-351; Robert S. Pindyck and Daniel L. Rubinfeld, Econometric Models and Economic Forecasts, 2nd edition. New York: McGraw-Hill, 1981, pp. 123-126; Russell Davidson and

Mart Discount's and Sam's Club's workforce is no exception. Due to the discretion and latitude that Store Managers have in setting pay rates (within broad company guidelines) to meet the unique needs of their store's customers and operate in their local labor market, and the resulting differences in the factors that go into their decisions and the relative importance of each, it is necessary to answer the question of whether one should conduct a single regression across the entire company (as the plaintiffs' expert did) or whether one should conduct a separate regression for each subsample (i.e., divisions within stores). As noted in a leading economics textbook, "The Chow test . . . is one possible method for testing for a break in structure. A break in structure is always a serious matter because it implies that *none* of the statistical techniques (hypothesis testing, confidence intervals, etc.) are valid any longer. Moreover, the substantive conclusions about the system being modeled that one might wish to draw are also vitiated, to a greater or smaller extent, where this problem of a break in structure comes to the fore."[108]

177. In this matter, because Store Managers make the compensation decisions of hourly employees and because the labor market for grocery associates tends to have higher wages, we have examined whether we should separate the stores and, within

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[Footnote continued from previous page]

James G. MacKinnon, Estimation and Inference in Econometrics. New York: Oxford University Press, 1993, pp. 374-381.

[108] Intriligator, Michael D., et al., Econometric Models, Techniques, and Applications, 2nd Ed., Prentice-Hall, Inc., 1996, p. 579.

the stores, the grocery units. To illustrate why this issue is important to determining whether the pattern of compensation is common across all of Wal-Mart, consider the Wal-Mart Non-Grocery Supercenter regression results for Wal-Mart Store #1 and Store #2 using the same model as described starting on paragraph 190 of this declaration. The below table shows the regression output for three of the variables in the model: gender, years since last hire, and years at Wal-Mart before the most recent hire.[109]

Wal-Mart Store #1 and Store #2 Regressions

Store	Gender Coefficient	Years Since Last Hire	Time at Wal-Mart Before Last Hire
1	-$0.20	$0.13	$0.77
2	$0.03	$0.43	$0.22
1 & 2 Combined	$0.08	$0.39	$0.31

178. The above table shows the regression results for each store as well as the results of estimating a regression that combines both of the two subsamples. For Store #1, after accounting for all other factors in the model, hourly females are paid on average 20 cents less per hour than their male coun-

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[109] In other words, these two experience variables are constructed in such a way that the sum of the experience measures is the total amount of time an employee has been at Wal-Mart.

terparts.[110] For Store #2, hourly females are paid on average 3 cents more than males.[111]

179. The regression also indicates that Store #1 values each year of continuous service at 13 cents per hour, whereas Store #2 values each year of continuous service at 43 cents per hour. For each year of prior Wal-Mart experience, Store #1 places a value of 77 cents per hour, compared to Store #2 which places a value of only 22 cents per hour. Such differences in pay for different experience may reflect the local labor markets from which each store draws its employees and/or the variety of skills needed to provide the range of product lines for each store.

180. If the two stores are pooled together into the same database and a single regression analysis is conducted, the results are biased, misleading, and not representative of either of the two stores. The combined gender result is 8 cents per hour in favor of females, which is higher than either of the coefficients for the separate stores. If one were to examine only the combined result, then the incorrect conclusion would be that both stores favor females, thereby masking the result that Store #1 has a negative (but statistically insignificant) gender effect.

181. The differences in the way that the two stores value experience is also striking. Store #1 places a higher value on prior Wal-Mart experience (77 cents per hour per year) than it does continuous

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[110] This difference is not statistically significant at -0.81 standard deviations.

[111] This difference is also not statistically significant at 0.21 standard deviations.

service (13 cents). Store #2, however, places a higher value on continuous service (43 cents) than it does prior Wal-Mart experience (22 cents). If one were to examine only the combined result, the conclusion would be that the two stores place a similar value for each type of experience (39 cents for continuous service and 31 cents for prior experience), again masking the substantial differences between the stores and thereby producing biased and misleading results.

182. Based on the above discussion, it is not surprising that the Chow test to determine whether these two stores should be combined or analyzed separately is statistically significant (probability value of 0.01), thus showing that these two stores should not be combined into a single regression.

183. We tested to determine whether or not the stores should be combined in one equation and also whether or not the grocery units within the stores should be estimated separately. In both cases, for each of the hourly pay models reported in this declaration, the result of aggregating the stores was a statistically significant Chow test result. Therefore, I estimated a separate regression for each store and separately analyzed the grocery units. It is clear that Dr. Drogin did not conduct any such tests in his original report, his declaration or his rebuttal report, thus blindly assuming that each subsample should be combined.[112] Indeed, when we conducted Chow tests using Dr. Drogin's regression models and his

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[112] Drogin Depo., pp. 207:23 - 209:19, 288:24 - 290:12; 442:12-20 ("I don't ever recall doing any Chow tests.")

databases, we found that the Chow tests results were also statistically significant, indicating that Dr. Drogin erroneously combined the data from different stores even for his models of compensation *and therefore, that his models cannot produce meaningful results that can be relied upon.*

V. Hourly Pay Rates

A. Decision-Making Processes for Hourly Employees

184. Prior to constructing a statistical model that can be used in analyzing pay rates for hourly employees, one must incorporate Wal-Mart's decision-making process. There are two general questions that must be answered. First, it is important to know who decides the pay levels for the hourly employees. Second, we need to understand the factors that the decision-makers rely upon when determining the pay rates for hourly employees. With the answers to these questions, the researcher is able to construct a statistical model that reflects the actual decision-making process as closely as possible, given the available data.

185. The Store Managers (at Wal-Mart Discount and Supercenters) and the General Managers (at Sam's Clubs) are responsible for setting each new hire's starting pay and making decisions about pay raises for the hourly employees in their facilities.[113] While each Division has field compensation guide-

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[113] They also are responsible for decisions to promote hourly employees within their stores to higher-level hourly positions in the facility.

lines that give general parameters about hourly employee pay, the Store Manager or General Manager (or the Specialty Department Manager in the Specialty Divisions) is given discretion to make decisions within the guidelines and in some instances to make decisions to go outside of them.

* * *114 115 116

C. Hourly Pay Rate Regression Model

190. It is clear that there are multiple compensation structures and decision-making processes for hourly employees for the Division 1 stores (Wal-Mart discount stores and Supercenters) as well as Sam's Clubs. The Chow test results informed us that it was inappropriate to combine all groups of hourly employees into one regression.

191. Because of the differences in compensation structures, we conducted a separate analysis of hourly pay rates for each of the major business types: (a) Wal-Mart stores and non-Grocery Supercenter divisions,[117] (b) Sam's Club,[118] (c) the Specialty Divisions[119] and (d) Grocery divisions.[120] These busi-

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[117] Divisions 1 and 8.

[118] Divisions 18, 59, and 64.

[119] The major Specialty Divisions are (a) Tire and Lube Express – Division 6, (b) Pharmacy –Division 10, (c) Jewelry – Division 11, (d) Shoes – Division 15, (e) Optical – Division 30, and (f) Photo – Division 31.

ness types are separable because the compensation decision-making processes are different or the labor markets are different (e.g., in Grocery units) and because the data patterns are different across units in each group. For all of these business types, the analysis of hourly pay rates is accomplished by estimating a multiple regression equation of the pay rate for each group of associates. This model equation controls for the following factors:

- Gender
- Department[121]
- Job code[122]
- Years of continuous service (and its squared term)[123]
- Total years of service – years of continuous service (and its squared term)[123]
- Whether or not someone has changed stores at any time during their career
- Whether or not someone has ever worked in a grocery division[124]

[Footnote continued from previous page]

[120] Divisions 24-28.

[121] See discussion in ¶¶ 289-90.

[122] Dr. Drogin used this variable in all of his regressions except Model 1.

[123] Plaintiffs have not contended this is a tainted variable. Women have longer service than men. Drogin Depo., p. 466:5-12.

- Whether or not someone was promoted within the past year (using the action code or action reason code of "PRO")[125]
- Whether or not someone was on leave of absence as of October, 2001[126]
- Whether or not someone has less than 3 months of service with Wal-Mart[123]
- Whether or not someone is part-time or full-time[127]
- Whether or not someone was hired as a part-time or full-time employee its
- Store[128]

[Footnote continued from previous page]

[124] Grocery employees are defined as Divisions 8 (Wal-Mart Radio Grill), 24 (Supercenter -Meat), 25 (Supercenter - Produce), 26 (Supercenter - Dairy/Frozen), 27 (Supercenter - Bakery/Bread), 28 (Supercenter - Grocery), 64 (Sam's Club Floral). In addition, Grocery employees are also identified as anyone whose job titles are: Asst. Manager-Bakery, Asst. Manager-Grocery, Asst. Manager-Meat/Deli, Asst. Manager-Produce, Sam's Bakery Manager, Sam's Meat Manager, Sam's Meat Trainee, Bakery Trainee-Sam's, Meat Trainee-Sam's, Meat Processor, Baker, Cake Decorator, Cafe Partner, Deli Processor, Floral Partner, Expanded Fresh Mdser., Wrapper, Produce Merchandiser, Fresh Maintenance, Fresh Demo., Production Leader, Home Meal Processor, and Sam's Bakery Trainee. See discussion in ¶ 286.

[125] See discussion in ¶¶ 285. Women applying for promotion are promoted at a higher rate than men seeking promotion.

[126] Dr. Drogin admits he is not claiming this is a tainted variable. Drogin Depo., p. 543:12-17.

[127] Dr. Drogin has not concluded that this is a tainted variable. Drogin Depo., pp. 465:24-466:4; 466:13-25; 545:18-546:4.

- Whether or not someone's job code is one of the Sales Associate job codes[128]
- Interaction term between Sales Associate and department[129]
- Whether or not someone ever received a premium for working night shifts[130]
- Whether or not someone had ever held secondary job responsibilities
- Current pay group[131]
- First performance evaluation[132]
- First pay group[131]
- First pay rate[133]
- Division

192. The hourly pay rate regressions are based upon employees as of October 12, 2001 who meet the following criteria: a) They were actively employed or on leave of absence as of October 12, 2001 (the date

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[Footnote continued from previous page]

[128] Plaintiffs have not contended this is a tainted variable and use this factor in their regressions. Drogin Depo., p. 465:21-23.

[129] See discussion in ¶¶ 289-90.

[130] Plaintiffs have not contended this is a tainted variable. See Drogin Depo., p. 588:18-21.

[131] Dr. Drogin admits that pay group is not a tainted variable. Drogin Depo., pp. 471:2-472:4.

[132] Dr. Drogin admits that women in hourly jobs receive higher performance evaluations than men. Drogin Report, p. 20.

[133] This variable is not included in the second model I estimated for each business type.

for which we have the most recent data from the Associate database), b) the country code = 12 (United States), c) the job code <= 49,999 (hourly jobs), d) the biweekly hourly pay rate <= $100, e) the associate status was full-time or part-time, f) the associate had not been demoted in the last year while working at Wal-Mart (identified using the action code or action reason code of "DEM"), g) the associate had never been a salaried or management employee,[134] and h) the associate had a store assignment.

D. Hourly Regression Results for Wal-Mart Stores and Supercenters (Non-Grocery)

193. Because pay rates for hourly employees at Wal-Mart and Supercenter (non-Grocery) are generally established by the Store Managers, it is appropriate from a theoretical point of view to conduct a separate regression analysis for each store. The "Chow" test described above allows us to determine whether there is a statistical basis for conducting separate regression analyses because there are statistically significant different compensation structures among the stores.[135] When the structural differences between stores are statistically significant, this creates a statistical reason to estimate a separate regression analysis for each store.

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[134] We estimated an alternative set of regression equations that included all hourly "management" employees, as defined by Wal-Mart. The pattern of statistically insignificant stores for these estimates was almost identical to the pattern shown in the original model.

[135] See, for example, Greene, William H., Econometric Analysis, 1990, pp. 218-224.

194. The results of the Chow tests we conducted found a statistically significant different hourly compensation structure among Wal-Mart and Supercenter (non-Grocery) stores.[136] The best way to model pay when the Chow test for combining stores is statistically significant is to estimate a separate regression analysis for each store. It is improper to combine the data for all the associates for all stores in one equation that includes these variables.

195. The table below summarizes the results of the regression analyses for hourly Wal-Mart and Supercenter (non-Grocery) employees. The first line of the table presents the results of the model of hourly pay that controls for the factors listed above. Of the 2,608 stores in the database on October 12, 2001 with results,[137] 2,421 (or 92.8%) showed no statistically significant difference in the hourly wage rates between women and men. There were 135 stores (or 5.2%) in which women had a statistically significantly lower hourly wage rate; and 52 (or 2.0%) of the stores that reported a statistically significantly positive hourly wage rate for women. The second line of the table contains a summary of the results of

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[136] The Chow test produced an F-statistic of 2.70, with a probability value of 0.00. When the probability value is smaller than 0.05 (i.e. 5%) the F statistic is statistically significant and the stores or units should be separated. While the size of the F statistic will vary the statistic always requires separate store-by-store estimation rather than a single equation when the probability that the F statistic is zero is less than 5%.

[137] A small number of stores, not yet opened, have too few employees to produce meaningful results.

the estimated equations when the starting pay rate is omitted from the analysis.[138]

Results of Analysis of Hourly Pay Rates by Gender for Wal-Mart (Division 1)[139]

		Gender Coefficient is Not Statistically Significant		Gender Coefficient is Not Statistically Significant		Gender Coefficient is Statistically Significant Adverse to Females		Gender Coefficient is Statistically Significant in Favor of Females	
# of Stores	# of Stores with Results	# of Stores with with Male Greater than Female	# of Stores with with Female Greater than Male	# of Stores	% of Stores with Results	# of Stores	% of Stores with Results	# of Stores	% of Stores with Results
				Including Starting Pay Rate					
3,175	2,608	1,375	1,045	2,421	92.8%	135	5.2%	52	2.0%
				Excluding Starting Pay Rate					
3,175	2,619	1,423	929	2,353	89.8%	225	8.6%	41	1.6%

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[138] The regression results for each store for the models with and without starting pay rates are in Appendices F-2 and F-3, respectively.

[139] The total of positive and negative results may not always equal the number of stores, or the number of stores with results, because some stores show zero difference between males and females. This also includes Division 8 (Wal-Mart Radio Grill) employees.

196. As noted above, the table's second line of data presents the results when the starting pay rates are excluded from the regression analysis. This model permitted us to determine whether the large proportion of stores with no significant differences by gender was strongly affected by including the starting pay rate variable in the model. As the table shows, however, the percentage of stores that have no statistically significant results is not much different between the two models. When controlling for starting pay, 92.8% of the stores show no statistically significant result, compared to 89.8% of the stores for the model that does not control for starting pay rates.

197. We also conducted alternative regressions which grouped the store results by store types as defined by the defendant's "alignment files" for this. time period ('2000-Sep-2002-Feb.xls' and 'Sam'sAlignments.xls') and where current grocery employees are defined using the method prescribed in footnote 124. These analyses combined all employees at a store (including Specialty Division employees, but excluding Grocery Divisions' employees). Grocery employees were run separately for the reasons previously explained. The results of these analyses (attached in Appendix C-17) are consistent with the results presented above.[140] For example, the alternative Wal-Mart non-grocery regressions show 92.6% of the stores with no statistically significant result (versus 92.8% in the above table), 5.1% of the stores with results significantly adverse to

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[140] The regression results for each store are provided in Appendices F-4 through F-7.

women (versus 5.2% in the above table), and 2.3% with results significantly favorable to women (versus 2.0% in the above table).

198. At his deposition, Plaintiffs' expert, Dr. Drogin, acknowledged that this statistical showing does not reflect a pattern adverse to women.[141]

E. Hourly Regression Results for Sam's Club

199. As is the case for Wal-Mart Discount Stores and Supercenters, the pay rates for hourly Sam's Club employees are established by the General Manager (again sometimes in conjunction with their subordinate managers). As before, we conducted Chow tests to determine whether the hourly compensation structures are statistically significantly different between clubs. The results of the Chow test again indicate that the clubs' compensation structures are statistically significantly different from one another.[142]

200. The table below presents the results of the regression analyses for hourly Sam's Club employees. Of the 479 clubs represented in the database on October 12, 2001 with results, 458 (or 95.6%) showed no statistically significant difference in the hourly wage rates between women and men after controlling for the factors listed above. There were 16 (or 3.3%) stores that showed a statistically significant lower wage rate for women and 5 (or 1.0%) of the

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[141] Drogin Depo., pp. 547:21 – 548:13.

[142] The Chow test produced an F-statistic of 2.99, with a probability value of 0.00. Again, this probability value less than 5% (0.05) requires that we estimate the clubs' hourly pay models separately by club.

clubs had a statistically significantly higher wage rate for women.[143]

Results of Analysis of Hourly Pay Rates by Gender for Sam's Clubs[144]

		Gender Coefficient is Not Statistically Significant		Gender Coefficient is Not Statistically Significant		Gender Coefficient is Statistically Significant Adverse to Females		Gender Coefficient is Statistically Significant in Favor of Females	
# of Stores	# of Stores with Results	# of Stores with Male Greater than Female	# of Stores with Female Greater than Male	# of Stores	% of Stores with Results	# of Stores	% of Stores with Results	# of Stores	% of Stores with Results
Including Starting Pay Rate									
506	479	251	207	458	95.6%	16	3.3%	5	1.0%
Excluding Starting Pay Rate									
506	479	234	219	453	94.6%	21	4.4%	5	1.0%

201. As we saw in the Wal-Mart and Supercenter non-grocery analyses, when we estimated the

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[143] The regression results for each club for the models with and without starting pay rates are provided in Appendices F-8 and F-9, respectively.

[144] The total of positive and negative results may not always equal the number of clubs, or the number of clubs with results, because some clubs show zero difference between males and females. The results from the alternative Sam's analyses (grocery and non-grocery) are provided in Appendix C-17. The regression results for each club are provided in Appendices F-10 and F-13.

hourly pay equation and did not control for starting pay rates we found that the percentage of stores that show no statistically significant result is still above 94%. Hence, it appears that the starting pay rate is not the determining factor in the result and that in almost all of the clubs there is no significant difference between women's and men's pay rates among hourly associates.

F. Hourly Regression Results for Employees in Grocery Divisions 24-28

202. Employees in Grocery Divisions 24-28 were analyzed separately from the other store types because their pay structure was significantly affected by the demand for grocery experience. In addition, there is often an emphasis on hiring people from outside of Wal-Mart with grocery experience.[145] As before, we also conducted Chow tests to determine whether the hourly compensation structures are statistically significantly different between stores and whether the grocery units had compensation structures that were statistically different from the non-grocery units. The results of the Chow test again indicate that the stores' compensation structures are

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[145] Kevin Harper describes a "Co-Manager in Training" position as a way to meet the expansion of the Supercenter line of business by bringing in people from outside of Wal-Mart with food experience. K. Harper Depo. pp. 155:3-156:7.

Kevin Harper also describes Co-Managers' duties as the same as Store Managers', with the difference that "Co's" are typically needed in Supercenters (where there is Grocery). The Co-Manager oversees the grocery side of the Store and "typically has some food experience." K. Harper Depo., pp. 151:6-152:17.

statistically significantly different from one another, even within the Supercenter Grocery group.[146]

203. The table below presents the results of the regression analyses for hourly employees in Grocery Divisions 24-28. Of the 1,079 stores represented in the database on October 12, 2001 with results, 978 (or 90.6%) showed no statistically significant difference in the hourly wage rates between women and men grocery employees after controlling for the factors listed above. There were 73 stores (6.8%) that showed a statistically significant lower wage rate for female grocery employees, while 28 (2.6%) of the stores had a statistically significantly higher wage rate for women.[147]

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[146] The Chow test produced an F-statistic of 2.15, with a probability value of 0.00, indicating that there is a statistically significant difference in the compensation structures between stores.

[147] The regression results for each store for the models with and without starting pay rate are provided in Appendices F-14 and F-15, respectively.

Results of Analysis of Hourly Pay Rates by Gender for Grocery Division 24-28 Associates[148]

		Gender Coefficient is Not Statistically Significant		Gender Coefficient is Not Statistically Significant		Gender Coefficient is Statistically Significant Adverse to Females		Gender Coefficient is Statistically Significant in Favor of Females	
# of Stores	# of Stores with Results	# of Stores with Male Greater than Female	# of Stores with Female Greater than Male	# of Stores	% of Stores with Results	# of Stores	% of Stores with Results	# of Stores	% of Stores with Results
Including Starting Pay Rate									
1,583	1,079	562	416	978	90.6%	73	6.8%	28	2.6%
Excluding Starting Pay Rate									
1,583	1,128	634	370	1,004	89.0%	106	9.4%	18	1.6%

204. For the regression model that excludes starting pay rates, there is a very small decrease in the percentage of stores with no statistically significant difference between women's and men's hourly pay rates (from 90.6% to 89.0%).

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[148] The total of positive and negative results may not always equal the number of stores, or the number of stores with results, because some stores show zero difference between males and females. The alternative analysis results for grocery employees are included in Appendix C-17. The regression results for each store are provided in Appendices F-16 through F-19.

G. Hourly Regression Results for Specialty Divisions

205. According to the Field Compensation Guidelines, the pay rates for hourly Specialty Division employees are established at the district level or below. Again we conducted Chow tests to determine whether the hourly compensation structures are statistically significantly different between districts. The results of the Chow test again indicate that the districts' compensation structures are statistically significantly different from one another.

206. The table below presents the results of the regression analyses for hourly employees of the Specialty Divisions.[149] For the Tire and Lube Express division, of the 314 districts represented in the database on October 12, 2001 with results, 278 (or 88.5%) showed no statistically significant difference in the hourly wage rates between women and men after controlling for the factors listed above. There were 28 (or 8.9%) of the districts that showed a statistically significant shortfall for women and 8 (or 2.5%) of the districts had a statistically significantly positive differential for women.[150]

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[149] It should be noted that, because the decision making process for the Specialty division is different from Wal-Mart/Supercenters and Sam's, the Specialty division regressions are estimated by district, controlling for store. K. Harper Depo., pp. 32:14 - 34:14.

[150] The regression results for each district are provided in Appendix F-20. The Chow test resulted in an F statistic of 2.04 and a probability value of 0.00, which tells us we should estimate separate equations by district.

207. For the Pharmacy divisions, of the 344 districts represented in the database on October 12, 2001 with results, 329 (or 95.6%) showed no statistically significant difference in the hourly wage rates between women and men after controlling for the factors listed above. There were 11 (or 3.2%) of the districts that showed a statistically significant shortfall for women and 4 (or 1.2%) of the districts had a statistically significantly positive differential for women.[151]

208. For the Jewelry division, of the 147 districts represented in the database on October 12, 2001 with results, 121 (or 82.3%) showed no statistically significant difference in the hourly wage rates between women and men after controlling for the factors listed above. Fourteen districts (or 9.5%) showed a statistically significant shortfall for women and 12 (or 8.2%) of the districts had a statistically significantly positive differential for women.[152]

209. For the Shoes division, of the 236 districts represented in the database on October 12, 2001 with results, 215 (or 91.1%) showed no statistically significant difference in the hourly wage rates be-

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[151] The regression results for each district are provided in Appendix F-20. The Chow test resulted in an F statistic of 2.23 and a probability value of 0.00, which tells us we should estimate separate equations by district. This model does not yet incorporate licenses and certificates which are particularly important in this division.

[152] The regression results for each district are provided in Appendix F-20. The Chow test resulted in an F statistic of 2.00 and a probability value of 0.00, which tells us we should estimate separate equations by district.

tween women and men after controlling for the factors listed above. Seven of the districts (or 3.0%) showed a statistically significant shortfall for women and 14 (or 5.9%) of the districts had a statistically significantly positive differential for women.[153]

210. For the Optical division, of the 93 districts represented in the database on October 12, 2001 with results, 70 (or 75.3%) showed no statistically significant difference in the hourly wage rates between women and men. There were 18 (or 19.4%) of the districts that showed a statistically significant shortfall for women and 5 (or 5.4%) of the districts had a statistically significantly positive differential for women.[154]

211. For the Photo divisions, of the 305 districts represented in the database on October 12, 2001 with results, 283 (or 92.8%) showed no statistically significant difference in the hourly wage rates between women and men. There were 16 (or 5.2%) of the districts that showed a statistically significant shortfall for women and 6 (or 2.0%) of the districts

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[153] The regression results for each district are provided in Appendix F-20. The Chow test resulted in an F statistic of 1.95 and a probability value of 0.00, which tells us we should estimate separate equations by district.

[154] The regression results for each district are provided in Appendix F-20. The Chow test resulted in an F statistic of 1.53 and a probability value of 0.00, which tells us we should estimate separate equations by district. This model does not yet incorporate licenses and certificates which are particularly important in this division.

had a statistically significantly positive differential for women.[155]

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[155] The regression results for each district are provided in Appendix F-20. The Chow test resulted in an F statistic of 1.64 and a probability value of 0.00, which tells us we should estimate separate equations by district.

Results of Analysis of Hourly Pay Rates by Gender for Specialty Divisions[156]

					Gender Coefficient is Not Statistically Significant		Gender Coefficient is Statistically Significant Adverse to Females		Gender Coefficient is Statistically Significant in Favor of Females	
Specialty Division	Number of Districts	Number of Districts with Results	Number of Districts with Male Greater than Female	Number of Districts with Female Greater than Male	Number of Districts	Percent of Districts with Results	Number of Districts	Percent of Districts with Results	Number of Districts	Percent of Districts with Results
				Including Starting Pay Rate						
T.A.	370	314	210	104	278	88.5%	28	8.9%	8	2.5%
Pharmacy	356	344	188	156	329	95.6%	11	3.2%	4	1.2%
Jewelry	351	147	91	56	121	82.3%	14	9.5%	12	8.2%
Shoes	298	236	125	111	215	91.1%	7	3.0%	14	5.9%
Optical	251	94	38	56	71	75.5%	18	19.1%	5	5.3%
Photo	298	276	140	136	254	92.0%	16	5.8%	6	2.2%
				Excluding Starting Pay Rate						
T.A.	370	317	186	96	275	86.8%	30	9.5%	12	3.8%
Pharmacy	356	350	182	146	328	93.7%	15	4.3%	7	2.0%
Jewelry	351	151	79	72	135	89.4%	10	6.6%	6	4.0%
Shoes	298	260	149	111	227	87.3%	15	5.8%	18	6.9%
Optical	251	107	51	56	86	80.4%	17	15.9%	4	3.7%
Photo	298	242	112	130	224	92.6%	13	5.4%	5	2.1%

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[156] The total of positive and negative results may not always equal the number of districts, or the number of districts with

212. All of these results are presented in the table above. It is clear from this table that the district structure is different among the divisions. However, it is also evident that most of the units have no statistically significant differences in pay rates by gender. The estimated pay differences from these equations generally are consistent with random variation that is not correlated with gender.

213. This table also shows the results of the estimates of pay that do not include the starting pay rates. The regression model consistently demonstrates the fact that the percentage of districts with no statistically significant wage differential between women and men changes only slightly when the starting pay rate is removed from consideration. The model shows little sensitivity to the inclusion of starting pay as an explanatory factor. Regardless of how starting pay is treated, the vast majority of the Wal-Mart Stores, Supercenters and Sam's Clubs do not have a statistically significant wage differential between men and women.[157]

H. Regressions Including Employees Who Were Ever Managers

214. In his rebuttal report, Dr. Drogin discussed the fact that the above regression analyses exclude Department Managers (job code 101). The exclusion

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[Footnote continued from previous page]

results, because some districts show zero difference between males and females.

[157] The regression results for all the Specialty divisions models excluding starting pay rates for each district are provided in Appendix F-21.

in the above regression was for all associates who had ever been management employees because such associates often have different pay structures than the non-management hourly employees. The tables below present results that include all hourly employees who had been managers (but does not include those who had been salaried employees or those who were demoted in the last year). A comparison of these tables to those presented above shows that the inclusion of the hourly managers has very little effect on the conclusion that most stores have no statistically significant gender differences in pay. It is still the case that approximately 90% (and often more than 90%) of the stores in the regressions show no statistically significant difference between women's and men's hourly pay rates. This result holds true regardless of whether the regression model includes or excludes starting pay rate as an independent variable.[158]

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[158] The results for each store are in Appendices G-2 through G-9. Also, summary results by store type, where store types are defined by the alignment file, are in Appendix D-8. Results for each store are in Appendices G-10 through G-21.

Results of Analysis of Hourly Pay Rates by Gender for Wal-Mart and Supercenter Non-Grocery Ever Salaried Excluded (Includes Department Managers)

		Gender Coefficient is Not Statistically Significant		Gender Coefficient is Not Statistically Significant		Gender Coefficient is Statistically Significant Adverse to Females		Gender Coefficient is Statistically Significant in Favor of Females	
Number of Stores	Number of Stores with Results	Number of Stores with Male Greater than Female	Number of Stores with Female Greater than Male	Number of Stores	Percent of Stores with Results	Number of Stores	Percent of Stores with Results	Number of Stores	Percent of Stores with Results
				Including Starting Pay Rate					
3,177	2,613	1,381	1,031	2,413	92.3%	143	5.5%	57	2.2%
				Excluding Starting Pay Rate					
3,177	2,629	1,427	933	2,361	89.8%	224	8.5%	44	1.7%

Results of Analysis of Hourly Pay Rates by Gender for Grocery Divisions 24-28 Associates Ever Salaried Excluded (Includes Department Managers)

		Gender Coefficient is Not Statistically Significant		Gender Coefficient is Not Statistically Significant		Gender Coefficient is Statistically Significant Adverse to Females		Gender Coefficient is Statistically Significant in Favor of Females	
Number of Stores	Number of Stores with Results	Number of Districts with Male Greater than Female	Number of Districts with Female Greater than Male	Number of Stores	Percent of Stores with Results	Number of Stores	Percent of Stores with Results	Number of Stores	Percent of Stores with Results
				Including Starting Pay Rate					
1,585	1,102	592	402	994	90.2%	78	7.1%	30	2.7%
				Excluding Starting Pay Rate					
1,585	1,147	657	352	1,009	88.0%	123	10.7%	15	1.3%

Results of Analysis of Hourly Pay Rates by Gender for Sam's Club Ever Salaried Excluded (Includes Department Managers)

		Gender Coefficient is Not Statistically Significant		Gender Coefficient is Not Statistically Significant		Gender Coefficient is Statistically Significant Adverse to Females		Gender Coefficient is Statistically Significant in Favor of Females	
Number of Stores	Number of Stores with Results	Number of Districts with Male Greater than Female	Number of Districts with Female Greater than Male	Number of Stores	Percent of Stores with Results	Number of Stores	Percent of Stores with Results	Number of Stores	Percent of Stores with Results
				Including Starting Pay Rate					
505	479	263	198	461	96.2%	12	2.5%	6	1.3%
				Excluding Starting Pay Rate					
505	480	278	179	457	95.2%	15	3.1%	8	1.7%

Results of Analysis of Hourly Pay Rates by Gender for Specialty Divisions Ever Salaried Excluded (Includes Department Managers)

		Gender Coefficient is Not Statistically Significant			Gender Coefficient is Not Statistically Significant		Gender Coefficient is Statistically Significant Adverse to Females		Gender Coefficient is Statistically Significant in Favor of Females	
Specialty Division	Number of Districts	Number of Districts with Results	Number of Districts with Male Greater than Female	Number of Districts with Female Greater than Male	Number of Districts	Percent of Districts with Results	Number of Districts	Percent of Districts with Results	Number of Districts	Percent of Districts with Results
					Including Starting Pay Rate					
TLE	370	320	161	118	279	87.2%	32	10.0%	9	2.8%
Pharmacy	396	357	186	155	341	95.5%	9	2.5%	7	2.0%
Jewelry	391	187	82	82	164	87.7%	17	9.1%	6	3.2%
Shoes	390	302	133	137	271	89.7%	18	6.0%	13	4.3%
Optical	351	92	38	34	72	78.3%	16	17.4%	4	4.3%
Photo	396	306	153	129	282	92.2%	17	5.6%	7	2.3%
					Excluding Starting Pay Rate					
TLE	370	321	174	106	280	87.2%	32	10.0%	9	2.8%
Pharmacy	396	358	183	155	338	94.4%	14	3.9%	6	1.7%
Jewelry	391	188	98	70	168	89.4%	15	8.0%	5	2.7%
Shoes	390	311	145	133	278	89.4%	18	5.8%	15	4.8%
Optical	351	108	50	37	87	80.6%	15	13.9%	6	5.6%
Photo	396	325	164	145	299	92.0%	19	5.8%	7	2.2%

I. Regressions Including Employees Who Were Ever Salaried or Ever Hourly Management

215. We estimated regression analyses that included hourly employees who had ever been salaried, those who had ever been management, or those who had been demoted in the last year. They, too, were consistent with the above results. These results are found in Appendix D-9.[159] We also estimated regression analyses for hourly employees excluding those demoted in the last year and those who had ever been management or salaried, but not excluding department managers (job code 101). Here again, the results are consistent with the above results. These results can be found in Appendix D-11.[160]

J. Plaintiffs' Claim that Job, Department, and Store Assignments are "Tainted"

216. The plaintiffs have argued in Dr. Drogin's rebuttal report (without giving any specific data to establish the point) that the use of job and department in a compensation regression analysis will bias the results because they believe that women are channeled into the low-paying jobs, "female" depart-

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[159] The results for each store are in Appendices G-22 through G-29. Also, summary results by store type, where store types are defined by the alignment file, are in Appendix D-10. Results for each store are in Appendices G-30 through G-41.

[160] The results for each store are in Appendices 0-42 through G-49. Also, summary results by store type, where store types are defined by the alignment file, are in Appendix D-12. Results for each store are in Appendices G-50 through G-61.

ments, and small stores (for managers).[161] The results from the job posting, Assistant Manager Trainee, and Manager Career Selection databases all reject or fail to support that hypothesis.[162] The results from the job posting and MCS databases show that Wal-Mart's workforce, like the national labor market as a whole, is characterized by a considerable amount of self-selection into different jobs and different departments at Wal-Mart.[163] Women have expressed concerns about hours and relocation requirements of promotions to management.[164] Women tend to apply to a different mix of departments and jobs than their male counterparts.[165] Our results consistently show that when you consider the positions and departments for which people have actually applied, women are being selected in a manner that is either gender-neutral or statistically significantly in favor of females.[166] In other words, females are being placed where they want to go. Thus there is no foundation to the claim that the job, department, and store variables are tainted adversely to females and should not be included in a compensation regression.

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[161] He does not believe that pay class is a tainted variable. Drogin Depo, p. 471:2 - 472:4.

[162] *See* ¶¶ 138-139.

[163] See ¶ 86 (Job Posting Results by Store), ¶ 88 (Job Posting Results by Job), ¶ 90 (Job Posting Results by Department), ¶ 120-121 (MCS Results by Job), ¶ 132 (MCS Results by Store Size).

[164] Miller Depo., pp. 179:9-194:25, 55:2-56:24, 62:8-63:5.

[165] see ¶ 95.

[166] See ¶¶ 93-94, 114-115, 121.

K. Plaintiffs' Claim that Starting Pay Rates are "Tainted"

217. Plaintiffs have also claimed that the use of starting pay rate will bias the results because that variable could be used by managers to pay women less. Our regression estimates change very little when starting pay rate is removed from the model. However, in order to investigate this issue further, I have estimated regression equations on starting pay rates, controlling for age at hire (and its squared term as a proxy for prior experience, starting full-time or part-time status, starting pay group, job hired into, department hired into, and the combination of store hired into, hire month, and year (to account for the effects of time and store on starting pay rates). The database is restricted to those between ages 16 and 90, who are assigned to a store and have a known hire date. Age at hire is a variable that assumes the same amount of work experience for men and women who are the same age. However, work histories in national data and other employment data all suggest that men and women are unlikely to have worked the same number of years even when they are working in the same type of job. (In fact, women work fewer years.) Therefore, it is likely that the use of age results in an overstatement of women's prior experience in these models.

218. The results in the tables below show, once again, that approximately 90% of the stores with employees in Wal-Mart Supercenter non-grocery divisions and 92% of the Sam's Clubs showed no statistically significant difference in the starting pay rates offered to men and similarly-situated women. Less

than 6% of the Wal-Mart Supercenter non-grocery stores showed significantly adverse results to females, compared to 4.6% of the stores having significantly adverse results to males. The second table shows that 85% of the Grocery divisions in Wal-Mart and Supercenter stores had no statistically significant differences in starting pay rates by gender. There are more statistically significant adverse results for Grocery associates (approximately 13% of the stores) than in the non-Grocery estimates. However, this model does not incorporate any measure of grocery-related experience and both national data and data from the 30,000 Wal-Mart associates who applied for Assistant Manager Trainee, tell us that men are more likely to have such experience.[167] Including grocery-related experience measures in the model (which I have not done) would be likely to reduce the number of stores with statistically significant differences. Overall, these results are consistent with the hypothesis that there is no pattern common across similar units in the same business type that results in starting pay rates that are lower for women at a statistically significant level.[168]

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[167] The AMT data contained responses from the applicants on whether or not they had grocery experience and grocery management experience. Men had a statistically significantly greater likelihood of responding yes to both of those questions. Men also had a greater willingness to relocate residence for a promotion. (Appendix D-14)

[168] The results for each store are in Appendices G-62 through G-64. Also, summary results by store type, where store types are defined by the alignment file, are in Appendix D-13. Results for each store are in Appendices G-65 through G-70.

Analysis of Hourly Starting Pay Rate by Gender for Wal-Mart and Supercenter Non-Grocery

		Gender Coefficient is Not Statistically Significant		Gender Coefficient is Not Statistically Significant		Gender Coefficient is Statistically Significant Adverse to Females		Gender Coefficient is Statistically Significant in Favor of Females	
# of Stores	# of Stores with Results	# of Stores with Male Greater than Female	# of Stores with Female Greater than Male	# of Stores	% of Stores with Results	# of Stores	% of Stores with Results	# of Stores	% of Stores with Results
3,208	2,525	1,175	1,085	2,261	89.5%	149	5.9%	115	4.6%

Analysis of Hourly Starting Pay Rate by Gender for Grocery Divisions 24-28

		Gender Coefficient is Not Statistically Significant		Gender Coefficient is Not Statistically Significant		Gender Coefficient is Statistically Significant Adverse to Females		Gender Coefficient is Statistically Significant in Favor of Females	
# of Stores	# of Stores with Results	# of Stores with Male Greater than Female	# of Stores with Female Greater than Male	# of Stores	% of Stores with Results	# of Stores	% of Stores with Results	# of Stores	% of Stores with Results
2,118	937	534	261	796	85.0%	122	13.0%	19	2.0%

Analysis of Hourly Starting Pay Rate by Gender for Sam's Club

		Gender Coefficient is Not Statistically Significant		Gender Coefficient is Not Statistically Significant		Gender Coefficient is Statistically Significant Adverse to Females		Gender Coefficient is Statistically Significant in Favor of Females	
# of Stores	# of Stores with Results	# of Stores with Male Greater than Female	# of Stores with Female Greater than Male	# of Stores	% of Stores with Results	# of Stores	% of Stores with Results	# of Stores	% of Stores with Results
1,786	476	227	212	439	92.2%	22	4.6%	15	3.2%

VI. Management Compensation Programs

219. The analysis of management compensation is more difficult than hourly pay because these associates are paid differently depending upon their position and their store type. In addition, some management associates have special compensation plans that are designed around specific problems or opportunities in their assignment. In this section I discuss some of the characteristics of these varied compensation plans and the absence of key variables for a reasonable compensation analysis.

A. Wal-Mart Division 1 Field Management Compensation

220. Store management at Wal-Mart Division 1 stores (Discount Stores, Supercenters, and Neighborhood Markets) includes the positions of Assistant Manager, Co-Manager, and Store Manager, each one of which has a *different* compensation plan

as set forth in more detail below.[169] District Manager positions are not considered to be part of the field management compensation structure, but are part of the Home Office compensation scheme and are not considered in either plaintiffs' or my declaration.[170]

1. Assistant Managers

221. Assistant Managers receive a base salary and are eligible to receive annual performance and separate merit increases.[171] Assistant Managers who work in stores located in areas where the cost of living is higher also receive Geographical Assistance Pay ("GAP"), which is a cost of living percentage additive that is unique to the store's local labor market and is calculated on their base pay only.[172] In addition, Assistant Managers are eligible to receive a Stakeholder Bonus.[173]

222. The base salary ranges for Assistant Managers are based on the size of the store. In FY 2002, the salary range for an Assistant Manager of a store less than 60,000 sq. feet was $29,500 to $42,000,

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[169] The compensation structure and specific pay plans described herein are for FY 2002, the period February 1, 2001 to January 31, 2002, except as expressly indicated.

[170] FYE 2002 Home Office Management Incentive Plan ("Home Office Plan"), WMHO 205231-20534.

[171] Field Exempt Guidelines, WMHO 205243.

[172] Memorandum from Peggy Wheatstone Re: FYE 02 GAP ("GAP Memo"), WMHO 363106; Deposition of Craig Arnold ("Arnold Depo."), pp. 185:11-186:21.

[173] FY 2002 Field Exempt Associate Pay Guidelines ("Field Exempt Guidelines"), WMHO 205239.

from 60,000 sq. ft. to 79,999 sq. ft. was $29,500 to $45,000, and $29,500 to $47,000 for large stores over 80,000 sq. ft.[174] Within these salary ranges, Assistant Managers' salaries depend on such factors as their experience, education, skill and expertise at the time they commenced the Management Training Program, and their performance.[175]

223. Merit increases and annual performance increases may be paid to Assistant Managers who have exhibited "exceptional performance."[176]

224. Assistant Managers are eligible to participate in the Stakeholder Bonus program offered to eligible hourly employees. Assistants who meet the eligibility criteria for the plan are eligible to receive one full share under the Plan.[177] Assistants who meet the eligibility criteria and whose current fiscal year performance rating is "exceeds expectations" (3.8 or above) are eligible to receive two full shares under the Stakeholder program.[178] Consequently, a reasonable model of Assistant Manager compensation should consider not only individual characteris-

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[174] Field Exempt Guidelines, WMHO 205239; FYE 2002 Neighborhood Market Pay Guidelines, WMHO 363163.

[175] Field Exempt Guidelines, WMHO 205239. Management trainees may be recruited at a salary up to 20% more than the trainee start rate of $27,500 based on retail job experience and/or retail educational studies and their salary, therefore, will exceed the start rate when the trainee is promoted to Assistant Manager and receives a $2,000 increase.

[176] Arnold Depo., pp. 202:20-203:9, 212:13-214:6.

[177] Field Exempt Guidelines, WMHO 205246.

[178] Field Exempt Guidelines, WMHO 205246.

ties of experience, skill and education, where relevant, but also eligibility for stakeholder bonuses and the size of those bonuses.

2. Co-Managers

225. The Co-Manager position is usually a training position prior to being promoted to Store Manager or a larger store than a Store Manager previously managed.[179] Co-Managers, however, have a separate compensation package, including a base salary and incentive program.[180] For FYE 2002, Co-Managers had a salary range of $42,000-47,000 per annum.[181] Co-Managers who live in areas with higher cost of living are paid GAP on their base salary.[182] Co-Managers are also eligible to participate in a separate incentive plan based on the profitability of the store.[183] Co-Managers do not receive merit or performance evaluation salary increases.[184] A reasonable compensation model for Co-Managers must incorporate elements of the incentive plan that impact total compensation.

3. Store Managers

226. Store Managers are paid a base salary based on the size of their store and are eligible to

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[179] Deposition of Marvin Raps ("Raps Depo."), p. 56:9-13.

[180] Field Exempt Guidelines, WMHO 205238.

[181] Field Exempt Guidelines, WMHO 205238.

[182] GAP Memo, WMHO 363106.

[183] Compare Field Exempt Guidelines, WMHO 205248 with Field Exempt Guidelines, WMHO 205253.

[184] Field Exempt Guidelines, WMHO 205238.

participate in an incentive program. Store Managers are not eligible for merit or evaluation raises.[185] For FYE 2002, Store Managers at stores under 60,000 sq. feet received a base salary of $44,000; over 60,000 sq. feet was $50,000; and Neighborhood Markets were paid $47,000.[186] Store Managers are eligible to receive GAP calculated on their base pay, depending on the cost of living of the area in which they work. GAP is paid only on the base salary.[187]

227. Store Managers also are eligible to receive a Profit Growth Incentive based on the size of the store. The Store Manager is given an "Adjusted Net Profit" threshold and then a percentage formula that will be paid for all Adjusted Net Profit over the threshold amount.[188] Store Managers may receive a portion of their incentive compensation as a draw in their bi-weekly paycheck.[189]

228. New managers and managers sent to stores experiencing special circumstances have different and variable compensation arrangements.[190]

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[185] Field Exempt Guidelines, WMHO 205238; Deposition of Judy Evans ("Evans Depo."), p. 222:1-10.

[186] Field Exempt Guidelines, WMHO 205238; FY 2002 Neighborhood Market Pay Guidelines, WMHO 363163.

[187] GAP Memo, WMHO 363106.

[188] Field Exempt Guidelines, WMHO 205248, WMHO 205249, WMHO 205251.

[189] Deposition of Ben Dolan ("Dolan Depo."), p. 60:11-20.

[190] Interview of Don Swann.

4. District Managers

229. The District Manager position is not considered part of the Field Management compensation structure and instead is part of the Home Office management compensation scheme.[191] Home Office management employees are placed in pay bands based on the level of responsibility and duties of the position.[192] District Managers are eligible for the Home Office Incentive Plan. The District Manager may earn up to a maximum of 32% of base salary.[193] The actual amount of incentive earned depends on the results achieved by the Company against the Pre-Tax Profit improvement goals.[194] To be eligible for payment of any incentive, the District Manager must be employed by the Company prior to November 1, and on the last day of the Plan Year, which is the Company's fiscal year. District Managers hired prior to November 1 of the Plan Year may receive a prorated share of any incentive earned.[195]

B. Sam's Club Field Management Compensation

230. Management at Sam's Clubs includes the positions of General Manager, Co-Manager, and As-

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[191] FYE 2007 Home Office Management Incentive Plan ("Home Office Plan"), WMHO 205231- WHMO 205234.

[192] FYE 2002 Home Office Management Incentive Plan ("Home Office Plan"), WMHO 205231- WHMO 205234, Deposition of Terry Pharr ("Pharr Depo."), pp. 249:18-250:3.

[193] Home Office Plan, WMHO 205232.

[194] Home Office Plan, WMHO 205233.

[195] Home Office Plan, WMHO 205233.

sistant Manager, each of which have different compensation plans as described below.

1. Assistant Managers

231. Assistant Managers receive a base salary plus annual performance increases and merit increases, as well as incentive compensation.[196] In FY 2002, Assistant Managers received a salary in a range from $32,000 – $47,000.[197] The General Manager in consultation with the RPM, RVP, and Director of Operations determines what the base salary will be within the above range.[198] Eligible Assistant Managers also receive GAP paid as a percentage of their base salary.[199]

232. As noted, Assistant Managers are eligible to receive merit increases and annual performance increases. Annual performance increases are based upon the employee's performance, and Assistant Managers may receive a percentage increase within an applicable matrix range.[200] Assistant Managers also are eligible to receive separate merit increases based on exceptional performance.[201]

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[196] Home Office Plan, WMHO 205233.

[197] Memorandum from Jim Haworth and Jeffrey B. Keeves re Metro Market Field Pay Changes –Effective May 4, 2001 ("Metro Pay Memo"), WMHO 204789. This range has been the same since 2000.

[198] Deposition of Ulonda Crawford ("Crawford Depo."), pp. 113:11-114:4.

[199] Crawford Depo., p. 112:5-11.

[200] Crawford Depo., pp. 120:25-122:18.

[201] Crawford Depo., p. 120:4-24.

233. Assistant Managers also are eligible to participate in different incentive plans depending on whether they are working in a regular Sam's Club, a new Club, or a Profit Improvement Club.[202] The incentive plans are based on the profitability of the Club and Assistant Managers are eligible to earn up to a maximum of $3,000 for regular SamShare or $750 for new Clubs.

234. Assistant Managers are eligible to receive incentive pay under a Profit Growth Incentive and Sales Growth Incentive Plan. The Profit Growth Incentive is based on the Adjusted Net Profit of the Club. After a $575,000 profit threshold (or $700,000 for Metro Markets) is met, the incentive earned is 0.5% of ANP for Profit Growth. Sales Growth Incentive is based on the Club's achievement of at least 3.5% sales growth. If the Club qualifies, the Assistant Manager will earn .0125% of Sales Growth.[203] New Clubs and Profit Improvement Clubs with special operating circumstances have different incentive plans.[204]

235. A reasonable model of compensation for Assistant Managers at Sam's Clubs should include measures of the variables described above that char-

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[202] Sam's Club Assistant Manager/Area Manager Guidelines for Profit Growth Incentive & Sales Growth Incentive, Profit Improvement Clubs, and New Clubs, WMHO 01030256, WMHO 01030252, WMHO 01030254.

[203] Sam's Club FY 2002 Profit Growth Incentive & Sales Growth Incentive Guidelines ("Sam's Club Incentive Guidelines"), WMHO 498056.

[204] WMHO 498056, WMHO 498053.

acterize the plan under which these associates are paid.

2. Co-Managers

236. In FYE 2002, Co-Managers initially had a salary range of $42,000 – $47,000 per annum.[205] The upper range was increased effective 5/5/2001 from $47,000 to $50,000.[206] The Co-Manager position is usually an 18-month rotation and is a training position prior to being promoted to General Manager.[207] Eligible Co-Managers are also paid GAP on their base salary.[208] Co-Managers do not receive merit or performance evaluation salary increases.[209]

237. Co-Managers are eligible to receive incentive pay under a Co-Manager Profit Growth Incentive and Sales Growth Incentive Plan. The Profit Growth Incentive is based on the Adjusted Net Profit of the Club. After a $575,000 profit threshold (or $700,000 for Metro Markets) is met, the incentive earned is 1% of ANP for Profit Growth. Sales Growth Incentive is based on the Club's achievement of at least 3.5% sales growth. If the Club qualifies, the Co-Manager will earn .1 % of Sales Growth.

238. New Clubs and Profit Improvement Clubs with special operating circumstances also have dif-

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[205] Memorandum from Jeffrey B. Reeves re: Field Management Pay Adjustment for FYE 02 ("Field Pay Memo"), WMHO 499360.

[206] WMHO 499360.

[207] Deposition of Michael Miller ("Miller Depo."), p. 44:10-17.

[208] Crawford Depo., p. 112:13-15.

[209] Crawford Depo., p. 112:13-15.

ferent Co-Manager incentive plans.[210] Characteristics of these plans and measures of the other variables that affect Co-Manager compensation should be included, where possible, to properly model the pay of associates in this position.

3. Accelerated Managers

239. Accelerated Managers are managers hired with outside experience and are usually brought in for training.[211] Their starting salary can be as high as $50,000, depending on their experience.[212]

4. General Managers

240. General Managers are the Sam's Club managers in charge of a club. In FY 2002, the base salary for General Managers was $50,000 per year or $60,000 for designated Metro Sam's Clubs.[213] GAP is paid only on the base salary.[214] General Managers also are eligible to participate in a General Manager Profit Growth and Sales Growth Incentive Plan

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[210] Sam's Club Incentive Guidelines, WMHO 498064.

[211] Deposition of Dianna Eldridge ("Eldridge Depo."), pp. 250:12-251:5; Deposition of Craig McNair ("McNair Depo."), p. 71:6-13.

[212] Field Pay Memo, WMHO 499361.

[213] Effective 5/4/2001, 245 Clubs were designated as Metro Market Clubs and the General Managers received an increase in base pay for $50,000 to $60,000 (as well as an increase in profit threshold from $575,000 to $700,000 for their incentive plan). Metro Pay Memo, WMHO 204789.

[214] Metro Pay Memo, WMHO 204789.

based on the profitability of the Club.[215] In addition, General Managers may receive a portion of their incentive compensation as a draw in their bi-weekly paycheck.[216] General Managers do not receive increases based on performance evaluations.[217] Once again, in order to properly model the compensation of General Managers these characteristics, or reasonable proxies for these variables, should be included.

C. Specialty Divisions

241. Each of the Specialty Divisions, including Tire and Lube Express, Photo Center, Optical, and Pharmacy, has a different compensation plan for its Specialty Managers as set forth below.

1. Tire and Lube Express ("TLE")

242. TLE Managers were paid a base salary in the range of $29,500 to $38,000 for FY 2002.[218] TLE Managers also are eligible to receive annual per-

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[215] Under the Profit Growth Incentive, General Managers receive 4.3% of the first $1,425,000 of ANP, 3% of the next $1,000,000 of ANP, and 1% of the remaining ANP, after the profit threshold is met. Sam's Club Incentive Guidelines, WMHO 498071. Under the Sales Growth Incentive, General Managers are eligible to receive an additional .2% of sales growth if the Club achieves at least 3.5% sales growth. Id. New Clubs and Profit Improvement Clubs with special operating circumstances have different plans. Id.

[216] Sam's Club Incentive Guidelines, WMHO 498071; Crawford Depo., p. 189:17-23.

[217] Crawford Depo.; pp. 112:20-113:1.

[218] Deposition of Kirk Guthrie ("Guthrie Depo."), pp. 53:20-54:7, 55:15-20.

formance increases and merit increases.[219] In addition, TLE Managers participate in a separate incentive plan which is based on the profitability of the TLE at their store.[220]

2. Photo Center

243. Photo Center Managers are paid a base salary, which in FY 2002 ranged from $24,000 to $38,500.[221] In addition, in FY 2002 Photo Center Managers received an additional $500 for each year up to five that they had held that position.[222] Photo Center Managers are eligible for merit increases and annual performance increases.[223] They also are eligible to participate in a separate incentive plan which is based on the profitability of the Photo Center.[224] Photo Center Managers are eligible to receive GAP.[225]

3. Optical

244. Vision Center Managers are paid a base salary depending on the state in which they are located, which effective January 2002 ranged from a

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[219] Guthrie Depo., pp. 56:17-20, 60:18-61:3.

[220] FYE 2002 Specialty Group Incentive Plan ("Specialty Incentive Plan"), WMHO 363219-WMHO 353222; Guthrie Depo., p. 62:3-22, Ex. 483, p. 2.

[221] Deposition of Michael Rosales ("Rosales Depo."), p. 50:15-22; Ex. 473.

[222] Rosales Depo., pp. 68:21-69:4, Ex. 472.

[223] Rosales Depo., pp. 56:13-57:6, 60:19-22.

[224] Specialty Incentive Plan, WMHO 363195-WMHO 363198.

[225] Rosales Depo., p. 60:11-18

minimum of $25,000 to $33,000, up to a maximum of $50,000 to $70,000, though Vision Center Managers could be above the maximum depending on their past experience.[226] According to the January 2002 guidelines, Vision Center Managers may be paid up to 10% over the minimum based on licensing and certification (and 40% over five years), prior management experience and prior optical experience.[227] Vision Center Managers are eligible to receive merit increases and annual performance increases.[228] Vision Managers also are eligible to participate in a separate incentive plan which is based on the profitability of the Vision Center.[229]

4. Pharmacy

245. Pharmacy Managers are paid a base salary, which in FY 2002 varied by individual market.[230] Pharmacy Managers are eligible for merit increases and annual performance increases.[231] Pharmacy Managers also are eligible to participate in a separate incentive plan which is based on the profitabil-

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[226] Deposition of Sue Pozar ("Pozar Depo."), p. 115:2-25, Ex. 452.

[227] Pozar Depo., p. 117:3 – 118:3, Ex. 452.

[228] Pozar Depo., pp. 119:18-120:13.

[229] Pozar Depo., pp. 125:14-127:1, Ex. 452; Specialty Incentive Plan, WMHO 363224-WMHO 363228.

[230] Deposition of David Perkins ("Perkins Depo."), pp. 59:10-60:23.

[231] Perkins Depo., pp. 31:20-32:19, 64:8-15, Ex. 466, p. 17.

ity of the Pharmacy and the numbers of generic and brand prescriptions and warehouse purchases.[232]

D. Statistical Analysis of Salaried Compensation

246. The description of the compensation plans in the preceding section makes it clear that there are multiple compensation structures and decision-making processes for salaried employees in Division 1 (Wal-Mart discount and Supercenters) as well as Sam's Clubs. Therefore, a single regression, such as the one that Dr. Drogin presented for all salaried employees, would inappropriately compare the salaried pay rates of employees who are not similarly situated. This kind of calculation results in misleading conclusions and a misspecification of the compensation analysis.

247. Given available data on store size and employees we may examine preliminary regression analyses of total compensation of Wal-Mart Discount and Supercenter Store Managers, as well as the Sam's Club counterpart, known as the General Manager. Because these Managers receive a significant portion of their compensation as an annual incentive pay award based upon the financial performance of their store or club, one must analyze the manager's compensation against the full year's performance in the facility. Thus, I have restricted this analysis to those who worked at the same store as managers for the full year. The analysis of total compensation for Wal-Mart Discount and Supercenter Store Manag-

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[232] Specialty Incentive Plan, WMHO 363200-WMHO 363203; Perkins Depo., pp. 80:2-83:12.

ers, as well as the Sam's Club General Managers, controls for the following factors based upon the data available to me at this time:

- Gender
- Years of continuous service (and its squared term)
- Years at that store (and its squared term)
- Total years of service – years of continuous service (and its squared term)
- Starting Employee Type (starting hourly/salaried status)
- Number of employees at that store
- Square footage of the store
- Starting full-time/part-time status
- District
- Division
- Store profit per square foot
- Job Code
- Leave Status

248. The number of employees in a store, square footage and store profit per square foot are measures that may be correlated with the managers' incentive plan, as well as their base salary. However, these do not capture the change in net profit from one year to another ("growth") which is a factor in most of the incentive plans.

1. Store Manager Regression Results for Wal-Mart Discount and Supercenters

249. Because the compensation levels are based in significant part on decisions made by the District Managers, it is appropriate to conduct a separate regression analysis for each district when analyzing the compensation of Store Managers. However, the number of Store Managers for Wal-Mart Discount and Supercenters relative to the number of districts makes a separate analysis of districts statistically uninformative. Therefore, I have conducted a regression analysis of total compensation for Store Managers using a single regression analysis that includes estimates of the average amount by which the districts differ.

250. After accounting in my regression for the factors listed above, I find that the difference between the total compensation of men and women is not statistically significant. Men are paid an average of $157.78 a year more than similarly-situated women. This statistically insignificant difference is −0.11 standard deviations.

2. Club Manager Regression Results for Sam's Club

251. The pay rates for the Sam's Club General Managers are generally established by the Director of Operations. Again, although the decisions are made at the district level, the size of the database precludes a meaningful district-by-district regression. Therefore, I have conducted a regression analysis of total compensation for Sam's Club General Managers using a single regression analysis but controlling for district as in the Store Manager estimates.

252. After accounting in my regression for the factors listed above, I find that the difference between the total compensation of men and women is

not statistically significant. The average woman is paid over $7,087 *more* than her male counterparts. This statistically-insignificant difference favoring women is +1.55 standard deviations.

3. Additional Information Needed for Salaried Analyses

253. Further research and data are needed to account for the multiple components of total compensation for salaried employees in the various job classifications under each of the many salaried compensation plans. It is clear that total compensation for these jobs is at least in part a function of factors that are not available in the data provided to either side. For example, the Store Managers' total compensation is based in part upon "Adjusted Net Profit" over a specified threshold, a formula-based driver of variable compensation. This formula should also be examined and considered in determining for sure whether females are being compensated more or less than similarly-situated male Store Managers or General Managers.

254. Some of the other factors that appear to be pertinent to some or all of the compensation programs for the salaried job classifications include starting pay at Wal-Mart, the amount and type of substantive and managerial experience prior to Wal-Mart, pre-Wal-Mart compensation, job history within Wal-Mart, the special challenges presented by the particular assignment and the facility at issue that impact compensation, the GAP and specific indicia of store or profit performance.

255. If appropriate factors are not included in each of the regression models for each of the pay plans, the regression models may not provide a

meaningful explanation of variations in total compensation.

VII. Critique of Drogin's Compensation Analysis

A. Introduction

256. Dr. Drogin reports the results of three basic analyses of the compensation of hourly and salaried associates in his report. These analyses considered associates to be "similarly situated"[233] if they met his definition of "similar" with respect to seniority, full- or part-time status, job held, performance (in some analyses) and store.

257. Dr. Drogin's analyses are impaired because his models fail to incorporate key features of Wal-Mart's decision-making practices in their design and implementation and because he omits several critical determinants of employee compensation from his models. These analyses do not reflect the range of relationships that exist between management levels, thereby distorting the decision process. By omitting readily available data, Dr. Drogin's analyses create an over-generalized picture of the workforce that obscures legitimate differences between employees. Finally, his models do not satisfy the basic statistical assumptions of the multiple regression technique he uses, so he has improperly estimated the compensation relationship. The remainder of this section discusses these problems.

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[233] Drogin Report, p. 39, 67.

B. Dr. Drogin's Compensation Models Do Not Reflect Wal-Mart's Compensation Practices or Policies

258. Dr. Drogin's models of compensation oversimplify and misrepresent the compensation plans and pay-related decisions within Wal-Mart Stores, Inc. His model leads to conclusions that do not reflect the actual decision process and, in this case, results that are inaccurate and irrelevant to the question of whether the stores and different types of businesses implement their pay decisions according to a common pattern adverse to women. A key feature of a proper modeling process for compensation is to determine the level in the firm hierarchy at which compensation decisions are made for each class of associates. Dr. Drogin's model does not even attempt to properly account for the fact that Store Managers make the pay decisions for hourly associates or that compensation plans for salaried management associates vary both within each store or club assignment and among the different salaried job classifications. This failure to properly model the compensation process at Wal-Mart produced information that cannot be used to determine whether there is a common pattern of gender differences in pay throughout Wal-Mart Stores, Inc. Dr. Drogin's results do not tell us the extent to which adverse pay decisions were made by Store Managers as a common practice among most of the stores or occurred, if at all, among only a small proportion of the Store Managers. Obviously, if only a small proportion of the Store Managers have statistical pay differences adverse to women then certifying a class that includes all stores would include a large group of stores in which the pay differences are either statistically insignificant (i.e. not statistically different) or favor women. Therefore, it

is important to know what proportion of the stores has pay differences between men and women that are not statistically significant or favor women. Dr. Drogin's model is not designed to provide that information.

259. In his analysis all hourly associates in the retail stores are placed in one common regression model. As I noted earlier in this declaration, using the variables that Dr. Drogin includes in his model, the equation he estimates does not satisfy the Chow test of whether the store data may be combined. That is – the test tells us that the stores do not have the same pay structure for their hourly employees and, therefore, are too diverse, given that model, to be combined into this single equation. To accentuate the problem Dr. Drogin has even included *both* hourly and salaried management associates in one of his regression models. A single equation, such as Dr. Drogin estimates, that is supposed to be appropriate for all stores, is equivalent to assuming that there is one common decision-making process (presumably made at Wal-Mart headquarters) for all hourly and/or salaried retail employees. Therefore, the issue that is before the court at this stage of the litigation has been assumed in Dr. Drogin's analysis.

260. The question before the Court is whether the data show a common pattern among the Wal-Mart decision-makers of paying similarly-situated men more than women. To answer that question, we examine the pay decisions made about men and women. Descriptive statistics (such as averages and medians) and improperly constructed statistical analysis models give misleading information, not instructive results.

261. For example, take a comparison of the average wage of all men who work at Wal-Mart to the average wage of all women who work at Wal-Mart. If we were to find that the average wage for men is, for instance, $4 higher than the average wage for women, we would conclude that Wal-Mart pays men $4 more on average than it pays women.

262. Though this approach is appealing due to its simplicity, it does not tell us the full story of how wages are determined and assumes that the pattern of wages is gender neutral. Imagine how misleading this approach would be if each Wal-Mart manager across the nation made wage decisions using different criteria.

263. Suppose, for instance, that the manager at Store A pays men a lot more than she pays women. For the ease of exposition, suppose that Store A employs 3 men and 2 women. Further suppose that every man at Store A earns $20 per hour and every woman at Store A earns $10 per hour. In this case, the math is simple. The men at Store A earn an average of $20 per hour, while the women at Store A earn an average of $10 per hour. We conclude that, on average, the men at Store A earn $10 more per hour than the women earn. This conclusion is consistent with our simple comparison of average wages described above wherein men are paid more on average than are women, assuming all other characteristics are the same.

264. Now suppose that there is a second store that is managed by a person who has very different decision criteria. Suppose that at Store B men are paid *less* than women are paid even though their job-related characteristics are the same. Suppose that Store B employs 2 men and 2 women. Further sup-

pose that every man at Store B earns $5 per hour and that every woman at Store B earns $15 per hour. Again, the math is simple. The men at Store B earn an average of $5 per hour, while the women at Store B earn an average of $15 per hour. We conclude that women at Store B earn $10 more per hour than the men at Store B earn.

265. What happens if we decide to combine the information about associates in Stores A and B together? To find the aggregated average wage of men for both stores, we add the wages of the men at both stores and then divide by the total number of men; we find that men earn an average of $14.00 per hour.[234] Following the same process for women, we find that women earn an average of $12.50.[235] This approach suggests that men at these stores earn an average of $1.50 more per hour than women at these stores earn.

266. The major problem with the $1.50 difference in wage rates is that it does not give us an accurate picture of the actual wage differences at either store. Store A pays men $10 more and Store B pays men $10 less. Given the aggregate average wage difference alone, we would not have known that men

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[234] $$\frac{\$20 + \$20 + \$20 + \$5 + \$5}{5} = \$14.00$$

[235] $$\frac{\$10 + \$10 + \$15 + \$15}{4} = \$12.50$$

are compensated much better at Store A or that women are, in fact, better off at Store B.

267. Now examine the question before this Court. The most useful piece of information available is the information for each store because the store data show that women are *not*, in fact, paid less than men in Store B and *are* paid less than men in Store A. While in Store A women may have the basis for a gender discrimination lawsuit, the women in Store B do not. A disadvantage of examining only the aggregated difference is that it does not tell us about the pattern of pay decisions by store and therefore does not accurately identify the people who may be affected by decisions nor does it identify the people who make those decisions.

268. What this example demonstrates is that each store has its own set of circumstances which determine pay. In statistical terms this would mean that one would need to account for each individual store's decision process in order to capture those unique store-by-store differences. For this reason, it is inappropriate to use Dr. Drogin's method of a weighted sum of the coefficients across different regressions in order to obtain a summary measure of how wages differ between men and women. His aggregation method treats each decision-maker (in this example Store Manager) as having identical decision-making criteria and behavior and does not recognize the workplace differences that people experience in the real world.

269. We can use our simple example from above to illustrate this point. The sum of the differences between men and women in each store is $10 + (-$10) or zero. However, we know from the averages calculated above that the average difference between

men's and women's wages for all associates is $1.50. Furthermore, we know that the within-store differences between men's and women's wages in these two stores are even greater (-$10 in Store A and +$10 in Store B). Summing coefficients across equations does not give us any information about the underlying differences between men's and women's wages.

270. This example illustrates the means by which Dr. Drogin sidesteps the issue of "similarly situated" – he simply assumes that it is already the case. It also illustrates the way in which seemingly straightforward calculations can radically misrepresent the situation that they claim to clarify.

271. Wal-Mart policies and practices provided in documents, depositions and the Store Manager declarations do not support Dr. Drogin's assumption. Statistical tests of the data, given his model, do not support his assumption. In our analysis we recognized that the single equation would not be appropriate because, unlike Dr. Drogin, we tested that hypothesis before finalizing our estimates. When we estimated each Store Manager's hourly pay decisions separately, we found that over 90% of the Store Managers made pay decisions that resulted in pay rates that were not statistically significantly different for men and women and the remaining stores either had pay rate differences that statistically favored women or pay rate differences that favored men.

272. It is inappropriate to use Dr. Drogin's method of summing coefficients across different regressions in order to obtain a summary measure of how wages differ between men and women. We know that simply summing the differences between

men and women in each store is $10 + (-$10) or zero – no difference.

273. To illustrate that point in the context of a regression analysis we note that averages are a simplified form of regression analysis. For example, if we estimated the gender difference in wages in a regression equation for Store A the gender coefficient would be the only variable in the model. The estimated gender coefficient would have a value of (-$10) because, in Store A, a woman's wage is lower than a man's wage by $10. So, for Store A, we would see the following estimated equation:

- Wage = $20 + (-$10)*gender,
  where gender is 1 if female and 0 if male.

In this equation, the $20 represents the men's wage rate (since $20 + (-$10)*0 is $20). For Store B, the wage equation would have a gender coefficient of (+$10) because women's wage rates are $10 higher than men's wage rates in that store. So, the estimated equation for Store B would be:

- Wage = $5 + (+$10)*gender,
  where gender is 1 if female and 0 if male.

Here, the $5 represents the men's wage rate in Store B ($5 + $(+$10)*0 = $5) and the (+$10) is the difference in store B between men's and women's wages. The gender coefficient is a measure of the average difference between men and women associates in the store. Using Dr. Drogin's method of summing coefficients across equations, he would sum the two coefficients from the equations for the two stores (-10 and +10) [each weighted by 2 because there are 2 women in each store] and get the sum of these differences – or zero ($0).

274. Since the average difference between women's and men's wage rates in this example is $1.50 it is clear that the sum of the regression coefficients do not provide an accurate measure of the difference in wages between women and men in the stores when the decisions are made by individual store managers and the store managers and the associates' data tell us that the decision criteria and their relative importance varies significantly among the stores.[236] Our separate estimates of each store's pay rate differences are more balanced between adverse and favorable results because we have a set of variables in the equation that is more complete, in contrast to Dr. Drogin's model that omits major pay-related variables. Our separate store estimates more appropriately model each Store Manager's decisions.[237]

275. As discussed in Section III of this report (Description of Wal-Mart), compensation decisions for hourly field employees in Wal-Mart Stores, Supercenters, and Neighborhood Markets (Divisions 1, 8, 20, 24-28) and Sam's Clubs (Divisions 18, 59, 64) are made at the store/club level by the Store Managers. Dr. Drogin recognizes that Store Managers have discretion in setting hourly pay for prior experience and local wage variation for particular jobs, but believes it is limited since "exceptional adjustments"

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[236] The statistical Chow tests show that these decisions are different based on data.

[237] See, for example, ¶197.

outside of regular pay policy must be reviewed by Regional and District Managers.[238] The suggestion that Store Managers have anything less than wide latitude in making pay-related decisions for hourly employees is inconsistent with Wal-Mart policy documents and the testimony of relevant Wal-Mart employees.[239]

276. As with hourly employees, Dr. Drogin pools all retail salaried employees into one common regression. This assumption that all classes of salaried employees (Assistant Managers, Co-Managers and Store Managers) can be pooled also violates modeling and statistical principles and is an inaccurate reflection of the decision process. Associates in these job classes are compensated in fundamentally different ways for different factors.[240] Consider a few examples of these differences.

- Unlike the other manager categories, Assistant Manager compensation is a function of a performance review.
- Unlike the Store Manager categories, an important determinant of Co-Manager pay is their pay at the previous job.
- While both Store Managers and Co-Managers receive a bonus that is a function of store profitability, the relation-

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[238] Drogin Depo., pp. 210-211, 284-287.

[239] See, for example, Shatz Depo., pp. 51:24-53:4.

[240] See, for example, *Field Exempt Associates Pay Guidelines*, WMHO 0201844 – WMHO 0201851.

ship between store profitability and total compensation is much stronger for Store Managers.

277. Pooling these salaried employees, with their very disparate compensation plans, results in inaccurate and biased estimates. The combination of structurally different compensation plans in one model without appropriate variables and adjustments yields a statistical result that is not valid.

278. Perhaps one of the simplest means of demonstrating the invalidity of Dr. Drogin's assumption that only two basic decision processes exist, one for all hourly employees and one for all salaried employees respectively, is to examine the compensation decisions in the Specialty Divisions of Wal-Mart listed below:

- Tire Lube Express (Division 6)
- Pharmacy (Division 10)
- Jewelry (Division 11)
- Shoes (Division 15)
- Optical (Division 30)
- Photo (Division 31)
- Hearing (Division 32)

279. Each of these Specialty Divisions contains hourly and salaried employees and has its own independent compensation decision hierarchy.[241] To consider Specialty Division employees as identical with either their hourly or salaried non-Specialty

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[241] K. Harper Depo., pp. 32:14 – 34:14

employees counterparts requires a compensation model that distorts or even ignores some of the actual decision processes at Wal-Mart. However, Dr. Drogin makes no adjustment for these associates' unique compensation structure and simply combines these Specialty Division employees with all other employees in his analysis of salaried and hourly associates' total compensation. **Once again, pooling these Specialty Division personnel with the rest of Wal-Mart for either hourly or salary compensation analysis is inappropriate and leads to biased and incorrect parameter estimates.**

C. Dr. Drogin's Compensation Analyses Suffer Omitted Variable Bias; They Omit Key Compensation Factors

280. Dr. Drogin's models fail to incorporate important factors that are part of the compensation determining process. He admitted that he is not a labor market expert and does not have opinions on those work patterns which would have provided him with a basis for understanding why certain variables are likely to be – and here are – related to compensation.[242] His failure to incorporate some of these important variables leads to estimates of gender differences that will be biased and incorrect when the factors he omitted are differently possessed by men and women associates. That is the case here.

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[242] Drogin Depo., p. 467:1-13.

1. Hours Worked (Total Compensation Models)

281. Dr. Drogin does not include a measure of hours worked in the calendar year when analyzing associates' total compensation. This is clearly inappropriate for hourly employees.[243] Furthermore, this omission from the model of total compensation tends to inflate the estimated value of any gender factor included in the regression model because, on average, men worked longer hours than women at Wal-Mart, (see Appendix C-18). The variables used by Dr. Drogin to capture time worked (weeks worked and full-time/part-time) are completely inadequate to account for the fact that a full-time worker works anywhere from 28 hours a week to more than 40 hours, nor do they identify those earning overtime rates for working over 40 hours in a week.[244]

2. Seniority

282. The measure of seniority used in Dr. Drogin's models does not account for breaks in service nor does it measure time spent in different types of jobs.[245] * * *[246]

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[243] Annual compensation for hourly employees is explicitly (formulaically) tied to hours worked. This is not the case for salaried employees.

[244] Drogin Depo., pp. 130-131.

[245] Drogin Depo., p. 178.

[246] * * *

3. Leave of Absence

283. Dr. Drogin does not adjust pay rates for those who are currently on or have been on leave of absence from Wal-Mart. These associates' pay rates and total pay may be reduced as a result of time lost, lost opportunities for promotions and missed raises.

4. Full-Time/Part-Time Status at Hire

284. The current full-time/part-time status included in Dr. Drogin's models does not account for employees who changed status during the year over which annual earnings are measured.[247] Therefore the model does not capture the reason for lower earnings of associates in a part-time position for part of the year. Instead, that difference would increase the estimated difference in pay by gender in Dr. Drogin's model because women are a larger part of the part-time workforce.[248]

5. Recent Promotion or Demotion

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6. Prior Grocery Experience

286. Prior experience in grocery, particularly in the departments with higher skill requirements, such as the meat or liquor departments, will affect initial placement and assist in capturing the higher premium paid to attract employees with specialized

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[247] Drogin Depo., p. 128

[248] Drogin Depo., p. 466:21-24

[249] * * *

grocery experience into the Supercenters and Sam's Club.[250]

7. Pay Groups

287. Wal-Mart's pay groups define to a large degree the range of values that the hourly employee's wage can take on. Clearly pay group is an important determinant of the hourly wage for hourly retail employees at Wal-Mart.[251] Dr. Drogin recognized that pay groups guide the setting of wages at time of hire[252] and he apparently experimented with the variable.[253] However, he did not include pay group in his analysis – even though he admits that it is not a tainted variable.[254]

8. Night Shift

288. It is well documented that hourly employees on the night (graveyard) shift are paid a substantial premium (*e.g.*, $1 an hour or more in many stores).[255] Since men, on average, are more likely to

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[250] An analysis of the 2003 Manager Training Program data indicates that male applicants to this program are significantly more likely than females to have had previous grocery or grocery management experience. *See* Appendix D-14.

[251] See Declarations by Pat Greeno, Store 8 and Kristi L. Schwartz, Store 1567 for an indication of the degree to which Store Managers incorporate Wal-Mart's pay group guidelines when making pay decisions for hourly employees.

[252] Drogin Depo., p. 210.

[253] Drogin Depo., pp. 272-274.

[254] Drogin Depo., pp. 471:2 – 472:4 ("I don't think that [pay group] would be considered a tainted variable.").

[255] See RPM Training, Review of Hourly Pay Guidelines, June 20, 2000, WMHO 0205153 -WMHO 0205194. See the Affida-

be working the night shift than women, this omission is likely to overstate gender wage differences. It is not clear why Dr. Drogin did not attempt to control for this important factor in his model, as he was aware that a premium is paid for the night (graveyard) shift.[256] Indeed, he never studied gender differences in scheduling availability for different shifts.[257]

9. Department

289. There are significant differences in the hourly wages paid to associates in different departments who are otherwise of the same seniority and full-time/part-time status. Therefore, it is important to adjust for department even for people in the same job (*e.g.*, Sales Associate). This is a market reality. Plaintiffs' expert, Dr. Bendick, testified that, "[i]t's true that people selling different types of goods within the general category of sales workers often are observed to have different wage rates after controlling for things like experience and other qualifications."[258] Dr. Bendick points out that the median sales worker pay for all employers differs, depending on the goods sold, regardless of worker gender: $336 median weekly pay for apparel sales workers, $496 median weekly pay for furniture and home furnish-

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[Footnote continued from previous page]

vits of Adam Cohen, Store 1374 or Tanya Parrish, Store 819 for an indication of the degree to which Store Manager's value employees than can/will work the night-shift.

[256] Drogin Depo., p. 133; 168:22-169:2.

[257] Drogin Depo., p. 133; 168:22-169:2.

[258] Bendick Depo., p. 107:1-9.

ings, $506 median weekly pay for radio/TV/Hi-Fi/appliances, $480 median weekly pay for hardware/building supply sales workers, and $458 for parts sales workers.[259] Dr. Bendick goes on to explain some of these national pay differentials: ". . . generally, economists would divide all the factors that might influence that decision into supply and demand considerations . . . . they would list things like how much knowledge is perquisite to the sales job, . . . special licenses involved in the sales job, the conditions of work, . . . whether the sales job also involves any kind of hard physical labor like lifting heavy goods or whether there are . . . alternative occupations that people doing the selling might engage in; for example, people selling hardware might also work as carpenters, . . . where people selling shoes probably couldn't have an alternative employment . . . at least [as] skilled carpenters."[260]

290. Dr. Drogin does not include any kind of department indicator in his compensation regression models, although he admits that he would not be surprised if some departments are more profitable than others.[261] He considered that department is correlated with gender and could be a tainted variable, but he did not provide any evidence of this possibility.[262] He also has no opinion as to whether men and women might have different preferences for

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[259] Bendick Depo., pp. 138:5-143:24.

[260] Bendick Depo., pp. 135:4-138:4; 140:1-141:21, Bendick Depo. Ex. 30.

[261] Drogin Depo., pp. 179-180.

[262] Drogin Depo., pp. 196-198.

working in different departments, such as the hosiery department.[263] Wal-Mart's job posting data show statistically significant differences in the department preferences that employees express in their job bids. See Section III.L. Since employees, far more than not, bid for jobs outside of their own departments, they do not appear to be constrained by Wal-Mart policy or actions.

10. Store Size

291. Stores that are more complex and have more revenue potential generally pay more to salaried employees.[264] Dr. Drogin does not include this relevant factor in his models of retail salaried compensation, although he did have data on the square footage of each store.[265] He believes that his store indicator control will account for differences in pay due to store size,[266] even though these indicators do not isolate the effect of store size. Small stores are not distinguished from large stores in his model. A store variable can only capture individual differences unique to each store and will not capture manager decisions affecting gender differences in pay. Group differences, like small stores or large stores, must be captured with a group variable (like store size).

11. Store Profitability

292. Managers operating Wal-Mart's more profitable stores are rewarded for this superior perform-

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[263] Drogin Depo., pp. 317-319.

[264] Heilman Depo., pp. 224:8 – 225:21.

[265] Drogin Depo., pp. 274-275.

[266] Drogin Depo., pp. 293-294.

ance with higher compensation through payments under various Profit Incentive Plans and Profit Improvement Plans.[267] These data are readily available to Dr. Drogin and Dr. Drogin agrees that they affect manager pay, but he chose not to include such data in his analysis.

D. Dr. Drogin's Alternative Calculation Provided in His Response Report

293. The aggregation of our store-by-store results that Dr. Drogin attempted in his Rebuttal Report still provides the wrong information. It assumes first, that the appropriate question is "How big is a difference in pay rates? (a liability or damage question) when the appropriate question is "Do we see a pattern of statistically reliable differences across the stores that reflect a common practice of paying women less than men?" It also assumes that it is appropriate to combine the results of each of the individual regressions we analyzed as if they were independent variables. This is not an accurate assumption either since each of the stores have different pay distributions and his aggregation does not capture the differences between the stores in those decision processes. In fact, the only proper way to estimate

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[267] For Regular Wal-Mart's, see "Board of Director Summary, Wal-Mart Compensation Programs, (May 2001)" WMH0363359, WMH0363359, WMH0363360. For Sam's Club, see "Profit Growth and Sales Growth Incentive Guidelines" WMH0002936, WMH0002928, WMH0002940, and "Profit Improvement Guidelines" WMH0363979, WMH0363982, WMH0363985.

the pay differences between groups of data with this much variation is to disaggregate.[268]

294. Dr. Drogin's aggregated analysis is not useful for determining whether there is a class with typicality, commonality, and numerosity. Not only is his aggregation faulty in that he double counted Specialty Divisions in his aggregation and that he used results that did not control for prior experience, but he loses the important information these equations provide about the extent to which there is a common pattern across the stores (decision-makers). His aggregation obscures the fact that more that 90% of the stores did not show a statistically significant adverse pay difference for women, and the difference he did obtain by this aggregation was only 26% of the difference computed by his own faulty estimates. Further, his estimate of the statistical significance of this estimate is faulty since it does not account for variations among the pay practices.[269]

E. Summary

295. Dr. Drogin's compensation models do not reflect the Wal-Mart compensation policies or guidelines. They do not reflect the Store Manager's practices. His models do not satisfy the statistical as-

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[268] "If the variances differ across groups,...,the pooling the observations will result in one biased estimate of both disturbance variances. In addition, the usual estimate of the covariance matrix of the coefficients will be incorrect. In this instance, the proper approach is to disaggregate the data and use the subsamples separately." Econometric Analysis, by William H. Greene, pp. 387-388.

[269] Green, op. cit., Chapter 7.

sumptions necessary to obtain unbiased estimates. Further, these models do not provide information to the Court regarding whether or not there is a common pattern of compensation differences adverse to women, because he assumed that pattern when he combined all of the stores and store types together in single regressions. In addition to these problems, Dr. Drogin's compensation models omit many significant variables that are known to affect pay decisions at Wal-Mart and elsewhere. The omission of these variables has resulted in inaccurate and overstated gender pay differences.

VIII. Response to Dr. Bendick's Management "Availability Analysis

A. Introduction

296. Plaintiffs' expert, Marc Bendick, Jr., Ph.D., has offered an opinion that purports to support plaintiffs' claim that Wal-Mart has not *promoted* a sufficient number of Wal-Mart female employees into store and club management positions. However, he provides, instead, an attempt to measure the existence of managers in possibly comparable films. It is my opinion that the measure of availability he developed is not appropriate for comparisons to Wal-Mart retail store management and that he has not performed any type of promotion analysis.

B. Dr. Bendick Does Not Provide a Reasonable Measure of Female Availability for Promotion to Wal-Mart Management Jobs

297. Instead of using the female availability among actual applicants for Wal-Mart's jobs, Dr. Bendick computed the representation of women in the Officials & Managers jobs in EEO-1 reports that

he believes 20 *other* companies submitted to the EEOC in 1999 and defined that statistic as the availability of women for promotion at Wal-Mart.[270] Dr. Bendick compared the gender composition of Wal-Mart's Officials & Managers in its store (and other) locations to the gender composition of the Officials & Managers at this group of 20 unnamed firms and concluded that the difference in the percentages reflected a "shortfall" of women promoted by Wal-Mart. These comparisons are not useful in making a determination for class certification since his benchmark of availability is biased and inappropriate. The representation of women employed in Officials & Managers jobs at the 20 unnamed firms does *not* constitute a methodologically sound sample from which to draw any conclusion about the availability of women at Wal-Mart for promotion to management positions at Wal-Mart for numerous reasons, including:

(i) The labor force from outside of Wal-Mart is not persons who could have been 'promoted' to Wal-Mart management jobs because one must already be a Wal-Mart employee to be "promoted." Thus, non-Wal-Mart employees do not constitute a reasonable pool from which to compute the gender representation among those interested, qualified and available for promotion at Wal-Mart. In this case there are extensive official Wal-Mart records of hundreds of thousands of actual applicants for such hourly and salaried management jobs filled by promotion during the period from 1997 through early 2003. The pool of actual promotional applicants for these Wal-Mart jobs reflects the best measure of availability for promotion in this case.

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[270] Deposition of Marc Bendick, Jr., ("Bendick Depo."), pp. 21-22. Different unnamed firms are identified as comparators in other years analyzed.

(ii) The EEO-1 reports from which Dr. Bendick took a very small sample present an incomplete picture of managerial employees in a given industry, even when the entire database is used. Generally the only employers who file EEO-1 reports are federal contractors who have 50 or more employees or employers with 100 or more employees.[271] Dr.

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[271] The EEO-1 filing instructions specifically state:

"Standard Form 100 must be filed by -

A. All private employers who are: (1) subject to Title VII of the Civil Rights Act of 1964 (as amended by the Equal Employment Opportunity Act of 1972) with 100 or more employees EXCLUDING State and local governments, primary and secondary school systems, institutions of higher education., Indian tribes and tax-exempt private membership clubs other than labor organizations; OR (2) subject to Title VII who have fewer than 100 employees if the company is owned or affiliated with another company, or there is centralized ownership, control or management (such as central control of personnel policies and labor relations) so that the group legally constitutes a single enterprise, and the entire enterprise employs a total of 100 or more employees.

B. All federal contractors (private employers), who: (1) are not exempt as provided for by 41 CFR 60-1.5, (2) have 50 or more employees, and (a) are prime contractors or first-tier subcontractors, and have a contract, subcontract, or purchase order amounting to $50,000 or more; or (b) serve as a depository of Government funds in any amount, or (c) is a financial institution which is an issuing and paying agent for U.S. Savings Bonds and Notes.

Bendick estimates that more than 50% of the U.S. workforce is likely to be *excluded* from EEO-1 counts.[272]

(iii) To exacerbate further the small sample problem, Dr. Bendick then used the *other* firm data for Wal-Mart locations so that when only One or two of the films were actually present in that location the comparison would be based on only one or two firms.

(iv) Because Dr. Bendick used only EEO-1 data (and then only a small portion of that), he excluded approximately 96% of the work force holding management jobs in the retail sales field. This is observed by comparing the 178,716 individuals in Officials & Managers jobs in the sample that Dr. Bendick used for 1999 to the approximately 4,896,000 individuals employed in "Sales occupations, Supervisor and proprietors" reflected in the 2000 Statistical Abstract of the United States for 1999.[273]

[Footnote continued from previous page]

Only those establishments located in the District of Columbia and the 50 states are required to submit Standard Form 100. No reports should be filed for establishments in Puerto Rico, the Virgin Islands or other American Protectorates."

See http://www.eeoc.gov/stats/jobpat/elinstruct.html

[272] Bendick Depo., p. 74

[273] U.S. Census Bureau, Statistical Abstract of the United States, Table 669, Employed Civilians by Occupation, Sex, Race, and Hispanic Origin: 1983 and 1999. See jbd_attl_1999a1l.sps for totals obtained from Bendick's data set.

(v) Although Dr. Bendick testified that retail sales in the Standard Industrial Classifications 52, 53, 54, 55, 56, 57 and 59 were "comparable" to Wal-Mart,[274] and he gathered the available set of EEO-1 data for establishments with headquarters in these SIC codes, he did not use most of these firms in his analysis. He arbitrarily confined his analysis to two SIC codes, neither of which is Wal-Mart's SIC Code: SIC code 53 (General Merchandise Stores) and SIC code 56 (Apparel and Accessory Stores). He then used data from only 20 companies in 1999 (as well as Wal-Mart) that he pulled from the broader "comparator" data; his data represent only SIC 53 and 56 and a very small number of the employers that filed EEO-1 reports in those SIC codes.[275] This use of an arbitrarily restricted data set in lieu of the full data set for the "comparator" SIC codes is not justified and greatly distorts the numbers that Dr. Bendick presents.

298. Neither Dr. Bendick's work nor our examination of his work can establish the reasonableness of his decision to select the 20 firms he uses and identifies as "comparable," since neither Dr. Bendick nor I know the identity of his selected "comparator"

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[274] "Q. . . . Why were those SIC codes selected by you?

A. What I was interested in doing was finding firms that were the most directly comparable to Wal-Mart. . . ." Bendick Depo., p. 68:4-7.

[275] The number of stores varied from one year to another but remained in the neighborhood of 20 for the years he studied. See the column for the "number of units reporting" for these SIC codes in the Table below titled, 2-Digit SIC Coded Industries Representing Wal-Mart Product Lines.

firms.[276] Thus, Dr. Bendick does not know and we cannot assess whether the firms truly are comparable and whether the jobs that those firms elect to include and not include in the Officials & Managers category of their EEO-1 reports are comparable to the jobs that Wal-Mart does and does not include.[277] In order to know whether it is appropriate to include or exclude firms from this already-limited EEO-1 dataset to obtain good comparator firms, we would need to know the following types of information about each of the firms and their data:

(i) The actual job titles, duties and qualifications of the jobs each company includes in its EEO-1 Officials and Managers category. Dr. Bendick and I have no information about these duties and qualifications for any of the jobs in the companies that he uses as comparators.[278] The specific jobs included by a given employer in that EEO-1 category can substantially affect the amount of female representation because there are vast differences in labor market availability for different types of management positions. For example, 61.8% of the personnel manager jobs in the country in 2000 are filled by women – about double the representation of women in grocery manager positions.[279] If one of the companies Dr. Bendick calls a "comparator company" has a personnel manager in every retail store and classifies that manager as an Official & Manager, an availability rate based on that firm's data cannot be comparable to Wal-Mart for purposes of the analysis that Dr. Bendick has performed because Wal-Mart does not have personnel managers coded as Officials & Managers in its stores. Thus, Wal-Mart would not be averaging into its Officials & Managers data a highly-female occupation that other companies include.

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[276] Bendick Depo., pp. 20:23-21:12.

[277] Bendick Depo., pp. 133:15-135:21.

[278] Bendick Depo., pp. 191:25-192:16.

[279] Bendick Depo., Ex. 10: U.S. Census Bureau, Statistical Abstract of the United States, Table 593. Employed Civilians by Occupation, Sex, Race, and Hispanic Origin: 1983 and 2000.

(ii) The different ways in which the companies Dr. Bendick calls "comparators" and Wal-Mart classify their department managers for EEO-1 purposes -- differences that could greatly skew the results.[280] Approximately 75-80% of Department Managers at Wal-Mart are women.[281] Wal-Mart does *not* classify them as Officials and Managers in its EEO-1 report, even though the EEO-1 definition includes those who: "direct individual departments or special phases of a firm's operations. Includes: . . . department managers."[282] Wal-Mart Executive Vice President Coleman Peterson, however, believes that some other firms include in their EEO-1 count individuals who perform the same functions as Wal-Mart's Department Managers.[283] Wal-Mart's EEO-1 female representation would be in the top tier of the unknown comparators that Dr. Bendick uses in his report if it similarly placed its Department Managers in the Officials and Managers category.

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[280] Dr. Bendick argues that differences in reporting do not affect comparisons with Wal-Mart because the percentage female among Officials & Managers for "comparators" with the most similar managers per store or managers per 100 employees is still higher than that at Wal-Mart. Such a comparison presumes that the "comparators" are comparable to begin with and that they and Wal-Mart have similar jobs and organizational structure, despite Wal-Mart's substantially larger size (at least 3 times larger than the next largest comparator).

[281] *See* Table 7, Drogin Report, p. 15.

[282] *See* http://www.eeoc.gov/statsjobpat/e1instruct.latml.

(iii) The schedules and working hours of each of the jobs. Dr. Bendick and I have no information about these issues or even about the days and hours of operation for any of the companies that he uses, but they have a marked impact on gender because, on average, women in the United States workforce show less interest in working nights (graveyard shift) and work fewer hours than men.[284] Dr. Bendick has made reference to this phenomenon in some of his research and in his deposition.[285] Salaried Wal-Mart managers, particularly Assistant Managers and Co-managers, work a lot of night shifts.[286]

(iv) The store types of the included comparator firms' establishments or of Wal-Mart. Dr. Bendick cannot determine from his data the different store types (e.g., retail clothing store; Wal-Mart Discount store; Wal-Mart Supercenter that sells meat, produce, liquor and other groceries; membership club) among Wal-Mart facilities or those of its "comparators."[287] (Dr. Bendick simply notes that each "comparator" firm is a different "mixed bag" of store types.)[288] As a consequence, he cannot take into account differences in female representation of Officials & Managers that exist for different store types. For example, as Dr. Bendick previously has opined, the availability of women for retail grocery management jobs is in the neighborhood of 37.1% according to the EEO-1 data he uses, while the availability of women for retail sales management jobs in furniture and home furnishings is 32.3%.[289] A Sam's Club membership-only club that sells gasoline at gas pumps and large appliances does not exhibit similarity of business with, nor would it be expected to draw the same applicants as, a women's clothing store.

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[283] Deposition of Coleman Peterson ("Peterson Depo."), p. 108:7-19.

[284] See, for example, the Bureau of Labor Statistics, Employment and Earnings, for monthly reports of hours worked and other characteristics.

[285] Bendick Depo., p. 265; Ex.24, p. 37.

[286] Store Manager Declarations.

(v) The product lines and the share of business associated with each product line as they, too, impact the pool of qualified and interested workers for jobs that handle such product lines. Dr. Bendick cannot determine whether his "comparators" sell comparable volumes or types of products that many Wal-Mart establishments sell: meat, bakery items, frozen foods, alcohol, wireless devices, electronics, guns, fishing equipment, optical products, pharmacy products, deli, floral, paint, or appliances.[290] While Dr. Bendick knew that Wal-Mart or Sam's Clubs sell food and grocery products and that managers must manage these areas, he had no idea how much time managers devote to that management, or what share of Wal-Marts have grocery product lines.[291]

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[287] Bendick Depo., pp. 172-173.

[288] Bendick Depo., pp. 167-168.

[289] Bendick Depo., p. 235; Ex. 18, p. 11. He has also opined that the availability of women in Sales Occupations, Hardware/Building Materials, Officials and Managers is 14.9%. Bendick Depo., p. 132; Ex. 13.

(vi) The amount of EEO-1 data that the EEOC captured from employers filing EEO-1 reports but did not provide to Dr. Bendick. Dr. Bendick is aware that the EEO-1 database he uses is several years old and incomplete, but he does not know what percentage of the EEO-1 data submitted by employers to the government is missing from the database he used.[292] Specifically, he believes that the EEOC deletes records every year from employers who submit EEO-1 data in order to maintain establishment confidentiality, but he does not know what percentage of records are deleted.[293] Dr. Bendick further acknowledges the inexplicable fact the EEO-1 data for the year 2000 have substantially more deleted records than other years and, thus, may not be comparable to employment patterns in other years.[294]

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[290] Bendick Depo., pp. 141-152.

[291] Bendick Depo., pp. 90-92, 152.

[292] Bendick Depo., p. 75 (does not know what percent of submitted data was deleted and never asked the EEOC).

[293] Bendick Depo., pp. 72, 75-77, 85-86.

[294] Bendick Depo. pp. 72-73.

(vii) The error rate in the submissions that employers make when they report their EEO-1 data. Dr. Bendick admits that there is no independent audit of the accuracy of the numbers the employers submit to the EEOC in the EEO-1 reports.[295]

299. The comparative benchmark on which Dr. Bendick bases his conclusions is a biased benchmark that created results adverse to Wal-Mart. If Dr. Bendick (1) had used actual applicant flow data for Wal-Mart positions filled by promotions (which would be the best measure of availability for those actual jobs), or (2) had broadened his choice of firms to include those in which Wal-Mart product lines fit (and which, therefore, would be more fairly reflective of persons with the requisite skills in the outside labor market), he would have found that the percentage of women promoted to management jobs at Wal-Mart from 1997 to 2003 is nearly identical to the female percentage of those who applied for the actual promotions and higher than the female percentage among Officials & Managers in those comparative industries. The remainder of this section provides a more detailed discussion of this opinion.

C. Additional Flaws in Dr. Bendick's Criteria for Selecting His Small Number of Comparators from an Inappropriate Sample

300. Dr. Bendick states that he began his analysis of women in management by "defining appropriate comparator firms as those large, multi-state retail chains that are widely recognized by Wal-Mart

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[295] Bendick Depo. pp. 80-81, 165-166.

itself and by standard sources of business and financial information as comparable to Wal-Mart in such terms as products, services, market niche, size, scope, operational style, and expected financial and operational results."[296] In practice, however, Dr. Bendick cannot say that the companies are the ones that Wal-Mart or others deem "comparable" to Wal-Mart because, as noted above, he does not, in fact, know who they are. He selected firms based on two criteria that exclude a majority of companies from which Wal-Mart is likely to draw experienced talent for Officials & Managers jobs if it hires from the outside.[297] The two criteria Dr. Bendick used to draw his comparator firms are:

a) The firm's company-wide level record reports the firm in a Retail industry (Standard Industrial Codes (SIC) of 52-Building Materials & Garden Supplies, 53-General Merchandise Stores, 54-Food Stores, 55-Automotive Dealers and Service Stations, 56-Apparel and Accessory Stores, 57-Furniture and Home Furnishings Stores, 59-Miscellaneous Retail respectively), excluding Eating and Drinking Places (58).

b) The firm had at least 100 separately-reporting establishments in SIC 53.

301. The first criterion restricts Dr. Bendick's potential comparables to applicants from outside for jobs only in Wal-Mart Discount Stores and Supercenters, and does not provide comparators for Sam's Clubs, since no membership or wholesale industry

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[296] Bendick Report, p. 9.

[297] Interview of Don Swann.

firms (like Sam's) are included. Dr. Bendick's criteria exclude any establishments for which the parent film is in the Wholesale distribution industries (SIC 50, 51), more akin to a Sam's Club. This omission is inexplicable.

302. The second criterion implies that the number of separately-reporting establishments in each company would somehow affect the gender composition of the Officials & Managers in a given facility. However, the basis for such an implication is not articulated and is not a reasonable methodology in this case because, when Wal-Mart stores hire from outside of the company, they recruit local talent, whether it be from a single-store entity (such as a privately-owned grocery store or meat market), a small local chain, or a national enterprise, all of whom are "competitors" when it comes to hiring management talent from outside of Wal-Mart.[298]

303. When Dr. Bendick applied his two criteria listed above, he obtained a list of 20 firms for 1999 identified in the table in paragraph 22 of his report (reproduced below). This table shows that he actually included only two of the six major SIC industries he testified were "comparators" – SIC 53 (General Merchandise Stores) and SIC 56 (Apparel and Accessory Stores). He omits the other SIC industries that even he testified were "the most directly comparable to Wal-Mart": SIC 52, 54, 55, 57 and 59. Consequently, this narrow "competitor" pool that Dr. Bendick constructed at a minimum does not include reasonable comparators for Wal-Mart Supercenters,

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[298] Interview of Don Swann.

which sell Groceries, nor does it include reasonable comparators for Sam's Clubs.

Copy of Table from Dr. Bendick's Report in Paragraph 22

Firm	SIC for The Parent Company	Industry for the Parent Company	Total Employees	Establishments Nationwide
A	531	Department Stores	279,255	1,168
B	531	Department Stores	271,171	2,111
C	531	Department Stores	264,581	1,254
D	569	Misc. Apparel & Accessories Stores	190,063	1,030
E	531	Department Stores	150,942	415
	531	Department Stores	133,906	434
G	531	Department Stores	85,421	356
H	531	Department Stores	63,285	340
I	565	Family Clothing Stores	58,228	214
J	539	Misc. General Merchandise Stores	54,845	247
K	539	Misc. General Merchandise Stores	54,171	336
L	531	Department Stores	37,152	244
M	531	Department Stores	37,039	297

N	531	Department Stores	34,600	391
0	531	Department Stores	18,837	167
P	531	Department Stores	15,895	198
Q	539	Misc. General Merchandise Stores	15,693	187
R	531	Department Stores	14,512	109
S	539	Misc. General Merchandise Stores	12,943	102
T	531	Department Stores	10,547	105
Wal-Mart	533[299]	Variety Stores	887,383	3,027

304. Dr. Bendick provides no other data on any of the other criteria that he described in his report –

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[299] Dr. Bendick's footnote reads: "Individual Wal-Mart retail establishments that variously report themselves in SIC 531 (Department Stores), 533 (Variety Stores), or 539 (Miscellaneous General Merchandise Stores) do not appear to be distinct from each other in obvious ways. For example, in 1999, total employees per store averaged 294 for those in SIC 531, 272 in SIC 533, and 284 in SIC 539, all within a few percentage points of each other. Moreover, between 1996 and 1999, more than 700 Wal-Mart establishments changed their SIC one or more times." (Bendick Report, p. 12, fn. 15.) Dr. Bendick, however, fails to recognize that a government employee, not Wal-Mart, assigns an SIC code to an establishment; it is not visible on the EEO-1 form for Wal-Mart to even check it. Bendick Depo., pp. 66-67. We have no information about how much information the government employee has about each facility.

such as "scope, operational style, and expected financial and operational results." Since Dr. Bendick testified that he does not know this information, his conclusions lack the requisite support.

305. Dr. Bendick's criteria identify an unduly narrowly-focused group of firms and establishments that are not conceptually likely to be similar to Wal-Mart in important ways. First, none of the 20 "comparators" that Bendick selects as "comparators" A through T have the same company-level EEO-1 SIC code as Wal-Mart: Variety Stores (SIC=533).[300] Instead, these "comparators" have EEO-1 codes of Department Stores (531), Misc. Apparel & Accessories Stores (569), Family Clothing Stores (565), and Misc. General Merchandise Stores (539), that reflect a more limited range of products.

306. Second, as noted, Dr. Bendick's criteria exclude any establishments for which the parent firm is in the Wholesale distribution industries (SIC 50, 51), more analogous to a Sam's Club.

307. Third, by focusing on the General Merchandise Stores (SIC 53), Dr. Bendick ignored the fact that Wal-Mart establishments offer a variety of product lines. Wal-Mart has indicated that these product lines require management talent from retail sales establishments likely found in other SIC codes - codes that Dr. Bendick testified were "comparable" to Wal-Mart, such as Hardware (525), Grocery Stores (541), Fruit and Vegetable Markets (542), Women's Clothing Stores (562), Furniture and Home Furnishings (571), Household Appliance Stores (572), Radio,

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[300] Bendick Depo. p. 152.

Television, and Computer Stores (573), and Liquor Stores (592).[301]

308. Fourth, Dr. Bendick's actual comparisons to Wal-Mart establishments were based on only one SIC code (53) and ignored comparators in the same SIC codes as those assigned to the 71 Wal-Mart facilities from (421) Trucking and Courier Services (and one facility from the Miscellaneous Food Stores industry (549)).[302] He argues that this is reasonable since he says that these facilities have a similar distribution of employees as other Wal-Mart stores.[303] He made no similar examination of and adjustments in the EEO-1 data for the companies he labels as "comparators," A through T.[304] Nor could Dr. Bendick even determine whether the Wal-Mart establishments for which he ignored differences in EEO-1 codes or which he analyzed were Wal-Mart Discount Stores, Supercenters, Neighborhood Markets, or Sam's Clubs.[305] Dr. Bendick admitted that his "comparators" A through T may have retail type establishments that could be coded as SIC 421, so he does not know if coding changes in comparator data would be appropriate.[306] In fact, more than 96% of his comparator establishments were in SIC 531, but

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[301] Interview of Don Swann.

[302] Bendick Report p. 14, fn. 16; Bendick Depo., pp. 163-164.

[303] Bendick Report p. 14, fn. 16; Bendick Depo., pp. 163-164.

[304] Bendick Depo., pp. 164-165.

[305] Bendick Depo., p. 164.

[306] Bendick Depo., pp. 164-165.

Wal-Mart had about 20% in that SIC code and almost 70% in SIC 533.

309. The propriety of Dr. Bendick's ignoring differences in SIC codes for 71 Wal-Mart establishments (from SIC 421 to SIC 53) so that he could add more employees ad hoc to his Wal-Mart analysis, combined with his decision to restrict the SIC codes for any alleged comparators' establishments, cannot be evaluated with any reasonable degree of scientific certainty because he turned over only the records he used, not the entire EEO-1 file from which he pulled limited records. Also, as discussed above, he does not even have the identities of the companies he calls comparators.

D. The EEO-1 Data from All SIC Codes that Dr. Bendick Says are Comparable (SIC codes 52, 53, 54, 55, 56, 57 and 59) are More Representative, Albeit Not Nearly as Accurate, a Measure of Availability as the Actual Applicants for the Promotions in Question

310. When the EEO data are included for *all* retail sales SIC codes (industry groups) that Dr. Bendick testified were "comparable," the female representation among Officials & Managers (37.4%) is similar to the female representation (40.4%) of those promoted to Officials & Managers jobs at Wal-Mart Discount Stores, Supercenters and Neighborhood Markets.[307]

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[307] The female representation figure of 37.4% is calculated as the unweighted average of the female representation in each of the SIC categories. It is not appropriate to use the number of

Female Representation Among Officials & Managers for 2-Digit SIC Coded Industries Representing Wal-Mart Product Lines, 1999 Nationwide EEO-1 Reports

SIC Code	SIC Title	Number of Units Reporting	Number of Officials & Managers	Percent Female Among Officials & Managers
48	Communication (including Wireless)	6,081	200,992	40.9%
52	Building Materials and Garden Supplies	2,396	32,427	20.5%
53	General Merchandise Stores	12,816	173,665	50.3%
54	Food Stores	15,816	187,580	35.2%
55	Automotive Dealers and Service Stations	1,965	32,249	19.8%

[Footnote continued from previous page]

Officials and Managers in each of these categories as weights because they are not the same as the distribution of employees at Wal-Mart for related product lines.

56	Apparel and Accessory Stores	1,497	31,101	61.6%
57	Furniture and Home Furnishings Stores	1,892	25,588	32.2%
59	Miscellaneous Retail	4,027	57,175	42.4%
73	Business Services (incl. Photo Developing)	12,354	326,928	33.0%
75	Auto Repair, Services, and Parking	1,187	21,012	28.2%
	All Establishments with 2-Digit SIC Codes (SIC codes 48, 52-57, 59, 73, and 75)			36.4%
	Establishments with 2-Digit SIC Codes Selected by Dr. Bendick (SIC Codes 57-57 and 59)			37.4%

Source: http://www.eeoc.gov/stats/jobpat/1999/sic2

311. As the table's data show, the female percentage among Officials & Managers in retail sales establishments having product lines relevant to Wal-Mart's product lines generates an average availability benchmark for Officials & Managers of 36.4%. This benchmark is much lower than the 56.5%

"availability" that Dr. Bendick uses for retail Wal-Mart stores.[308]

312. This 36.4% female external labor market availability for Officials & Managers jobs in retail sales entities is consistent with information in some of Dr. Bendick's prior analyses. As noted by Dr. Bendick in his deposition, the female representation in Officials & Managers positions in various categories of retail sales establishments that cover many of Wal-Mart's product lines is much lower than the "availability" he elected to present in this report, which he restricted to a few establishments in SIC 53 and 56. In one expert report he gave for plaintiffs (*Shores, et al. v. Publix*), Dr. Bendick wrote that "while precise estimates vary depending on which data source, time period, and definitions is [sic] used, the representation of women among managers in the supermarket industry is between 30 percent and 40 percent for all managerial personnel within stores and between 10 and 15 percent for Store Managers."[309] (In that report, Dr. Bendick cited a Food Marketing Institute Survey that indicated the female representation of retail food Store Managers ranged from 7.3% to 15.4%.)[310] In another expert report he gave for plaintiffs (*Butler, et al. v. Home Depot*), Dr. Bendick calculated the range of availability of women for retail sales management trainee positions to be from 34.43% in 1990 to 40.24% in 1997.[311] In

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[308] Bendick Report, p. 17.

[309] Bendick Depo., Ex. 18, pp. 18-19; ; Bendick Depo., p. 239.

[310] Bendick Depo., Ex. 18, p. 16; Bendick Depo., pp. 238-239.

[311] Bendick Depo., Ex. 9, p. 7; Bendick Depo., pp. 95-96.

this case, however, Dr. Bendick's use of an unduly restrictive group of retail stores – fewer than those even he believes to be comparator industries – and his restriction to only 20 companies with multiple facilities in those types of retail stores – greatly and improperly increased the availability benchmark Dr. Bendick used.

313. When the EEO-1 data are included for *all* industries that most closely match Sam's Club establishments, the female representation among Officials & Managers of 31.7% is similar to the 33.0% representation of women selected for Assistant Manager Trainee positions at Sam's Club from December 27, 1998 through March 8, 2002, based on Global PeopleSoft data.

Female Representation Among Officials and Managers for 2-Digit SIC Coded Industries Most Analogous to Sam's Clubs, 1999 Nationwide EEO-1 Reports

SIC Code	SIC Title	Number of Units Reporting	Number of Officials & Managers	Percent Female Among Officials & Managers
48	Communication	6,081	200,992	40.9%
50	Wholesale Trade - Durable Goods	5,144	125,042	23.3%
51	Wholesale Trade - Nondurable Goods	4,211	119,720	22.7%
59	Miscellaneous Retail	4,027	57,175	42.4%
73	Business Services (incl. Photo Developing)	12,354	326,928	33.0%
75	Auto Repair, Services and Parking	1,187	21,012	28.2%
	All Establishments with 2-digit SIC Codes	33,004	850,869	31.7%

314. The share of women promoted to Assistant Manager Trainee positions in Global PeopleSoft data is comparable to availabilities calculated from the range of industries that represent all Wal-Mart or Sam's Club product lines.

Analysis of Moves into Manager-in-Trainee Jobs by Store Type from December 27, 1998 through March 8, 2002[312]

	Wal-Mart/ Supercenters			Sams Club			Specialty Divisions		
Year	Male Moves to MIT Jobs	Female Moves to MIT Jobs	% Female	Male Moves to MIT Jobs	Female Moves to MIT Jobs	% Female	Male Moves to MIT Jobs	Female Moves to MIT Jobs	% Female
1999	1,840	1,201	39.5%	289	128	30.7%	364	88	19.5%
2000	2,518	1,689	40.1%	327	139	29.8%	423	108	20.3%
2001	2,142	1,508	41.3%	313	176	36.0%	479	112	19.0%
2002*	424	300	41.4%	39	33	45.8%	58	14	19.4%
Total	6,924	4,698	40.4%	968	476	33.0%	1,324	322	19.6%

* 2002 PeopleSoft data ends on 3/8/2002.

E. Three-Digit SIC Codes

315. We also matched 3-digit SIC industries to individual departments representing product lines at Wal-Mart and Sam's Club (based on the WM AREA_CODE field). The industries identified by the 3-digit level provide a more precise match between Wal-Mart and Sam's Club product lines and relevant outside industries. This is particularly true here where the presence of women varies widely from one industry to another. The percentage of women

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[312] There are no moves into Assistant Manager Trainee jobs from December 27, 1998 to December 31, 1998.

available for Officials & Managers positions in industries relevant to product lines at Wal-Mart is 37.1% and at Sam's Club is 29.2%. The table below shows the results for Wal-Mart Discount stores, Neighborhood Markets and Supercenters.

Female Representation Among Officials & Managers for 3-Digit SIC Coded Industries Representing Wal-Mart Product Lines[313]

SIC Code	SIC Title	Number of Units Reporting	Number of Officials & Managers	Percent Female Among Officials & Managers
481	Telephone Communication	3,815	139,998	42.2%
489	Communication Services, Nec	611	21,483	39.3%
523	Paint, Glass, and Wallpaper Stores	35	1,778	13.1%
525	Hardware Stores	115	1,679	18.7%
526	Retail Nurseries and Garden Stores	80	1,297	29.1%
531	Department Stores	9,646	127,114	55.9%
539	Miscellaneous General Merchandise Stores	978	14,957	34.6%
541	Grocery Stores	15,580	183,157	35.1%
542	Meat and Fish Markets	16	306	24.2%
543	Fruit & Vegetable Markets	-----	-----	-----

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[313] Information does not include data from SIC 533, because it was not provided by the EEOC to the public (i.e., the data available to me) in 1999.

544	Candy, Nut and Confectionery Stores	8	1,239	67.6%
545	Dairy Products Stores	15	216	28.2%
546	Retail Bakeries	102	1,307	26.9%
553	Auto and Home Supply Stores	198	4,641	21.5%
561	Men's and Boys' Clothing Stores	50	1,314	42.8%
562	Women's Clothing Stores	94	3,912	71.3%
564	Children & Infant's Wear Stores	-----	-----	-----
565	Family Clothing Stores	600	6,722	63.0%
566	Shoe Stores	69	3,008	36.6%
569	Misc. Apparel and Accessory Stores	-----	-----	-----
571	Furniture and Homefurnishings Stores	539	8,620	42.2%
572	Household Appliance Stores	94	925	23.0%
573	Radio, Television, and Computer Stores	1,259	16,043	27.4%
591	Drug Stores and Proprietary Stores	1,203	10,091	32.5%
592	Liquor Stores	15	175	20.6%
594	Miscellaneous Shopping Goods Stores	1,891	22,514	42.0%
596	Nonstore Retailers	452	15,468	48.8%
599	Retail Stores, Nec	311	7,245	47.0%
731	Advertising (Signing)	405	16,419	47.0%

738	Misc. Business Services (incl. Photo Devel.)	4,610	101,302	32.0%
754	Automotive Services, except Repair	121	1,392	25.9%
Average across Relevant SICs		42,912	714,223	37.12%

Source: http://www.eeoc.gov/stats/jobpat/1999/sic3

F. Dr. Bendick's Conclusion is Not Supported by Appropriate Industry Data

316. After calculating the inflated availability benchmark of 56.5% for retail stores, Dr. Bendick compared that percentage to the female representation of 34.5% among Wal-Mart's Officials & Managers workforce. The difference between those two numbers, of course, is statistically significant. However, a comparison of two numbers that are not reasonably expected to be related is not an appropriate basis on which to develop conclusions. Further, his analysis does not provide a foundation for the conclusion he reaches – namely, that the "causes of Wal-Mart's shortfall are likely to be found in how Wal-Mart hires, trains, selects, assigns, treats, promotes, or retains women employees, not a lack of interested, qualified women candidates."[314] Dr. Bendick's own criteria for drawing his conclusion "with a reasonable

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[314] Bendick Report, p. 33.

degree of scientific certainty," are not met for the reasons discussed below.[315]

317. First, as noted earlier, Dr. Bendick does not have "sound data" that is accurately "representative of the phenomenon that it's purporting to represent."[316] The quality of the comparison between Wal-Mart and Bendick's selected comparators is poor because the data are unavailable to define the mix of industries and jobs at supposedly "comparator" firms. Indeed, Dr. Bendick's selected "comparators" come from only a limited share of the industries that represent product lines at Wal-Mart, thus calling into question the relevance of the selected data.

318. Second, as noted earlier, an availability benchmarking analysis does not represent the process by which promotions are filled and may be irrelevant for that reason as well. Dr. Bendick admits that his model has pitfalls, acknowledging that most – 70%, he believes – of the moves into management come from within the company – not from the outside workforce represented by his data.[317] More precise applicant flow analysis, using job posting information, will more accurately reflect the process by which Associates, including women, move into management positions, but this was not the analysis Dr. Bendick performed.[318]

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[315] Bendick Depo., pp. 62-63.

[316] Bendick Depo., pp. 62-63.

[317] Bendick Depo., pp. 181-182.

[318] Bendick Depo., pp. 272, 279, 282-283.

319. Dr. Bendick testified that the disparity between his (unfounded) benchmark and Wal-Mart's gender composition among managers can support the extreme conclusion he drew because it is "consistent" with results of other analyses conducted in Drogin's reports.[319] In fact, however, that conclusion is based on an analysis of incumbent employees (not those promoted) as well as a set of assumptions about the data and the characteristics of Wal-Mart and his "comparators" that are completely different from anything in Dr. Drogin's report. Further, his conclusion that there is some support for his result in Dr. Drogin's report completely ignores the fact that, as he testified, MCS, hourly job posting and Assistant Manager Trainee posting data had not been analyzed by Dr. Drogin in his report.[320]

320. A more appropriate conclusion that may be drawn from this data is that the "significant" result Dr. Bendick found simply reflects a comparison of Wal-Mart to a heterogeneous group of "comparators" whom he has not established to be comparators and from which no reasonable or relevant conclusions can be drawn. Indeed, the difference reflects (i) data on companies and industries without sufficient known characteristics to assess their appropriateness as comparators and (ii) the failure to properly select comparators that reflect the variety of product lines at Wal-Mart.

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[319] Bendick Depo., pp. 278-279.

[320] Bendick Depo., pp. 121-124; Bendick Depo., Exhibit 5.

G. Dr. Bendick's Analyses of Non-"Retail" Establishments are Also Inadequate

321. Dr. Bendick also compared the representation of women among managers to Wal-Mart associates in management at headquarters, in establishments with a majority of employees in Managers & Professionals EEO categories, in establishments with a majority of employees in Craft, Operatives, or Laborers EEO categories, and in establishments with a majority of employees in the EEO categories of Clerical and Technician positions. None of these positions falls within the definition of the purported class.[321] While the same flaws identified above apply to each of these analyses, this analysis is also flawed because it makes a comparison with firms that do not have the same employee distribution among the other EEO categories.

322. Relevant portions of the labor force are excluded from the benchmarks in all analyses, *e.g.*, firms with less than 100 separately-reporting establishments in SIC 53 and other comparator SIC's (which likely would exclude from Dr. Bendick's analysis most grocery and food stores, electronics stores, furniture and home furnishings stores, lawn and garden stores, building materials stores, and sporting goods stores, to name a few that are sources of employees for Wal-Mart).

323. Dr. Bendick's comparisons between Wal-Mart and all comparator firms as a group were not made (as they should be) by including only establishments in the same Metropolitan Statistical Areas

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[321] Third Amended Complaint, ¶ 14.

(MSA's), but instead are made on a nationwide basis. Dr. Bendick believes that the varying geographic location of these establishments is most likely to have a significant effect on the availability of women among jobs for clerical employees, but not for the other EEO categories.[322] However, there is no control for geographic location in his analysis of non-store establishments where the majority of Wal-Mart's clerical employees are likely to be. Nor does Dr. Bendick include a control for MSA's for the analysis of female representation among Officials & Managers at locations at which most of the employees are locally recruited and are largely Craft, Operatives and Laborer employees.[323]

H. Conclusion

324. The Motion for Class Certification in this case indicates that *promotion* decisions during the time frame from December 26, 1998 to the present are at issue – not initial hiring decisions. Dr. Bendick's analysis of female availability is flawed in that it does not differentiate between those women *hired* into management and those women *promoted* into management. Furthermore, Dr. Bendick's analysis does not differentiate between *promotion* decisions made *during the time frame* relevant to this litigation, versus promotion decisions made *prior to the time frame* relevant to this litigation. Dr. Bendick's analysis is a "static" or "snapshot" analysis that merely looks at the composition of the work force at a point in time and does not differentiate between de-

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[322] Bendick Depo., pp. 158-159.

[323] Bendick Report, Attachment F, (4) and (5) analyses.

cisions that are relevant to the time frame and those that are irrelevant because they preceded the time frame.

325. A *flow analysis* of the actual applicants for promotion and promotions made during the time frame relevant to the litigation is more useful to the question at issue when, as here, a reliable sample of that data is available. Dr. Bendick's analysis is flawed because it does not compare the female composition of the actual applicants for management promotions at Wal-Mart to the female composition of actual promotion decisions made by Wal-Mart during the relevant time frame. Instead, Dr. Bendick's availability analysis compares his artificially-defined and constructed external labor-force benchmarks against the female representation of Wal-Mart's Officials & Managers jobs.

326. Had Dr. Bendick used the actual applicant flow, he would have found no shortfall of women among the promotions to management jobs at Wal-Mart. Had he used all of the EEO-1 data for the retail sales Standard Industrial Classification codes that he admits are comparable, he again would have found no shortfall in the female representation of promotions to management during the limitations period.

327. Dr. Bendick's limitation of his analysis to 20 retail establishments is too narrow and his assumption that an availability analysis tells him that the "causes of Wal-Mart's shortfall are likely to be found in how Wal-Mart hires, trains, selects, assigns, treats, promotes, or retains women employees, not a lack of interested, qualified women candidates" is unsupported and unfounded.

IX. Summary and Conclusions

328. In this declaration we discussed the Wal-Mart policies and practices that guide a researcher in this field to model the actual decision-making process for promotion and for pay. The model for promotion decisions was based on the actual applicant flow data that had been submitted over the years and used in most stores throughout the country. These data showed several things:

- The promotion of women at Wal-Mart stores is favorable to women or consistent with a neutral decision process for Support Manager, for hourly management positions and salaried management positions, as well as selections for the Assistant Manager Trainee positions in 2003.

A. Hourly Promotion Analyses

- Women have been promoted into hourly management positions, such as Department Manager/Team Leader, Support Manager and Customer Service Manager at rates that exceed their representation among the 580,000 applications for such promotions.
- There were 1,692 stores in which women received more hourly management promotions than predicted by their application rates compared to approximately 800 stores with fewer women promoted than predicted. There were 67 stores in which these decisions were made that had statistically significantly *favorable* rates of promotion for

women and only 5 that had statistically significant adverse results from December 28, 1998 through September 30, 2002.

- The first Assistant Manager Trainee program in 2003 (for the first quarter) selected 200 more women than predicted by their share of the applications (44%). There was only one job division (Optical Center) in which fewer women were selected than predicted at a statistically significant rate and 17 job divisions in which women were selected at a rate consistent with their application rate or at a greater rate.

B. Salaried Promotion Analysis

- This same favorable pattern held true when we examined the salaried positions that were filled during this period by promotion. The Management Career Selection (MCS) process had over 55,000 applications and over 5,000 promotion decisions were made.
- Women received approximately 200 more promotions to salaried positions, including Store Manager, Assistant Manager and Co-Manager positions, out of the MCS application process than expected from their application rate.
- Women were as likely as men to be promoted to salaried management positions, regardless of store size or job level.

- In a nationwide posting in January 2003, women were 44% of those who expressed an interest in entering the Assistant Manager Trainee program. During a second posting in April – May 2003, women comprised 41% of the applicants. This 41-44% range is close to the percentage promoted into that training from December 27, 1998 to March 2002: 40.4% female at Wal-Mart Discount stores and Supercenters. It is also nearly the same as the proportion of women who expressed a desire to fill Support Manager vacancies (46%) – which plaintiffs' expert, Dr. Drogin, believed was a key position for advancement to salaried management.
- The selections among those associates who expressed an interest in the 2003 Assistant Manager Trainee positions also favored women. More women were selected than predicted by their interest in Wal-Mart Discount and Supercenter stores and in Sam's Clubs.
- In summary, women were promoted into management jobs at rates that were even greater than their application rates at the store level, in the various jobs they applied for and by department.

C. Hourly Pay Decisions

329. The model for hourly pay decisions recognized, both as a result of the Wal-Mart guidelines, policies and practices, Store Manager declarations and from statistical testing, that pay decisions must

be modeled at the store level. Dr. Drogin improperly assumed that all the stores could be combined into a single equation, without testing to see whether the data supported that assumption. The Chow test (a commonly used statistical test of whether the models are the same for subsets of data out of a large population) showed that his model could not be estimated with statistical reliability if all the stores' associates were combined into one data set as he did. Thus, Dr. Drogin's model suffers from "aggregation bias" and does not yield meaningful results. The application of the Chow test to my pay models also confirmed (i) that the stores should be estimated separately, and (ii) that Grocery divisions should be estimated separately by store and not combined with non-Grocery employees.

330. My pay models were developed to include a variety of factors that helped to capture the variation in the experience that associates had at Wal-Mart. Dr. Drogin's models of pay for hourly employees omitted important variables that resulted in biased estimates of pay differences between men and women. Thus, Dr. Drogin's models suffer from "omitted variables" too. When statistical estimates of pay differences between men and women were properly constructed, the data showed that there was not a common pattern of significantly lower pay for women associates in most Wal-Mart stores. At more than 90% of the stores, the hourly pay rates are not statistically significantly different between men and women – regardless of store type. Women are paid more in some of the stores in which there is a statistically significant gender difference and men are paid more in others.

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- The model of pay rates for hourly employees included adjustments for the associates' job, department, measures of Wal-Mart experience, part-time/full-time status, night shift status, pay class, first performance rate and other related variables. One set of regressions included starting pay rate, and a second set of regressions excluded that variable. The results were very similar in both models.
- The male-female differences in pay rate in over 90% of the stores (non-Grocery, Grocery or Sam's Clubs) were not statistically significant. The remaining stores either paid statistically significantly higher pay rates to women or statistically significantly lower pay rates, but these stores were few in number relative to the rest of the stores.

D. Salaried Pay Decisions

331. The model for salaried employees' pay should include a variety of factors in order to capture the compensation structure at Wal-Mart. Omitting important factors in a salary model will result in biased and inaccurate estimates of differences by gender whenever those omitted factors are correlated with gender. When statistical estimates of pay differences between men and women Store Managers were examined using the available data, the results showed that there was not a common pattern of lower pay for female Store Managers in Wal-Mart stores and Sam's clubs.

- The salaried pay structure is quite complex and is greatly influenced by the incentive structure that has target profitability rates. These data and other data that measure, or are proxies for, relevant factors in the salary determination are not currently available.

- Therefore, more research is needed to more properly model the compensation systems for most of the jobs held by salaried employees.
- The total compensation of Wal-Mart Store Managers and Sam's Club General Managers is not statistically significantly different between men and women when the available, relevant factors are included in the model. Sam's Clubs women salaried managers are paid more annually than male managers by about $7,000 but the difference is statistically insignificant. In the other Wal-Mart stores the men receive an average of approximately $158 more than women annually, but that difference is also statistically insignificant.

332. Dr. Bendick did not do either a promotion analysis or a pay analysis. He constructed a measure of availability of women for manager positions that was inappropriately limited to only 20 firms, none of which he can name with certainty, and thus excluded many of the firms in industries whose products are part of the Wal-Mart product line. He does not know the names or duties of their jobs, products, hours of operation, schedules and a myriad of other factors that must be checked to determine whether they are comparators at all. Dr. Bendick attempted to use a snapshot of part of the U.S. work-

force as a benchmark to suggest the expected female representation of promotions of Wal-Mart employees. However, his benchmark overstated the availability of women in this industry by a substantial amount. Alternative measures, including the applicant flow data from Wal-Mart itself, and alternative measures of the external labor force working in sales management, demonstrate that benchmarks better matched to Wal-Mart jobs are available and that Wal-Mart promotions to management jobs are similar to those more reasonable benchmarks.

333. Dr. Drogin's analysis of promotions at Wal-Mart ignored the important applicant flow data of approximately 530,000 hourly associates for hourly management and other higher-level hourly positions, 30,000 (now 41,500) associates applying for the Assistant Manager Trainee program and over 46,000 applications for salaried vacancies through the MCS during the limitations period. His artificial promotion pools inflated the availability of women and failed to model the decision process by which these decisions were made.

334. The hourly pay analysis that Dr. Drogin produced did not recognize the way in which these decisions were made, so that he failed to estimate pay differences at the store level. In addition, he assumed that the analysis of pay should include all the stores of all types together. He did not recognize that the statistical properties of the data and the appropriate model were such that he must estimate the hourly pay systems for each store (grocery and then non-grocery) separately. Consequently, his hourly pay estimates failed to produce reliable information because the models he developed did not reflect the decision process, omitted important relevant vari-

ables and failed to meet required statistical assumptions because they suffer from aggregation bias. Dr. Drogin's pay analysis for salaried employees also failed to meet the required statistical assumptions and did not accurately model the complex pay structures that are used for managers in these stores. Consequently, these estimates also fail to provide useful and accurate information about pay differences between men and women.

I declare under penalty of perjury under the laws of the State of California and United States of America that the foregoing is true and correct.

Executed this 10th day of June, 2003 at Tallahassee, Florida.

/s/ Joan Gustafson Haworth
Joan G. Haworth, Ph.D.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

BETTY DUKES, et al.,
Plaintiffs,
v.
WAL-MART STORES, INC.,
Defendant.

Case No. C-01-2252-MJJ

DECLARATION OF CHARLYN JARRELLS PORTER IN SUPPORT OF DEFENDANT WAL-MART STORES, INC.'S OPPOSITION TO MOTION FOR CLASS CERTIFICATION

Date: July 25, 2003
Time: 10:00 a.m.
Courtroom: 11, 19th Floor
Judge: Martin J. Jenkins

Complaint Filed: June 8, 2001
Trial Date: None Set

DECLARATION OF CHARLYN JARRELLS PORTER

I, Charlyn Jarrells Porter, declare:

1. I have been employed by Wal-Mart Stores, Inc. ("Wal-Mart" or "Company") since 1992. Since 2000 I have been in charge of the People Division for the Wal-Mart Stores Division. I became a Vice President in January 2000 and Senior Vice President in December 2000. My prior jobs in the Company include Corporate Counsel, Manager of Corporate Pol-

icy and Drug Screening, Manager of Labor Relations and Director of Labor Relations.

2. I have personal knowledge of the facts set forth herein, except where stated upon information and belief and, if called as a witness, I would and could competently testify thereto.

Introduction

3. Wal-Mart's Store Managers are responsible for hire, assignment, pay and promotion decisions affecting the hourly Associates in their stores. District Managers, with input from store-level management and Regional Personnel Managers, select Associates for entry into the Assistant Manager Trainee Program (also known as the Management-in-Training Program), Co-Manager and Store Manager.

4. These employment decisions, and the treatment of our Associates, must be consistent with Wal-Mart's fundamental principal of respect for the individual, our policies requiring equal employment opportunity ("EEO") and nondiscrimination and our commitment to diversity in the workplace.

Wal-Mart's Corporate Culture

5. Wal-Mart is a company built on three basic fundamental principles that have guided Wal-Mart in its growth and development. Foremost among these is "respect for the individual," a value that serves as the basis for nearly all of Wal-Mart's programs and policies, including those pertaining to diversity. Our Employee Handbook, a true and correct copy of which is Exhibit "A," is one of the means we use to communicate this message to every one of our employees.

6. Wal-Mart believes that having a diverse workforce is not just "the right thing to do," but a

business mandate that enables the Company to better recognize, understand, and be sensitized to the wants and needs of its customers and to provide appropriate service in light of those needs.

7. In creating a diverse workforce, Wal-Mart upholds its two other basic beliefs: commitment to customer service and striving for excellence. By adhering to these three beliefs, Wal-Mart employees are expected to practice the so-called "Platinum Rule": they treat people as they believe those people would like to be treated.

8. Wal-Mart has achieved enviable results in creating a culture with a strong support for EEO and diversity. For example:

- Wal-Mart received the 2002 Ron Brown Award, the highest Presidential Award recognizing companies for outstanding achievement in employee and community relations
- The National Action Network (NAN) presented Wal-Mart with the 2002 Community Commitment Corporate Award for Wal-Mart's community involvement and diversity practices
- *Latina Style* magazine has named Wal-Mart one of the top 50 corporations in America offering opportunities for Latinas
- *Black Collegian Magazine* named Wal-Mart one of the top 20 employers of African Americans
- *Hispanic Business Magazine* named Wal-Mart one of the Top 25 Diversity Recruitment Programs in 2001 for its aggressive program to hire and promote Latinos

- The Wal-Mart Foundation received the NAACP 2000 Pacesetter Award for corporate leadership in the NAACP's 2000 National Corporate Campaign
- The Hispanic Association of Colleges and Universities (HACU) presented Wal-Mart with the 2000 Outstanding Private Sector Partner Award for being a leader in establishing the Wal-Mart/HACU national scholarship fund benefiting Hispanic college students nationwide
- Wal-Mart attained the prestigious 2001 Billion Dollar Roundtable Award for spending more than $1 billion with women-owned and minority-owned businesses
- Wal-Mart won the Hispanic National Bar Association's "Corporate Partner of the Year" award in 2002
- Wal-Mart is recognized as one of the leading employers of disabled people in the nation. In a most recent annual poll by *CAREERS & the DISABLED* magazine, Wal-Mart was ranked 13th among all U.S. companies in providing a positive working environment for people with disabilities.

Wal-Mart's EEO Policies

9. Wal-Mart's EEO policies, known as the "People Action Plan," were adopted to ensure legal compliance and proactive efforts to ensure equal employment opportunity. These EEO policies apply to Wal-Mart and all of its divisions. A true and correct copy of the current version of the policies is attached as Exhibit "B" to this Declaration. This document

available to all Wal-Mart employees via our intranet, known as Pipeline.

10. Everyone at Wal-Mart is encouraged – indeed, expected – to play a role in the implementation of EEO and diversity policies. The company's "People Action Plan" begins, "We expect *all* Associates to demonstrate sensitivity to and respect for all other Associates and to demonstrate commitment to the company's Equal Employment Opportunity and People Action Plan objectives." *See* Exhibit "B."

11. Wal-Mart also takes steps to ensure that all of its employees – from entry level associates through senior management – understand their responsibilities under the EEO laws. The company's training programs incorporate its conviction that diversity and EEO are not just legal obligations, but an essential part of Wal-Mart culture. Our Coaching for Improvement Guide, our Management Career Selection Guide (addressing selections for management openings), and our Leadership Express Guidelines (that identify diverse high-potential employees) also quote and require compliance with our EEO and diversity objectives.

Wal-Mart's Communication of and Training on Its EEO and Diversity Expectations

12. Wal-Mart spends considerable time during its training programs explaining the company's commitment to diversity and to EEO laws. Like the policies themselves, the training programs are reviewed and updated regularly. Wal-Mart strives to ensure that employees at every level in the organization receive and complete their training in a timely manner. These training endeavors include:

13. **Diversity Presentations by Top Management at Meetings:** Wal-Mart's and SAM'S

CLUB's top executives, including Lee Scott, Chairman & CEO of Wal-Mart Stores, Inc., Tom Coughlin, Vice Chairman, Mike Duke, new CEO of the Wal-Mart Stores Division, Kevin Turner, CEO of SAM'S CLUB, Coleman Peterson, Executive Vice President of People, Jim Haworth, Director of Operations for Wal-Mart Stores, Greg Spragg, Director of Operations for SAM'S CLUB, Sharon Orlopp, the new Vice President of SAM'S CLUB People Division, and/or I raise the issue and importance of diversity at nearly every major meeting. These include holiday and year-beginning meetings (attended by all store managers and approximately half of the assistant managers), as well as shareholder, district, key leader, executive committee, and divisional meetings. Diversity goals, initiatives and accomplishments are discussed at other meetings as well.

14. **New Associate Orientation:** New associates are introduced to Wal-Mart culture and diversity policies, as well as EEO laws, in part by new associate orientation. This includes an introduction to the Associate handbook, videos – both in-store and broadcast, daily meetings and posters, and Computer-Based Learning ("CBL") modules that first were developed and introduced in the mid-1990s.

15. **CBL Modules:** One CBL module, devoted exclusively to the topic of "Diversity Awareness," was rolled out in the 1990s. Today we have one mandatory Diversity Awareness module for all employees and a second that is mandatory for all of our management employees. Other modules cover our policies prohibiting harassment. These modules are available on "Pipeline," the company's intranet.

16. **Management Training in EEO and Diversity:** Those hired or promoted to various man-

agement and supervisor positions explore EEO topics in even more depth. Examples include:

(a) **"Avoiding Discrimination in the Workplace":** This facilitated video training is conducted by the District Managers for new hourly supervisors and management. Scenario-based training teaches supervisors how to recognize and respond to discrimination in the workplace.

(b) **The Walton Institute:** The Walton Institute, an educational center dedicated to providing training for Wal-Mart store managers, conducts leadership development seminars for Wal-Mart's store managers and SAM'S general managers on the laws governing equality of opportunity; the company's diversity policies are also discussed throughout the four-and-a-half day program. Walton Institute materials also demonstrate ways in which retail managers can best adhere to the letter and spirit of these laws and incorporate them into their practices.

(c) **The Advanced Leadership Development Class:** This program for "multi-unit" managers, such as district managers, directors of operations, and occasionally regional personnel managers, incorporates training on diversity as well.

(d) **Regional Personnel Manager, People Division and Recruiter Training:** Regional personnel managers ("RPM") participate in the RPM Development programs held multiple times per year. A significant portion of the RPM-specific training is dedicated to EEO issues. For example, they spend one-half day with members of the legal department, who discuss how to investigate harassment and similar claims. RPMs also discuss turnover, diversity, and other EEO issues at regular meetings throughout the year. EEO and diversity are regular topics at various and People Division meetings. Wal-Mart's training for recruiting managers likewise emphasizes applicable laws and company policies as they relate to diversity and EEO in the hiring process. A true and correct copy of "Our People Make the Difference Always – Management Policy Workshop" materials are attached as Exhibit "C."

(e) **Other Training:** Wal-Mart sponsors a Management Policy Workshop, a 17-week Retail Leadership School or Management Training Program, Leadership Foundations, and Management Skills 101 (an entry-level manager program) that similarly instruct participants as to what these laws and Wal-Mart policies require.

17. **Culture Saturdays:** All of Wal-Mart's stores, as well as SAM'S CLUB, have daily meetings, at which time culture and store sales are discussed. Wal-Mart's regional leaders meet every Saturday morning, and also devote the first Saturday of every month entirely to discussing aspects of Wal-Mart culture, including its commitment to diversity and equal opportunities. Although SAM'S CLUB has its own Saturday morning meeting, it always joins the Wal-Mart group each month on "Culture Saturday."

Recent Culture Saturday speakers have included Maya Angelou, Dexter King and Tavis Smiley, as well as celebrations of Cinco de Mayo and our country's veterans.

18. **Awards to Recognize EEO Achievement:** Good EEO performance is publicized by recognizing good performance through awards including the following commenced in 2003:

- **Diversity Champion Award:** At Wal-Mart's annual meeting in Kansas City, this award was given to the District Managers in each of Wal-Mart's six operating divisions who had the best improvement in diversity representation. An award also was given to a District Manager in each of the Specialty Divisions.
- **Compliance Award:** This award is given to a District Manager in each Wal-Mart operating division who is recognized by Regional Personnel Manager as excelling in the area of HR compliance.
- **Get It Done Award:** Awards are given weekly to Regional Personnel Managers to recognize those who have excelled in HR compliance.

19. **Wal-Mart Pipeline:** Wal-Mart's "Pipeline" educates associates about Wal-Mart's culture, policies, and history, as well as the Saturday morning meeting topics. The Pipeline also contains a variety of informational materials about diversity including the Diversity Toolkit and "Diversity – Valuing Difference – Working Together." *See* Exhibit "B."

20. **Diversity Newsletter and Brochure:** Wal-Mart distributes its Diversity Newsletter and Diversity Brochure to its employees. True and correct copies of various diversity brochures are attached as Exhibits "D," "E," "F," "G," "H" and "I."

21. **Wal-Mart World:** Wal-Mart also includes diversity-related items in "Wal-Mart World" (formerly known as "Wal-Mart Today"), a monthly internal magazine circulated to all stores. SAM'S CLUB has and similarly uses its own newsletter, entitled "In the Loop."

22. **Wal-Mart's Culture Pocket Handbook:** This handbook includes a summary of our diversity policies. A true and correct copy of one edition is attached as Exhibit "J."

23. **Reports to the Board of Directors on Diversity:** Each Quarter, Coleman Peterson, Executive Vice President of People, makes an in-person presentation to the Compensation, Nominating and Governance Board Committee on diversity and other people related issues. I participate in some of these presentations. At least annually, Coleman Peterson also makes an in-person presentation to the full Board on diversity and other people issues.

24. **Annual Performance Reviews:** At yearly performance reviews, those in management positions are evaluated on their diversity goals and activities.

Diversity Goals and Programs Specifically Designed to Advance Diversity Goals

25. During the past decade, Wal-Mart has implemented many programs, including "Twelve Major Initiatives," to create a more diverse work force. These initiatives include training and development of current female and minority Wal-Mart associates, internships for those interested in a career with Wal-Mart, and scholarships, partnerships and recruitment efforts aimed at developing the company's future managers, officers and directors. True and correct copies of some of the documents that describe these initiatives are attached as Exhibits "B," "D"

and "K." SAM'S CLUB has similar initiatives. I am informed and believe that Exhibit "L" is a true and correct copy of one document reflecting some of SAM'S CLUB initiatives. Other programs implemented by Wal-Mart include:

(a) **Mentoring Program:** All Regional Vice President, Regional Personnel Managers, District Managers, Store Managers and other managers have been challenged to select three Associates who do not look like them, to whom they will provide support and career advice. Tom Coughlin, now Vice Chairman, has called upon managers at meetings to name mentees and report on their progress in advancing them.

(b) **"Women in Leadership":** Founded in 1992, Women in Leadership is a network of women exchanging best practices and mentoring one another to successfully achieve company goals while promoting the career development of women at all levels within Wal-Mart. The group has held seminars and created videos, widely distributed to tens of thousands of women in the field, challenging them to volunteer for leadership roles in their communities and to mentor other women, both within and beyond Wal-Mart. The Main Event (also known as Women-Future), is another Women in Leadership Initiative. This yearly program, that Wal-Mart began broadcasting live via satellite to "high talent individuals" in the company in 2002, features prominent women across various industries and professions who discuss issues surrounding women in the workplace.

(c) **Women's Leadership Development Conference:** Michelle Whitehead, then a Regional Personnel Manager in the Boston area, founded the Women's Leadership Development Conference, a series of one-day seminars on women's issues hosted by Wal-Mart's women leaders. These conferences were so successful that they have been expanded to a broader audience, and women in the field now suggest topics *they* would like to be addressed. More than 35 of these conferences will be held across the United States in 2003.

(d) **Leadership Express:** This diversity initiative is a mentoring program designed to assist in identifying and developing the future leaders of the company. Mentors and participants jointly create an individualized development plan for each participant to ensure that the necessary training and experience is received. Almost half of the participants in this program are female.

(e) **SAM'S C.A.M.P. ("Calling All Management Potential"):** The goal of this program is to identify and develop those hourly associates who are interested in and are able to assume more leadership responsibility within the company. Employees interested in management careers with SAM'S sign up for this program in their clubs.

(f) **SAM'S "Leadership Link":** This program for SAM'S employees focuses on teaching women networking skills.

(g) **"Women's Executive Breakfast":** This is another program that Wal-Mart and SAM'S use to help women network.

(h) **Intern Programs:** Since 1987, Wal-Mart has sponsored a Corporate Intern Program to develop outstanding students interested in retail as a career. Participants in the Summer Internship Program complete a 12-week training rotation. During 2002, 43.22% of our field (store) interns were women, as were 51.67% of our Home Office interns.

SAM'S has its own internship program and likewise is active in recruiting diverse individuals.

(i) **Outreach Recruiting:** Recognizing that recruiting women and minorities is the first step, and a critical step, in developing a managerial workforce that is representative of the greater community, Wal-Mart recruits men and women from many minority Colleges and Universities. In 2003 Wal-Mart will recruit from 17 minority colleges and universities, as well as 30 other schools with diverse student bodies. Wal-Mart also participates yearly a variety of Women and minority career fairs across the country. This year we will attend over 50 women and minority career fairs. The company actively tracks its diversity recruiting efforts.

(j) **Scholarships:** Wal-Mart also donates considerable sums to a number of scholarship programs benefiting diverse groups of students. The "Life Gets Better" partnership with Florida A & M University, for example, provides minority and female students with a full scholarship and summer employment. Wal-Mart's support of the United Negro College Fund, NAACP local scholarships, the Hispanic Association of Colleges and Universities, the League of United Latin American Citizens, the American Indian College Fund and the National Asian Pacific American Bar Association, among others, likewise provides significant opportunities to minority and female students. Wal-Mart's Pharmacy Scholarship program provides opportunities for junior pharmacists, and its Competitive Edge Scholarship helps students pursue careers in technological fields vital to the long-term growth and prosperity of the United States. In addition, Wal-Mart executives and managers often participate in the Students in Free Enterprise (SIFE) program, an organization that involves a large number of women and minority students at many schools across the country. All of these programs have helped Wal-Mart move further toward building a diverse workforce from top to bottom.

(k) **Diversity Directory:** In 1999, Wal-Mart began to develop the "Diversity Directory," a contact list available to all associates who wished to discuss their career advancement (or other issues) with Wal-Mart's successful female or minority leaders.

(l) **Women of Wal-Mart (WOW):** This is another group formed by Wal-Mart's female leaders that meets quarterly. The meeting topics alternate between professional development and networking opportunities.

Diversity Goals and Monitoring of Progress

26. Wal-Mart has set diversity goals and has implemented structured programs to assess its progress in meeting those goals. These include the Diversity Report Cards prepared for the People Directors, the Diversity Report delivered quarterly to Wal-Mart's Board of Directors, and various other reports. We currently track placements, turnover and representation. A true and correct copy of one current report is attached as Exhibit "M."

(a) **Diversity Goals:** Since 1994-95, numerical "diversity goals" have been set, communicated and tracked to help Wal-Mart measure its progress in diversifying its managerial workforce. We frequently circulate reports that depict our goals (set by job classification) and our progress. A true and correct copy of our most recent year-end report is attached as Exhibit "N." Exhibit "O," created for this declaration, shows the continual rise over the past ten years in female representation in Officials/Managers EEO-1 category management jobs in our Wal-Mart discounts stores and Supercenters, SAM'S CLUBS and Specialty Divisions. The second page shows the rise in total company Officials/Managers EEO-1 category management jobs.

(b) **Annual Evaluation of Management EEO Performance:** Wal-Mart measures manager's efforts and success in meeting the diversity goals as part of the Yearly Performance Evaluations. True and correct copies of current evaluation forms for Wal-Mart are attached as Exhibit "P," while a SAM'S CLUB form is attached is Exhibit "Q."

(c) **Diversity Reports and Report Cards:** The quarterly Diversity Reports and Report Cards are used to track the company's progress in reaching its diversity objectives that are set for every store, district, division and the company overall. True and correct examples are attached as Exhibit "R." Regional Personnel Managers receive a monthly diversity report for their area of responsibility. The People Division of SAM'S CLUB does the same. SAM'S People Division also issues a "Quarterly Report of Accomplishments and Issues"; diversity and retention goals and accomplishments are part of these reports. A true and correct copy is attached as Exhibit "S."

(d) **People P&L:** This report, which tracks community and associate demographics for each particular store and other location, is another tool for measuring the company's progress on diversity goals. SAM'S CLUB sets and tracks its diversity goals and has its own People P&L reports. True and correct copies of these reports are attached as Exhibit "T."

(e) **Rising Star, Leadership Express and First-in Line Minority/Female Participation Tracking:** Wal-Mart tracks minority and female participation in programs that often lead to management positions: Rising Star, Leadership Express and First-in-Line, a management training program for Wal-Mart employees who are currently in college and interested in a career at Wal-Mart.

Complaints and Feedback to Management

27. Wal-Mart uses a variety of methods to give associates an opportunity to critique the company and its managers, and to report and resolve incidents of harassment, discrimination and retaliation.

(a) **"Open Door" Policy:** Under this policy, Wal-Mart associates are encouraged to discuss with any supervisor their concerns, grievances, or ideas, without fear of retaliation. In this way, Wal-Mart empowers all of its associates to confront challenges head-on and provide input that can improve the company as a whole. The policy is described in countless publications that are distributed to and available online to employees, including the Employee Handbook, a copy of which is attached as Exhibit "A." Every store posts the names, pictures and contact information for multiple members of management, just to remind associates that they are able, and encouraged, to contact any member of management to discuss any issues, whether relating to themselves or to others. Not only does Wal-Mart encourage employees to speak their minds, it expects those in charge of handling complaints or inquiries to take prompt action when problems arise and trains them how to do so. The company's "Sundown Rule" states that associates should respond to "any request, either from an external customer or an internal customer [associate], before the sun goes down."

Notwithstanding all of the training and admonitions we provide about the importance of respectful treatment, EEO and diversity, we have had some instances of improper conduct by a small number of our 1.3 million employees. When such instances come to light, we move quickly to investigate and take appropriate remedial action. Suffice it to say that there are serious consequences for managers, supervisors and all employees who do not adhere to Wal-Mart's EEO commitment. Violation of an EEO policy may result in a coaching, up to and including termination. Examples of actual management coachings/terminations for violation of EEO policies are:

- An Assistant Manager made sexually related comments to an hourly Associate. The Assistant Manager was terminated for inappropriate conduct, and the Store Manager was also terminated for failing to properly investigate the sexual harassment allegations.
- A District Manager investigated an allegation of sexual harassment and terminated the accused harasser. The District Manager improperly indicated on the exit interview form that the Associate could be considered for re-hire and did in fact re-hire the Associate 90 days after the termination. The District Manager was demoted.
- After an investigation was conducted of an allegation that a SAM'S CLUB Vision Center Manager made inappropriate

comments of a sexual nature to an hourly Associate, the Vision Center Manager was terminated for inappropriate behavior.

(b) **Ethics Hotline:** The "Ethics Hotline," a toll-free telephone number available to all associates, receives reports from associates who believe that discrimination, harassment, retaliation or other conduct they deem inappropriate has occurred. Upon receiving a call, the Hotline administrators immediately e-mail a summary of the complaint or concern to the appropriate Regional Personnel Manager or District Manager. Callers are not required to give any identifying information. The Home Office logs and maintains a database of both the issues raised and the action taken by the appropriate supervisor. Information about the Ethics Hotline is available to all employees in the Employee Handbook, attached as Exhibit "A," on the intranet (Pipeline), and various in-store postings.

(c) **Grass Roots Survey:** The yearly Grass Roots Survey is a series of questions administered by computer to all Wal-Mart and SAM'S CLUB associates in the field. The anonymous results are compiled and distributed to Personnel Managers, Store Managers, Assistant Managers, and District Managers who use them to identify areas of concern or weakness and develop a plan to address these areas. While the company's commitment to Grass Roots and the goal of the program itself have not changed over the years, its method of administering the survey and analyzing the results are reviewed and updated regularly.

(d) **Leadership Survey:** Wal-Mart and SAM'S CLUB also conduct "Leadership Surveys," in which employees may anonymously evaluate their direct Store Managers and District Managers. Surveys periodically are administered on Assistant Managers, as well.

Other Outreach

28. The object of Wal-Mart's "Store of the Community" policy is to ensure that each Wal-Mart store meets and represents the unique needs of the community it serves, in staffing, stocking and active participation in the community.

29. Wal-Mart strives to inform the communities it serves of its efforts and accomplishments in creating a company in which individuals are valued and equal opportunity is afforded to all. Each Wal-Mart store strives to build relationships with a variety of community-based organizations, including active participation in organizations benefiting women and minorities, and dedicates considerable time and resources to a variety of community outreach programs. This includes participation in programs and functions hosted by organizations, including (but not limited to) the NAACP, the Congressional Black Caucus, the National Council of La Raza, and the Speaking of Women's Health Initiative.

30. Wal-Mart has been applauded for its commitment to purchasing from female-and minority-owned vendors and suppliers. During 2002, it spent more than $ 2.5 billion with companies that are owned by women or persons of color.

Upward Mobility

31. **Job Postings:** Hourly openings for Wal-Mart's higher-level store positions, including Department Manager, are posted in the store in which the vacancy exists. (Employees may be reassigned

laterally without a posting.) Official electronic records of the postings, the bidders and the job advancements are maintained in the ordinary course of business.

32. **Management Career Selection:** The Management Career Selection ("MCS") system is an electronic posting system historically used to post Store Manager and District Manager openings and others on an as-needed basis. Store Manager and District Manager openings are posted consistently, and the Vice President of Operations People and the Senior Vice-President of Operations People must approve any exception. This expectation has been communicated by me in various management meetings, including Regional Personnel Manager meetings and Operations meetings. An exception report is generated on a weekly basis. The MCS postings have been expanded so that today the following positions are posted: Store Manager, District Manager, Pharmacy District Manager, Shoes and Jewelry District Manager, Vision Center District Manager, Vision Center Regional Manager, TLE District Manager and Photo Center District Manager.

33. **Management Trainee Career Selection:** The Management Trainee Career Selection ("MTCS") system is an electronic pre-registration system started in January 2003 that allows hourly Associates to express an interest in the Management Trainee position. Sam's Club also utilizes the Management Trainee Career Selection system.

34. I initiated this system to ensure that we would identify talent for the 6,000 management positions that we believe will be filled in 2003. I introduced the MTCS to the District Managers, the primary users of the system, at the Year Beginning

Meeting in Kansas City, MO in January 2003. As with many presentations at Year Beginning Meetings, I incorporated discussion of diversity into this kickoff of the MTCS program. I emphasized how important diversity is to and made absolutely clear our strong commitment to developing future leaders of our company who represent the myriad of backgrounds and diversity of our customers throughout the country and the world. I urged our District Managers to use the many opportunities we will have to select managers in 2003 to enhance our diversity profile from among equally qualified people. I told the District and Regional Managers that the Regional Personnel Managers would be involved to carefully monitor the promotion decisions.

35. The Exhibits attached to this Declaration (other than "O" that was created for this Declaration) are true and correct copies of Wal-Mart business records for which I am a custodian of records and that were maintained in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California and United States of America that the foregoing is true and correct.

Executed this 9th day of June, 2003, at Bentonville, Arkansas.

/s/ Charlyn Jarrells Porter
Charlyn Jarrells Porter

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

WAL-MART STORES, INC.,

Defendant.

Case No. C-01-2252-MJJ

DECLARATION OF JINA JORDAN

[IN REBUTTAL TO DECLARATION OF DESIGNATED CLASS MEMBER KATHERYN JOHNSON]

Date: July 25, 2003
Time: 10:00 a.m.
Courtroom: 11, 19th Floor
Judge: Martin J. Jenkins

Complaint Filed: June 8, 2001
Trial Date: None Set

DECLARATION OF JINA JORDAN

I, JINA JORDAN, declare:

1. I am a female. I am the Co-Manager at the Wal-Mart Supercenter, Store # 723, in Troy, Alabama. I have held this position from 1999 to the present. I have worked for Wal-Mart since 1985, and was an Assistant Manager from 1986 to 1999. From approximately March 1999 to October 1999 and from April 2000 to April 2001, Katheryn Johnson was an associate at Store # 723.

2. I have read the "DECLARATION OF KATHERYN JOHNSON IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION." In paragraph 3 of her declaration, Ms. Johnson claims that she was denied a promotion into the Management Training Program because she is a woman. I am submitting this Declaration in rebuttal to that claim.

3. Ms. Johnson worked at Wal-Mart as a part-time sales associate until she graduated from college in December 2000. From October 1999 to April 2000, Ms. Johnson took a leave of absence from Wal-Mart. Up until she graduated from college, Ms. Johnson had expressed interest in working in her chosen field of study, sports medicine, after graduation.

4. In early 2001, Ms. Johnson told me that she was interested in joining the Management Training Program. I encouraged her to submit an application and resume to the District Manager, James Pike. I also encouraged her to make herself known to Mr. Pike because he was more likely to place in the training program an associate whom he had met and could recognize. Since I have been a Co-Manager at Store # 723, I have encouraged other female hourly associates, including Sylvia Williams and Jackie Smith, to enter the Management Training Program.

5. Ms. Johnson resigned from Wal-Mart in April 2001. This was only approximately two months after Ms. Johnson first expressed interest in joining the Management Training Program.

6. Since I have been the Co-Manager at Store # 723, I recall only two associates from Store # 723 being placed into the Management Training Program. One was a male, Brandon Jones, and the other was a female, Jackie Smith. Both were promoted

from hourly supervisory positions – Jones was promoted from a Department Manager position, and Smith was promoted from an Inventory Control Team Lead position. When I joined the Program in 1986, I had spent four to five months as a Support Manager.

7. Associates are placed into the Management Training Program when there are Assistant Manager openings in our District. If there is not a need in the District for additional Assistant Managers, associates generally are not placed in the Program. During the approximately two months between the time that Ms. Johnson expressed interest in being placed in the Program and her resignation, there were no Assistant Manager openings in the District.

8. Ms. Johnson was not promoted because there were no openings for Management Trainees in the District during the short time that Ms. Johnson expressed interest in the Program.

9. In Paragraph 15 of her declaration, Ms. Johnson alleges that I told her that Mr. Pike does not like to place women in the Management Training Program. I did not make this statement, nor do I agree with it. In addition to Jackie Smith, I know of at least three other women Mr. Pike has promoted within the past two years, including Kathy Mills, Jennifer Ross, and Pinkie Sparks (who was promoted by Mr. Pike from Assistant Manager to Co-Manager).

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

Executed this 5th day of June, 2003, at Troy, Alabama.

/s/ Jina Jordan
Jina Jordan

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiffs, v. WAL-MART STORES, INC., Defendant.	Case No. C-01-2252-MJJ **DECLARATION OF MARIE PERKINS** **[IN REBUTTAL TO DECLARATION OF DESIGNATED CLASS MEMBER ERNESTINE GORDON]** Date: July 25, 2003 Time: 10:00 a.m. Courtroom: 11, 19th Floor Judge: Martin J. Jenkins Complaint Filed: June 8, 2001 Trial Date: None Set

DECLARATION OF MARIE PERKINS

I, MARIE PERKINS, declare:

1. From September 2001 to December 2002, I was the Tire & Lube Express ("TLE") Manager in Store # 1615 in Pittsburg, California. I have been employed by Wal-Mart since approximately 1992. I am a female.

2. This Declaration is based on my personal knowledge, and my review of business records that

are maintained in the ordinary course of business. If called upon to testify under oath, I could, and would, testify competently as follows:

3. I have read the "DECLARATION OF EARNESTINE GORDON IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION." In paragraphs 2, 10, 11 and 12 of her declaration, Ms. Gordon claims that she was denied a promotion from hourly associate to a salaried management position because she is a woman. I am submitting this Declaration in rebuttal to that claim.

4. Throughout the time that I was a TLE Manager at Store # 1615, Earnestine Gordon was a TLE associate whom I supervised. From the time I arrived at the store in September 2001 until I demoted her to Sales Associate in February 2002, Ms. Gordon held the position of TLE Support Manager, an hourly position.

5. When I arrived at Store # 1615 in September 2001, Ms. Gordon had an active "decision day" coaching in her file, resulting from her abuse of overtime (*i.e.*, working overtime without management approval). Prior to this "decision day" coaching, Ms. Gordon had received a verbal and a written coaching, also for abuse of overtime. Her "decision day" coaching made her ineligible for promotion during the twelve months that it was active. The coaching remained active through the time of her demotion, in February 2002.

6. Ms. Gordon had serious performance issues as a TLE Support Manager. She showed far less productivity than I expected of any associate in TLE. For example, every day had a "slow period" during which few customers were in the department. During

this period, associates were expected to "maintain the integrity" of the department, *i.e.* restock the shelves, clean, and otherwise upkeep the appearance of the sales floor. Instead of performing these duties, Ms. Gordon spent these slow periods resting next to the sales counter.

7. When I first arrived at Store # 1615 in September 2001, I was appalled by the appearance of the TLE department. The sales floor was in disarray, and the sales counter looked like a garbage dump. Surfaces throughout the department were filthy, and the computer terminal was black with oil smudges. I immediately instructed the TLE associates that they were to maintain and clean the department on a daily basis. At that time the department had been without a TLE Manager for two to three months, and Ms. Gordon, as Support Manager, was one of the two ranking members of the department. I asked Ms. Gordon how she could have allowed the department to reach such a state, and her answer was "I can only do so much." I found this answer unsatisfactory, because the daily "slow periods" mentioned above allowed sufficient time for anyone to keep the department clean and orderly.

8. Ms. Gordon demonstrated to me a lack of the motivation necessary for promotion into salaried management. When I attempted to teach her how to use the Telxon handheld computer, which is one of the necessary tools of a TLE Manager, she showed very little interest. When I asked her to reset a series of four-foot shelf sections that house the department's merchandise – a reasonable task for any associate, given the amount of "downtime" in the department – Ms. Gordon reset a single four-foot sec-

tion, and accomplished nothing further with the project over the course of the next week.

9. Because of Ms. Gordon's lack of productivity, TLE District Managers Bobby Jones and Ed Brockman both, on separate occasions, suggested that I demote her from her Support Manager role. Nonetheless, I continued for five months to give Ms. Gordon the benefit of the doubt.

10. In Paragraph 14 of her Declaration, Ms. Gordon claims that she was demoted to a Sales Associate because she was not available to work on Sundays. In fact Ms. Gordon's availability problems were significantly greater. In addition to being unable to work at all on Sundays, Ms. Gordon refused to work any evenings. Because a Support Manager is required to be available for both evening and weekend hours, Ms. Gordon could not effectively meet the demands of her position. For this reason, I demoted her to a Sales Associate position in February 2002.

11. In Paragraph 10 of her Declaration, Ms. Gordon claims that she expressed to me interest in the TLE Manager position. On the contrary, Ms. Gordon never expressed to me any such interest. Rather, she indicated her *lack* of interest in holding a management position. For example, while watching me perform my duties, she would make such comments as, "I don't see how you do it."

12. Because of Ms. Gordon's lack of productivity and motivation, as described above, she clearly was not qualified for promotion.

13. As the TLE Manager at Store # 1615, I encouraged both men and women whom I felt were strong performers to enter the Management Training

Program. Examples include Kay Saceho and Erica Nunez.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

Executed this 6th day of June, 2003, at Fairfield, California.

/s/ Marie Perkins
Marie Perkins

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

WAL-MART STORES, INC.,

Defendant.

Case No. C-01-2252-MJJ

DECLARATION OF MARGARET DANIEL IN SUPPORT OF WAL-MART STORES, INC.'S OPPOSITION TO MOTION FOR CLASS CERTIFICATION

Date:	July 25, 2003
Time:	10:00 a.m.
Courtroom:	11, 19th Floor
Judge:	Martin J. Jenkins
Complaint Filed:	June 8, 2001
Trial Date:	None Set

DECLARATION OF MARGARET DANIEL

I, Margaret Daniel, declare:

1. I have been employed by Wal-Mart Stores, Inc. ("Wal-Mart") for seventeen years. I am currently employed as a District Manager in Region 11. As a District Manager in Region 11, I have responsibility for six stores located in northern New York state and part of Vermont. Approximately 1250 associates are employed at stores within my District and last year my District had gross sales of over $280 million dol-

lars. I have just accepted the job of Operations Coordinator at the Home Office and will be moving to Bentonville, Arkansas in July 2003 to begin a one to two year training period to work toward my goal of becoming a Regional Vice President.

2. Since becoming a District Manager in 1998, my achievements and contributions have been recognized by the Company. I was recently awarded the District Manager of the Company for the first quarter of 2003, based on a sales increase of 17% and a 2% increase in profitability in my District. In 2002, I was honored as the District Manager of the Year for the Company, based on improved profit over 1.3% and double digit sales increases in my District, and also was the District Manager of the Company for the first quarter of 2002. I also was proud to win the 1999 Company Hero Award. This is an award for excellence which was given to me in recognition of my District being the best in the Region in reducing turn-over in the District in both management and hourly associates. I was rated as a top 25% District Manager for all six years that I have been in that position. I was designated as a "rising star" District Manager, which I understand means I am promotable to the next level. Approximately one month ago, I was advised that I had been selected to be in the Leadership Express Program, which I believe indicates management's view that I am capable of being promoted two levels.

3. I began my employment at Wal-Mart as an Assistant Manager in Florida in 1986. At the time I was hired, I already had two years experience as an Assistant Manager with Montgomery Wards department store and a high school degree. There was not a formal Assistant Manager Training Program

when I started working at Wal-Mart, but I received hands-on training by the Lead Assistant Manager in the store, who had completed his training and was waiting for a store to open.

4. From 1986 to 1991, I worked as an Assistant Manager in four different Wal-Mart stores located in Florida and gained experience in all areas of the store. In 1991, I was promoted to the position of Co-Manager of a store in Stuart, Florida. After I had been a Co-Manager for one year, I was promoted to become the Store Manager of that store when the prior Store Manager left. After two years as a Store Manager in Florida, I moved to Utah where I gained more experience by working as the Store Manager at a larger store for approximately three years. In 1998, I was promoted to be a District Manager in Syracuse, New York and, in 2001, moved to Plattsburgh, New York, to manage another District.

5. During my career at Wal-Mart, I was aware of promotional opportunities within management that were posted on the Management Career Selection program. I also had knowledge through the Associate Handbook and other training materials that if an associate was interested in promotion, he or she should communicate that interest to the Store Manager. During the annual evaluation process, I usually discussed with my Store Manager what my goals were and advised the Store Manager that I was interested in promotion and in obtaining additional experience which would lead to promotional opportunities. On the evaluation form, there was a space at the end of the evaluation for the associate to comment and indicate his or her goals. I always indicated that I was interested in promotion.

6. When I expressed interest in being promoted, various Store Managers and District Managers mentored me and assisted me in achieving my goals. I particularly recall Fred Bunch, who was my Store Manager at the Sarasota, Florida store. Fred encouraged me to become a Store Manager and always challenged me to do more. As a result of his encouragement and mentoring, I became a Lead Associate Manager and took the Retail Manager Training Seminar ("RMTS"), which is a one week training program at the Home Office, and was promoted to the Co-Manager position in 1991. A year later, with the recommendation of my Regional Vice President and Divisional Vice President, I became a Store Manager.

7. As a manager, I have responsibility for making compensation decisions. I generally follow the compensation guidelines, but I sometimes pay a manager a higher starting rate for additional experience, education, or special skills. For example, we had an opportunity to hire a female who had over 12 years experience at K-Mart, three and a half of which was as a Store Manager. She was paid more than the guidelines when we brought her in as an Accelerated Assistant Manager of a store with the hope that she would soon be ready to be promoted to an available Store Manager position. I would have made her a Co-Manager, but I did not have such a position available until March 2004 when a Supercenter in the District will open.

8. As a manager, I pay people fairly and make fair and nondiscriminatory employment decisions. I have learned at Wal-Mart that a good manager should always be trying to replace herself or himself; so I make every effort to mentor others.

9. I have been chosen to represent the Company at different functions. For example, I recently was one of the Company representatives present when Wal-Mart received the Career and Disabled Magazine Award for doing the most to promote access for disabled persons in the private sector. I also represented the Company when Wal-Mart accepted the Ralph Jonas Philanthropic Award for education at Long Island University for providing scholarships to students for further education and at an event sponsored by the National Mass Retailer Association, honoring Tom Coughlin, President and CEO of Wal-Mart Stores Division and SAM'S CLUBS.

10. I also have participated in three women's conferences sponsored by Wal-Mart. During the last two years, these one day conferences for female managers at all levels have been held twice a year in my Region with all expenses paid by Wal-Mart. Approximately 40 to 50 female managers have attended the conferences in my Region with the goal of mentoring female managers who are interested in growing with the Company. Two of the female managers in my District who attended these conferences have been placed on the "rising star" list.

11. When I was hired by Wal-Mart, I was married and had two children – a son who was 10 and a daughter who was 13. Although I had a rotating schedule as an Assistant Manager, my Store Manager generally was able to accommodate my requests to have time off to attend my children's activities at school and other important family events as long as sufficient advance notice was given. When my father was ill and recently passed away, I received a personal telephone call from Jim Haworth, Executive Vice President of the Company, to express his sym-

pathy, and he told me to take as much time off as I needed.

12. I have personal knowledge of the facts contained in this Declaration. If called and sworn as a witness, I would testify competently to those facts.

13. I make this Declaration entirely of my own free will and choice. No promises of benefits or threats have been made to me to persuade me to sign it.

I declare under penalty of perjury under the laws of the State where I execute this declaration, the State of California, and the United States of America that the foregoing is true and correct.

Executed this 10th day of June 2003, at Rochester, New York

/s/ Margaret Daniel
Margaret Daniel

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

WAL-MART STORES, INC.,

Defendant.

Case No. C-01-2252-MJJ

DECLARATION OF SANDY ELLISON IN SUPPORT OF WAL-MART STORES, INC.'S OPPOSITION TO MOTION FOR CLASS CERTIFICATION

Date: July 25, 2003
Time: 10:00 a.m.
Courtroom: 11, 19th Floor
Judge: Martin J. Jenkins

Complaint Filed: June 8, 2001
Trial Date: None Set

DECLARATION OF SANDY ELLISON

I, Sandy Ellison, declare:

1. I have been employed by Wal-Mart Stores, Inc. ("Wal-Mart") for twelve years. I currently am employed as a District Manager in Region 45. As a District Manager in Region 45, I have responsibility for eight stores located in Wyoming, Nebraska, and Colorado, with a total area of over $1.2 million square feet of retail space. I currently have responsibility for the largest square footage of any District

Manager in my Region. Five of these stores are Supercenters, and three are Division 1 Discount Stores. Over 2,000 associates are employed in the stores within my District.

2. I began my employment at Wal-Mart in 1991 after being recruited at the University of Wyoming to join the Wal-Mart Management Training Program ("MTP"). In my MTP, there was another female who also had been recruited upon graduation from college. I currently have responsibility for recommending associates for the MTP. In the MTP starting in my District on Monday, June 16, 2003, there are six persons, three of whom are females. Three are female Department Managers who were recommended by their Store Managers and approved by me for the program. During the time that I have been a District Manager, a substantial number of female hourly supervisory associates have been recommended by their Stores Managers to participate in the MTP. I now have two female Co-Managers in stores in my District.

3. After training in the Cheyenne, Wyoming store for approximately six months, I became an Assistant Manager in the Vacaville, California store. After about two years as an Assistant Manager at that store, I spoke to my Store Manager about openings in Montana because I was interested at that time in moving closer to home and gaining additional experience. When an opening became available in the Bozeman, Montana store, I moved to Bozeman as an Assistant Manager in 1993. I then moved to Kalispell, Montana store in 1995, where I became a Training Assistant Manager. This position is used as a training position to become a Co-Manager. I transferred to the Missoula, Montana store in December

1995, and in January 1996 became the Co-Manager at that Store. The Co-Manager position is generally an 18-month training position to gain experience prior to being promoted to a Store Manager position. In order to gain more experience in a higher volume store, I accepted an opportunity to move to Hays, Kansas as a Co-Manager. After I completed a training period as a Co-Manager, I contacted the Regional Vice President of my Region to express my interest and readiness to be promoted to a Store Manager position and, shortly thereafter, I was offered a promotion to be the Store Manager in Sheridan, Wyoming and accepted that position in October 1996.

4. Sometime shortly after my promotion to Store Manager, the Company began posting openings for management positions on the Managers' Workbench, which is a intranet computer site which contains company information for use by managers. In early 1998, I applied for a position of Store Manager in Spokane, Washington. The available opening was a larger store with a higher volume in a metropolitan area, and I believed that it would be a good opportunity to gain more experience and advance my career. After being recommended by my District Manager and interviewing for the position, I was selected for the position and transferred to become the Store Manager of a Spokane, Washington store in April 1998.

5. Thereafter, in approximately July 1999, I expressed interest in a Regional Personnel Manager ("RPM") position to my Division Vice President, Kendall Schwindt. Mr. Schwindt encouraged me to pursue the RPM position and, although no position was currently open at that time, I underwent a series of interviews in the event that such a position be-

came available in the future. I was approved as a qualified candidate for the position in 1999 and when a position became available in Region 12 in January 2000, I was selected for the position and moved to Bentonville, Arkansas. I was originally a RPM in Region 12, which had responsibility for 26 stores in Alaska, Hawaii, and Seattle. Five months later, I was asked to become the RPM for Region 19, which had 90 stores in California, Oregon and Washington. Both the RPM positions were located in Bentonville, Arkansas, although I frequently traveled to my Region.

6. After gaining this Home Office experience, I applied for a promotion to a District Manager position in Cheyenne, Wyoming. This position was posted on the Managers' Workbench. I was recommended for the position by the Regional Vice President and interviewed for the position. I was offered the District Manager position and accepted the position effective in November 2001.

7. In my opinion, a person is in charge of his/her own destiny in any job. Success does not just happen if a person sits back and does nothing to pursue his or her goals; it is important for a person to take ownership of any plans to succeed. Whenever I expressed interest in being promoted at Wal-Mart, my management was supportive and assisted me in achieving my goals. Various Store Managers and District Managers mentored me over the years. I particularly recall Mel Stos, who was the District Manager when I was first promoted to be a Store Manager in Sheridan, Wyoming. Mr. Stos frequently visited my store when I was a new Store Manager and provided invaluable one-on-one training and direction as well as being an excellent example of lead-

ership. Mr. Stos was very approachable and always available to answer any questions. He also appeared to genuinely care about me as a person and found time to have a coke with me in the store and ask how my family was doing.

8. In August 2002, my Regional Vice President, J.R. Lee, informed me that I had been placed in the Leadership Express Program because I was designated as someone who has the capacity to do more with the Company. I have been advised that this is a special mentoring program to help me grow within the Company and to provide me with additional experience outside of my area. Since that time, I have traveled to various meetings with Mr. Lee and gained valuable experience outside my District. I also have assisted Mr. Lee with special projects in the Region.

9. As a Manager, I have responsibility for making compensation decisions. I generally follow the compensation guidelines, but I sometimes pay an associate a higher starting rate for additional experience, education, or special skills or based on competitive market factors. I pay people fairly and make fair and nondiscriminatory employment decisions.

10. I am married and have a daughter who is now ten years old. She was born when I was an Assistant Manager in the Vacaville, California store, and I took a paid leave of absence when she was born. While she has been young, I have been willing to move to advance my career. I have, however, advised my Regional Vice President that when my daughter starts middle school, I need to be in one area because I believe it is important for my daughter to be able to complete those middle and high school years in one place. The Company has been

very supportive of this decision, and I anticipate that I will be able to stay in one location while my daughter is in middle and high school.

11. I have personal knowledge of the facts contained in this Declaration. If called and sworn as a witness, I would testify competently to those facts.

12. I make this Declaration entirely on my own free will and choice. No promises or benefits or threats have been made to me to persuade me to sign it.

I declare under penalty of perjury under the laws of the State where I execute this declaration, the State of California, and the United States of America that the foregoing is true and correct.

Executed this 10th day of June 2003, at Sterling, Colorado.

/s/ Sandy Ellison
Sandy Ellison

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

WAL-MART STORES, INC.,

Defendant.

Case No. C-01-2252-MJJ

DECLARATION OF VICTORIA HOWARD IN SUPPORT OF WAL-MART STORES, INC.'S OPPOSITION TO MOTION FOR CLASS CERTIFICATION

Date:	July 25, 2003
Time:	10:00 a.m.
Courtroom:	11, 19th Floor
Judge:	Martin J. Jenkins
Complaint Filed:	June 8, 2001
Trial Date:	None Set

DECLARATION OF VICTORIA HOWARD

I, Victoria Howard, declare:

1. I am currently a Store Manager at Wal-Mart Store # 1815 in Fresno, California. I was hired as a seasonal temporary employee in 1995 in the Tire & Lube Express ("TLE") Department at Wal-Mart Store # 1826 in Visalia, California. Because of my hard work, I was the only one of several temporary associates to be offered a permanent part-time position with the TLE Department. A few weeks later,

TLE Manager Holly Thomas offered me a full-time position in the department.

2. At the time that I was employed full-time in Store # 1826, I was dealing with numerous time pressures outside of work. I was going through a divorce, and was fighting to keep custody of my two year-old son, Garrett. I was taking classes at a junior college, and working the evening shift at Wal-Mart, which usually lasted until midnight. Holly Thomas, my TLE manager, was very understanding of my situation, and offered me flexibility in my scheduling so I could handle these demands on my time.

3. At least twice while I was a TLE associate at Store # 1826, TLE Manager Holly Thomas offered to help me join the TLE management training program, through which I would become a salaried manager in TLE. Each time I declined, because I did not feel that I had enough experience, and because I wanted to continue exploring other opportunities through college classes.

4. The TLE Department included five women, two of whom were Manager Holly Thomas and me. I did not observe the female TLE associates receive any discriminatory treatment from male associates, nor did I ever hear suggestions from the men that women should not be working in an automotive department.

5. In 1997, I learned of a new store, Store # 2536, opening in Tulare, California. I introduced myself to the Store Manager, Jesus de los Santos, and informally interviewed with him for an hourly supervisor position, TLE Department Manager. Although I believe the position was posted, I did not go through a formal application process. Soon after our interview, Mr. de los Santos offered me the position.

6. When I arrived at Store # 2536 as a TLE Department Manager, my primary duty, like all the Department Managers in the store, was to set up my department for the store's grand opening eight weeks away. Through hard work and a strong sense of urgency, I set up the TLE Department more quickly than any department in the store. Store Manager de los Santos, during his tours of the store, told me how impressed he was with the progress my department was making. Moreover, he had created a large chart that allowed the Department Managers to track one another's progress during this setup period, and the chart showed that my department was always well ahead of everyone else's.

7. As a result of my hard work in setting up the TLE Department, after the grand opening and after only eight weeks as a Department Manager, Store Manager de los Santos promoted me to Support Manager, an hourly position. In this position, I helped to oversee the operation of the entire store. During this time I recognized the compensation potential of pursuing a career with Wal-Mart, and decided to stop taking classes at junior college.

8. After approximately two months as a Support Manager, I approached Store Manager de los Santos and expressed my interest in the Management Training Program, whereby I could become a salaried manager in Wal-Mart Division 1. I explained to him my plan to move up the ranks as a Wal-Mart manager. Within two weeks of this conversation, Mr. de los Santos called me into his office and offered me a position as an Assistant Manager Trainee. I understood that after completing the training program, as an Assistant Manager, I would likely have to transfer to another store to fill a va-

cant Assistant Manager position. I explained to him that, because of the custody order resulting from my divorce, I was required to live in Tulare County in order to retain custody of my son, and that I could only transfer to stores within approximately 50 miles of my home. Mr. de los Santos responded that this would not be a problem. In April 1997, having worked for Wal-Mart approximately eighteen months, I joined the Management Training Program.

9. As an Assistant Manager Trainee, I was given the opportunity to train at Store # 2536, the same store where I had been promoted. The three male and two female Assistant Managers at the store were very supportive of me, helping me master the leadership qualities needed for the position. In particular, male Co-Manager Don Wallace was diligent about offering me help and making sure I understood everything I needed to learn to successfully complete the Management Training Program.

10. Partway through the 17-week training, I was faced with a difficult decision. Because I was spending more time at work than I had as a non-management employee, I was seeing less of my son, Garrett. I found out from his teachers that Garrett seemed very upset at preschool. He was not playing with the other children, and would spend much of the day alone, often on the swing set, crying for his mommy. After I heard this, I came to work crying, feeling guilty that I had not been spending as much time with my son during nights and weekends. I told District Manager Ron Smoot that I wanted to step down from my Trainee position and become a Department Manager. Ron Smoot's response was that I should take all the time I needed as an hourly employee, and that as soon as I felt ready, he would

promote me right back into the Training Program where I had left off.

11. After approximately two months as a Department Manager, I felt I had reached a point with my son that he and I both could adjust to the schedule required by the Training Program. I told District Manager Ron Smoot that I was ready to rejoin the Program, and I immediately resumed my training. To this day, I view Ron Smoot as having been instrumental in my career at Wal-Mart.

12. Before I had completed my full 17 weeks as a Trainee, Ron Smoot approached me and another female Trainee and told us that there was a need for Assistant Managers in the district, and offered to promote us both to Assistant Manager if we felt we were adequately prepared. We both enthusiastically accepted the promotion, and in November 1997 I became an Assistant Manager.

13. As an Assistant Manager I was transferred to Store # 1645 in Hanford, California. My short-term goal when I arrived at Hanford was to learn every part of the store, beginning with the overnight shift. Store Manager Sean Evans supported me in my goal, and granted my request to be placed on overnights. Although I voluntarily sought the overnight shift, no manager has ever required me to work overnights. I spent approximately nine months on overnights, and over the following eighteen months I learned Front End and Softlines, and supplemented the knowledge of Hardlines I had gained as a TLE associate and TLE Department Manager.

14. In October 1998, Store Manager Sean Evans gave me an opportunity I felt was very valuable both in my career and personally. Hurricane George had struck Puerto Rico, devastating the Wal-Mart

stores there. Emails were sent to Store Managers and Assistant Managers throughout the company, asking for volunteers to help the Puerto Rico stores recover from the disaster. The project in Puerto Rico was scheduled for four weeks, and I needed Sean Evans' approval to be away from our store for so long. When I asked him for approval, Sean encouraged me to go, telling me that I was moving up in the company, he wanted me to advance, and this would be a great opportunity to learn about store planning and setup, and a way to increase my management experience. Soon after I returned from Puerto Rico, he was promoted to Regional Personnel Manager and replaced by Gisel Ruiz. To this day I remain in contact with Sean Evans, who is currently based in Las Vegas and continues to call and check up on my well-being.

15. During most of my tenure as an Assistant Manager at Store # 1645, my Store Manager was Gisel Ruiz, whom I continue to regard as my teacher, mentor and friend. Gisel Ruiz brought my knowledge of store operations to another level, instructing me in budgeting, controlling expenses and Profit & Loss statements. In addition, she placed me in the Rising Star Program, thereby both recognizing me for my outstanding work and increasing the pace of my advancement in the company.

16. Three of the specific accomplishments for which I was recognized while an Assistant Manager at Store # 1645 were: successfully running a "Store Within A Store," or "SWAS"; effective use of the "Retailtainment" concept; and successfully reducing turnover and increasing productivity at the Front End. These accomplishments are explained in greater detail below.

17. The Store Within A Store concept involves creating and executing plans for specific areas and departments within the store. I have often observed other Assistant Managers devote less attention to the SWAS concept than it deserves. For example, I worked with my Department Managers to create 30-, 60- and 90-day plans for merchandising in the various departments. At my direction the Department Managers filled their plans with extensive details and packaged them in SWAS binders so that associates and managers could see the plans at a glance.

18. The Retailtainment concept involves combining the customer's shopping experience with various forms of entertainment. For instance, during the time that I oversaw the Softlines area of Store # 1645, I coordinated events for the customers such as a Spring Fashion Show and mini-"baby showers," complete with games and prizes. I also arranged for the store to receive "visits" from Santa Claus and the Easter Bunny.

19. When I first began overseeing the Front End at Store # 1645, there were problems with high turnover (cashiers were quitting after spending a short time in the position) and with low "Items Per Hour," or "IPH," scores (cashiers were not scanning items quickly and efficiently). I developed creative methods for solving these problems. For example, all newly hired associates had to complete a 90-day probation period. Whenever cashiers completed their 90 days, I held a graduation ceremony and party for them, during which I played "Pomp and Circumstance" to honor their accomplishment. In addition, I held "Cashier Rodeos" in the morning before the store opened, during which cashiers would compete to scan the most items in a short period. These

events helped to boost morale at the Front End. Due to my efforts, both cashier turnover and IPH numbers improved at the store.

20. My work at Store # 1645 drew special recognition from District Manager Ron Smoot. He told me that he wanted to help me develop my public speaking skills, and he suggested I attend district meetings and make presentations on my accomplishments to the Store Managers in the district. I made between five and six such presentations to the Store Managers, on a variety of areas in which I had proven my skill and hard work, including Store Within A Store, organization of the Back Room, and improving Front End morale and performance.

21. My Store Within A Store presentation at one of the district meetings caught the attention of Regional Vice President Jon Sims, who invited me to make a SWAS presentation to a regional meeting of District Managers in Van Nuys, California. On another occasion while I was at Store # 1645, because of my Rising Star status and because there was a shortage of field trainers in California, Jon Sims asked me to attend a "Train the Trainer" class in Porterville, California. After taking this class I taught two sessions in Orange County, California attended by other Assistant Managers, in which I trained them in scheduling, SWAS, and other operations-related topics. Although Jon Sims is now located in Boston, I recently ran into him at a seminar. I was surprised at how many details he recalled about my family, and he invited me to call him whenever I needed support on any issue.

22. While I was an Assistant Manager at Store # 1645, I expressed interest to District Manager Ron Smoot in being promoted to Co-Manager. Ron Smoot

responded with enthusiasm, telling me, "You would make a great store manager." He instructed me on areas in which I needed to improve to be ready for promotion, and I worked diligently to improve those areas. However, I was concerned, despite his encouragement, and even though I had been placed on the Rising Star list and received numerous other forms of recognition as an Assistant Manager, that my inability to move out of Tulare County would be an obstacle to my being promoted above Assistant Manager level. Even though Ron had offered me his recommendation, he still needed approval from Regional Vice President Jon Sims and Regional Personnel Manager Vince Martinez.

23. In February 2002, Ron invited me to sit in on a call over a speaker phone, during which he spoke with Regional Personnel Manager Vince Martinez about my career prospects with Wal-Mart. Ron told Vince Martinez, "Victoria is ready to move up, her areas are always running great." I explained to Martinez that I could not move from Tulare County, but was willing to commute. Ron then asked Martinez directly, "Do you see Victoria moving up to Co-Manager, without leaving Tulare County, as a possibility?" To my great happiness, Martinez responded that it was a possibility. Within two weeks I was transferred to Store # 1826 in Visalia, California, in the same district, as a Co-Manager.

24. After working for a year as a Co-Manager, which I understood to be the minimum amount of time necessary to be eligible for promotion, I began searching for Store Manager job postings in the area around Tulare County. Such openings were rare, and after a few months I became concerned about finding a position. Only one vacancy had been posted in that

time, and I had interviewed for it but was not selected. However, both Store Manager Ben Spaley and District Manager Matt Tinney gave me support and encouragement. They assured me that they both had applied for several store manager positions before they were finally selected for promotion. Regional Personnel Manager Marcus Ludwig offered me a position in Anaheim, California, which I declined because it was too far away. In October 2001, after I had been a Co-Manager for nineteen months, a position opened at Store # 1815 in Fresno, California. I applied for a second time to become a Store Manager, and was offered the position.

25. From the time I was hired by Wal-Mart in 1995 until November 2002, when I remarried, I was a single mother. Far from seeing this as an obstacle to my work performance, both District Manager Ron Smoot and District Manager Matt Tinney have given me the flexibility in my scheduling that I needed to take an active role in my son's life. I continue to volunteer at Garrett's elementary school as a "Room Mom," taking part in reading sessions with his classmates and coordinating holiday parties and other events with their parents. Ron Smoot in particular has encouraged me to pursue these activities and to adjust my work schedule when necessary.

26. As a Store Manager, I determine starting pay for new hires in my store. I sometimes raise a new hire's pay above the starting rate if they have experience in a specific department, or if they have supervisory experience with a competitor.

27. I make every effort to treat the associates in my store equally regarding pay increases and promotions. When I give merit raises to high performers in the store, the raises are always 5% of the associate's

current pay. When interviewing candidates for promotion, my Assistant Managers ask each candidate the same set of questions, which are focused on customer service and how the candidate relates to and interacts with other associates. Candidates are assessed according to specific criteria, including their past evaluations, their current performance, their attendance, and their past coachings. Although open positions are posted on the computer terminals, to which all associates in the store have access, we also post these openings on paper to alert everyone in the store to the fact that there is a vacancy.

28. I never discriminate on the basis of gender in any of the pay or promotion decisions I make in my store.

29. I treat my associates with respect. I make exceptions to Wal-Mart policies when I believe it the reasonable, appropriate, and considerate thing to do. For example, associates in the store sometimes encounter personal or family emergencies, and are forced to miss their scheduled work hours. In such cases I am supportive of the associate, and make an exception to the policy that would normally call for me to give them a coaching for an unscheduled absence.

30. I actively encourage associates in my store, both male and female, to seek promotions to management. Since I have been a Store Manager I have encouraged seven outstanding associates in my store to seek an Assistant Manager Trainee position. Four of those associates, two of them women, have since gone on to join the Management Training Program, and I believe the other three will be enter the Program as openings appear.

31. I have personal knowledge of the facts contained in this Declaration. If called and sworn as a witness, I would testify competently to those facts.

32. I make this Declaration entirely of my own free will and choice. No promises of benefits or threats have been made to me to persuade me to sign it.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

Executed this 11th day of June, 2003, at Visalia, California.

/s/ Victoria Howard
Victoria Howard

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

WAL-MART STORES, INC.,

Defendant.

Case No. C-01-2252-MJJ

DECLARATION OF JULIE JENEANE MURPHY IN SUPPORT OF WAL-MART STORES OPPOSITION TO CLASS CERTIFICATION

Date:	July 25, 2003
Time:	10:00 a.m.
Courtroom:	11, 19th Floor
Judge:	Martin J. Jenkins
Complaint Filed:	June 8, 2001
Trial Date:	None Set

DECLARATION OF JULIE JENEANE MURPHY

I, JULIE JENEANE MURPHY, declare:

1. I am currently a District Manager for District 186 at Wal-Mart. I have held this position since approximately January 2000. This Declaration is based on my personal knowledge. If called upon to testify under oath, I could, and would, testify competently as follows:

2. District 186 includes seven Wal-Mart stores. There are 6 stores in eastern central Illinois

and 1 store in Indiana. There are 5 Supercenters and 2 Division 1 stores. I visit each store approximately once every 2 weeks. Originally, my District office was located in Clinton, Indiana which was approximately 15 miles from my home. The Paris, Illinois Store was built in approximately October 2000 and I relocated my District Office there because it is closer to my home.

3. The Wal-Mart stores in my District are diverse. For example, the Terre Haute Store is the largest volume store in my District. There are also many more competitors surrounding the Terre Haute Store, therefore I spend more time monitoring competitor's prices for this store than is the case with my smallest volume store in Marshall, Illinois. The Savoy, Illinois and Champaign, Illinois stores both are located in metropolitan college communities. There, the store managers hire lots of students.

4. I hold a bachelors of science degree in Management from Southwest Missouri State University. I interviewed with Wal-Mart prior to graduating from college in the Spring of 1985. I also interviewed with other retailers, including Kmart, in search of a sales representative position. I received an offer of employment from both Kmart and Wal-Mart. The Kmart offer would have allowed me to remain in Springfield, Missouri, while the Wal-Mart offer required me to relocate. I chose to work for Wal-Mart because I was more familiar and comfortable with the company as they had a stores in the area where I grew up.

5. Wal-Mart recruited me as a salaried Assistant Manager Trainee. I relocated 6 hours from Springfield, Missouri to Store #233 in Anna, Illinois and began as a Trainee in June 1985. In November

1985, I completed my training, at which point District Manager Bob Miljan promoted me to Assistant Manager at Store #596 in Herrin, Illinois, which is in the same District as Store #233 (where I trained).

6. While working at Store #596, I became engaged. My fiancé, and now husband, lived in Springfield, Missouri, and I wanted to move closer to Springfield to be with him. I recall that on one of Regional Manager Ray Hobbs' visits to the Store, during the wrap-up discussion that occurs after a tour of the store, Mr. Hobbs asked me, and the other managers at the meeting, if there was anything he could do for us. I voiced to Mr. Hobbs my desire to be closer to my family. Mr. Hobbs responded that he would check to see what positions were available and get back to me. Within 30 days, I was offered a transfer to the Springfield Store. I was surprised at how quickly my request was granted. In April 1986, I relocated to Store #179 in Springfield.

7. While working at Store #179, I received valuable guidance from Lead Assistant Manager Randy Epley. He helped to train me and encouraged me to seek promotions to the next level of management. For example, since I was new within the Company and did not have the experience of working as an hourly associate, I initially was not confident in some of my decisions. Mr. Epley gave me the self-confidence to make decisions by pointing out what I was doing correctly, areas where I needed improvement, and how to handle various circumstances arising at the store. I believe that Mr. Epley helped me establish a good style of management.

8. While at Store #179, I told District Manager Jim White that I wanted to advance within the Company. I mentioned this goal both on my evaluations

and during discussions while he was touring the store. In response, Mr. White asked if I was interested in transferring to Store #86, also in Springfield. He told me that the experience of working at this higher-volume store would be a good opportunity and would help me to get promoted. In July 1987, I transferred to Store #86.

9. While working at Store #86, District Manager White and I had numerous conversations about my goal of being promoted to Store Manager. At that point, I was unsure of my ability to take on a Store Manager position successfully. I was advancing quickly, and had just recently become comfortable with the Assistant Manager position. Mr. White, however, had confidence in me and encouraged me to consider a promotion. He told me that he did not want me to limit myself only to stores that were close to my home because it would be harder for me to gain advancement opportunities. He encouraged me to take a chance and to move to a new area for the promotion.

10. In April 1988, after less than 3 years with the Company, Mr. White approached me and made me aware of a Store Manager opportunity in Versailles, Missouri. I agreed to take the position and was promoted to Store Manager of Store #357 in Versailles, Missouri.

11. In 1990, I spoke to District Manager Arlen Hickman and Regional Manager Edwin Fountain about my interest in managing a larger volume store. I told them that I was willing to move anywhere as my daughter was not yet in school. Mr. Fountain responded that he would support me and would get back to me with available positions in higher volume stores. Mr. Fountain called me back with 2 locations:

Clinton, Indiana and Charleston, Illinois. I chose the Clinton Store and transferred there in June 1990.

12. While working at the Clinton Store, a Store Manager position opened in Terre Haute, Indiana, a town that was approximately a 30-minute commute from my home. I told my District Manager, Curtis Morgan, that I was interested in managing that store. Mr. Morgan passed my name along to the Regional Personnel Manager. I heard that a man – a former Assistant Manager at the Terre Haute Store – also was interested in the position. I believed that the Regional Personnel Manager was more familiar with the male candidate and I felt that this might disadvantage me. At Mr. Morgan's suggestion, I used the Open-Door Policy to speak to David Glass, the President of Wal-Mart stores. I requested that Mr. Glass include me in the group of individuals being considered for the Store Manager position. I also told Mr. Glass that I hoped he would choose the most qualified candidate. I was selected for the Terre Haute position and started as Store Manager there in July 1992.

13. In 1994, Regional Personnel Manager Kent Morris and Mr. Fountain visited with me and encouraged me to seek a promotion to Regional Personnel Manager at the Home Office. The position of Regional Personnel Manager is often a step on the road to becoming a District Manager. Because my daughter would soon be starting school I had no desire to relocate, I chose not to pursue the opportunity.

14. In 1999, Regional Manager Fred Wesson approached me about the possibility of promotion to District Manager. District Manager Curtis Morgan, who managed the neighboring District, was retiring

and his District was becoming available. I agreed to pursue this opportunity and Mr. Wesson recommended me for this District Manager position. In January 2000, Divisional Manager Dave Jackson promoted me to District Manager.

15. There have been times during my career with Wal-Mart when my family situation has required me to take a leave of absence, including the birth of my children, my mother's surgery, and my father's illness and death. My managers at Wal-Mart have always been understanding in these circumstances and have given me the time off I needed. I was never asked, in any of these cases, when I would be returning. My male supervisors understood and respected my need to be with my family.

16. In my career at Wal-Mart, I have never felt that I was denied an opportunity because I am a woman. Indeed, the men that I have worked for and with, including Randy Epley (Lead Assistant Manager at Store #179), Jim Lunn (District Manager), and Fred Wesson (Regional Manager) have provided me with the training and guidance to develop professionally and encouraged me to seek out opportunities where I might not have done so on my own. For example, when I was Store Manager at the Terre Haute store, Mr. Wesson would talk to me during his tours of the store about my interest in becoming a District Manager. We spoke about different options for my career advancement. Mr. Wesson encouraged me by telling me he believed that I would add strength to his Region and that I had the ability to become a District Manager.

17. As a Store Manager, I never consider gender, race, or national origin when making pay or promotion decisions. My decisions were based upon

objective factors such as experience, productivity, supervisor recommendations, and attendance.

18. As a Store Manager I had discretion to set the pay of new associates above the Company guidelines when I believed it is necessary. As a District Manager, my Store Managers have the same flexibility. As District Manager, I receive an exceptions report notifying me of any new associates pay rate within my District set above the guidelines. This comes to me after the associate has been hired, but gives me a chance to be informed about decisions made by Store Managers.

19. I make this Declaration entirely of my own free will and choice. No promises of benefits or threats have been made to me to persuade me to sign it.

I declare under penalty of perjury under the laws of the State where I execute this declaration, the State of California, and the United States of America that the foregoing is true and correct.

Executed this 11th day of June 2003, at Mattoon, Illinois.

/s/ Julie J. Murphy
Julie Jeneane Murphy

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

WAL-MART STORES, INC.,

Defendant.

Case No. C-01-2252-MJJ

DECLARATION OF JANICE TREE IN SUPPORT OF WAL-MART STORES, INC.'S OPPOSITION TO MOTION FOR CLASS CERTIFICATION

Date:	July 25, 2003
Time:	10:00 a.m.
Courtroom:	11, 19th Floor
Judge:	Martin J. Jenkins
Complaint Filed:	June 8, 2001
Trial Date:	None Set

DECLARATION OF JANICE TREE

I, Janice Tree, declare:

1. I am twenty-seven years old and the General Manager of Sam's Club 4703 in Albuquerque, New Mexico. I began working at Sam's Club almost six years ago. At the time, I was living in North Carolina and attending school during the day to become a dental assistant; and I was looking for a place to work in the evenings. I applied with Sam's Club at a job fair, was called back the next day, and was

hired as a part-time Cashier at the Goldsboro, North Carolina Club.

2. After about five months as a Cashier, I decided to leave dental assistant school. When I did so, I began to talk to members of the management team about management opportunities at Sam's Club. For example, one evening when I was still a Cashier, Freddie Cox, who at the time was my Business Manager, asked me where I wanted to go with the company and whether I would be willing to learn a new position. I told him I was interested and he encouraged me to apply for the Checkout Supervisor position. I applied and he promoted me to that position. I held the Checkout Supervisor position until about April 1999.

3. While I was a Checkout Supervisor, I told my Merchandise Manager, Mike Roberdy, that I was interested in becoming a part of management. He told me on a number of occasions that I had potential to do great things at the company and that I should pursue it. On one such occasion, he told me that he would talk to our Director of Operations, Jerry Boggs, recommend me to Jerry, and see if Jerry would be willing to interview me for any open management positions. After he spoke with Jerry, Mike asked me if I would be willing to move to the Cary, North Carolina Club, which I told him I happily would do. A couple days later, Mike got back to me and told me there was Front End Manager opening in the Cary, North Carolina Club and encouraged me to pursue the opportunity, which I did. I interviewed with Nancy Anderson, who was the General Manager at the Cary Club. About a week later, she and Jerry called me together and offered me the position, which I accepted.

4. I worked as a Front End Manager at the Cary, North Carolina Club until about October 2000, when my then-husband was transferred to Colorado Springs. At that time, I approached Nancy Anderson and told her about my situation. I also told her that I would love to stay with the Company and asked if there were any positions available in Colorado Springs, and that I would be willing to take a step down if it would facilitate the move. Nancy informed me that she intended to speak with Paul Stone, who was in charge of management development and training for the division (including Club 6219 in Colorado Springs), and recommend me for a Business Manager position there. It is my understanding that she did so. Paul later called me to talk about the potential move, and subsequently hired, me for the Business Manager position (a promotion), even though a Front End Manager position (the same position I was in at the time) was also open. Shortly after that, and for the next two months before my move to Colorado, Nancy put me in the Assistant Manager Training Program.

5. I was a Business Manager until about January 2002. During that time, one of the things I did was work with Teresa Alexander, who was the Front End Manager, to improve the Front End (which is where the Cashiers work). We did things in order to improve customer service, reduce turnover, and increase morale among Cashiers, including increasing training (*e.g.*, developing new hire training programs instead of simply having new Cashiers spend a few hours on the register with another Cashier before sending them out on their own), establishing biweekly meetings, increasing one-on-one training for Checkout Supervisors and Cashiers, recognizing good Cashiers, and showing them our apprecia-

tion. These changes brought about much better member service, fewer member complaints, shorter lines, and lower turnover among the Cashiers. Al Roberts, our Director of Operations, spent a lot of time in our Club because it happened to house his regional office. As a result, he had the opportunity to see the changes that we were making on the Front End. Al talked to us about these changes, telling us that ours was one of best Front Ends in the region. It was about this time that he began to ask me where I wanted to go with the company and encourage me to get out on the sales floor (*e.g.*, in a Merchandise Manager position) to learn what I needed to learn to move up in the company. I told him that I wanted to be a General Manager as soon as possible.

6. Around January 2002, Thom Gary promoted me to a position on the sales floor – Merchandise Manager II (skipping over the Merchandise Manager I position, which is the usual next step in management). I have observed, based on my personal familiarity with the backgrounds of numerous management associates, that associates almost always spend time as a Merchandise Manager I, Merchandise Manager II, and as a Business Manager before being promoted to Co-Manager. I believe this is so they will become, by the time they are Co-Managers and General Managers, more familiar with each management position in order to be able to teach and train their management associates more effectively. I made up for my lack of Merchandise Manager I experience by taking on extra work to learn about the areas supervised by that position. My attitude was that I was responsible not just for two areas of the Club, but for the entire Club. I often offered to help the Merchandise Manager I and other associates on various shifts and with various jobs in the fresh de-

partments (which are supervised by the Merchandise Manager I) in order to learn about those areas. For example, the fresh areas had monthly inventories that usually took place between 9 p.m. and midnight. I often would show up for these inventories and offer to help. At times, when the Merchandise Manager I was not present, I was the only manager there. I also spent time working in those areas of the Club offering to help the hourly associates. For example, when the Meat or Bakery Areas were short-staffed, I would offer to help. I often ended up grinding meat or wrapping bakery products. (As part of my training for management, I had completed all the health and safety-related computer based learning modules necessary to work there.) This experience gave me a better understanding for what these associates do, how their respective areas should look and operate, and what my reasonable expectations on them should be.

7. I continued to work hard and, around September 2002, was promoted to Co-Manager at Club 6408 in Santa Fe, New Mexico. I took it upon myself to look upon the Club as my own, acting as I would have had I been the General Manager – always working hard and taking as much responsibility as I could get. I worked as a Co-Manager until February of this year, when I saw on the Pipeline (which contains, among other things, information on management jobs that are open for posting and is accessible to management employees in all the Clubs), an opening for Club Manager at 4703. I called Al Roberts, my Director of Operations, and told him I was interested in the position. Al agreed to recommend me for the position. In February of this year, I was promoted to my current General Manager position.

8. I always knew what to expect in the jobs I sought because I asked a lot of questions of those already in management and watched how they performed their jobs (including the kinds of hours they worked). I always knew that management meant working long hours, but that was never (and is not now) a problem for me.

9. I have been promoted ahead of men who, as I understand it, have been with the company longer than I have. For example, when I became a Merchandise Manager II in Colorado Springs, I took over the position opened up when Ben Orf was moved from that position to Merchandise Manager I. Ben still is a Merchandise Manager I. Also, Darryl Bennett, who was the Co-Manager at that Club and a person I consider a mentor, still is a Co-General Manager (though at a different Club).

10. I have worked for a lot of honest people at Sam's Club, who told me when I was ready for a promotion and when I needed to learn more before moving on. Throughout my career at Sam's Club, I have worked hard to succeed. My managers frequently asked about my plans and encouraged me to seek higher-level positions. I believe that they did so because they appreciated the results of my hard work. Mike Roberdy, Freddie Cox, Al Roberts, and Thom Gary, for example, always listened to me when I expressed an interest in promotion, gave me advice, and encouraged me. Many of these people have acted as mentors to me. For example:

(a) Nancy Anderson was the first General Manager I worked for and I like the way she ran her business. She was tough, but extremely fair and honest. I still try to emulate her. Today, I try to do so in the way I run my Club.

(b) Freddie Cox, who was my Business Manager when I began with Sam's Club, always exerted a positive influence on me. He told me what I needed to work on for a promotion, then he was the one who promoted me into a supervisory position. He also always stressed the positive before offering any constructive criticism. And he always made time to help prepare me for management, including spending his personal time teaching me about reports and computer programs that I would need to be familiar with to move up in management.

(c) Thom Gary also spent a lot of time preparing me for management, including showing me how to prepare and review budgets and touring my areas with me. When Thom toured with me, he would ask me questions about those areas, such as whether the features were correct, if seasonal concerns had been accounted for, whether and how I was planning the area for the future (not just the next week, but the next six months). He also reviewed cleanliness and safety issues with me. I also learned from those tours how to tour a management associate when I was in a position to do so, including the diplomacy that it called for. Thom also inspired me with his own story at Wal-Mart – for example, how he emphasized the "we" concept instead of the "I" concept in his career. Thom always made time to help me.

(d) Angel Valdez was my General Manager when I was a Co-Manager. He role modeled what it meant to be a General Manager and I tried to mirror him. He also showed concern for me as a person and encouraged me to balance work with family. For example, when I was having marital problems, he offered to let me take time off.

(e) Darryl Bennett was a Co-Manager when I was a Merchandise Manager. Darryl also went out of his way to train me to become a Co-Manager. He is another role model who was an inspiration to me and made me a better associate. He did so by challenging me to be my best. I also benefited greatly from the times he toured with me, when he would quiz me on features that were on display and make sure I was prepared to speak intelligently if upper management came into the store and wanted to tour with me. He shared with me his own experiences at Sam's Club and inspired me to accept the challenges and responsibilities associated with management.

11. As a Club Manager, I decide what to pay associates in my Club, and I make those decisions in a fair and nondiscriminatory way. The Starting Rate for hourly associates in my Club is $8.50 per hour. I have the authority and the flexibility to start an associate at a level above that rate based on, for example, the associate's skills and prior experience. As long as that extra pay I am authorizing is within a reasonable amount of the minimum pay for a given position (*e.g.*, $1.50 or $2.00), I do not seek the approval of my Director of Operations. I have only sought such approval once, which involved an associate in Produce with 15 years of prior experience whom I wanted to pay $13.00 per hour. My Director of Operations approved that amount. I don't give associates raises just because they ask for one. Instead, I want to see evidence of hard work, dedication, and quality performance before giving someone a raise. When I do see those things, I award the raise I consider appropriate.

12. I am excited about my Club because I have seen a lot of changes in the four months that I have been the General Manager. I am a firm believer that the only way to succeed is to empower your people. I believe a well-run Club is one where the associates are empowered to run their own departments and do not feel they need to call management to make decisions for them. I trust my associates and want my associates to trust me. I try to have fun, promote teamwork, show my associates I appreciate them, give them a lot of feedback, and improve morale. I have also tried to be available to associates, including spending time with them on the floor so they can find me if they want to talk. This makes it easier for associates to raise "open door" issues with me. For example, on several Saturdays, I have put on a butcher's coat and ground meat with the Meat Cutters. They told me that was the first time a General Manager had ever done that with them.

13. These efforts are paying off. For example, we just reached 90 consecutive days accident-free, which is the longest accident-free stretch in the Club since it opened in November 2000. Also, when I took over, we were classified as a "high-shrink Club," unable to reconcile $70,000 in inventory. We have reduced that number to $7,000 and no longer are classified as a "high-shrink Club." Not only are sales and profits up – and sales *are* up 40% from the same month last year and profits have quadrupled from the same month last year – I have seen real improvement in morale. For example, at our recent Club picnic, there were about 100 people there at any given time, which is a much higher turnout than in recent years.

14. I have personal knowledge of the facts contained in this Declaration. If called and sworn as a witness, I would testify competently to those facts.

15. I make this Declaration entirely of my own free will and choice. No promises of benefits or threats have been made to me to persuade me to sign it.

I declare under penalty of perjury under the laws of the State where I execute this declaration, the State of California, and the United States of America that the foregoing is true and correct.

Executed this 10th day of June 2003, at Albuquerque, New Mexico.

/s/ Janice Tree
JANICE TREE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

WAL-MART STORES, INC.,

Defendant.

Case No. C-01-2252-MJJ

DECLARATION OF STACY WIGGINS IN SUPPORT OF WAL-MART STORES, INC.'S OPPOSITION TO MOTION FOR CLASS CERTIFICATION

Date:	July 25, 2003
Time:	10:00 a.m.
Courtroom:	11, 19th Floor
Judge:	Martin J. Jenkins
Complaint Filed:	June 8, 2001
Trial Date:	None Set

DECLARATION OF STACY WIGGINS

I, Stacy Wiggins, declare:

1. I am a female. I am the Store Manager at Wal-Mart Store # 2844. Store # 2844 is a Supercenter in Half Moon, New York, which is approximately ten minutes outside of Albany, New York. The Supercenter is approximately 204,000 square feet in size.

2. I have been a Store Manager for over four years. I have held my current position for the past 1½ years.

3. I am a high school graduate. Prior to coming to work at Wal-Mart, I worked for approximately two years as a waitress. Prior to that I served in the Army for three years. While in the Army, I was an E4 Specialist in Graphics Illustration.

4. On September 14, 1992, I was hired by Wal-Mart as a part-time Cashier in Mechanicsburg, Pennsylvania. Shortly thereafter, I became a full-time Cashier.

5. After I had been a Cashier for two months, my Store Manager approached me and asked me whether I would like to become a Customer Service Manager. I accepted the position and soon afterward I became the Head Customer Service Manager.

6. After becoming a Customer Service Manager, I told my Personnel Manager that I was interested in becoming part of Wal-Mart management. She told me to tell my Store Manager, a male, and I did so.

7. Shortly after I spoke to my Store Manager about my interest in advancing at the Company, he offered me the position of Support Manager. Then, approximately eight weeks later, he offered me a position in the Management Training Program. I became a Management Trainee in the Gettysburg, Pennsylvania store in June 1995.

8. After I completed the Management Training Program I became an Assistant Manager in the Hanover, Pennsylvania store. While I was an Assistant Manager, my Store Manager (a male) recommended me for a Sam Walton Hero Award, which I

received. This is an award that is given each year to approximately six Assistant Managers selected from the entire Company. It is a big honor to receive this award. I received the award because my overnight associates wrote to the home office and told my Store Manager that they felt I was the best Assistant Manager they had ever seen. As a result of winning this award, I received a plaque and a gold watch, and became a member of the Rising Star program.

9. After I had been an Assistant Manager for approximately three years, my Regional Personnel Manager (a male) called and asked me if I would be willing to go to Millville, New Jersey to be a Co-Manager at a store there. I accepted the position and was promoted to Co-Manager in February 1998.

10. After approximately eight months as a Co-Manager, the same Regional Personnel Manager (a male) called and told me that he felt that I was ready for my own store – *i.e.*, to be a Store Manager. I then applied for a Store Manager position in Pennsville, New Jersey via a computer-based learning ("CBL") terminal. It was common knowledge among Assistant Managers and Co-Managers that this was the way to apply for Store Manager positions. I received the Store Manager position in Pennsville, New Jersey.

11. After becoming a Store Manager, I was selected for the Company's Leadership Express program. Only 50 associates in my entire Division, which includes the upper Northeast portion of the country, are part of this program. The Leadership Express program is designed to help associates whom the Company believes have the potential to be two steps higher in management than they currently

are. The program will help me progress even further with the Company.

12. During my time at Wal-Mart, there have been a number of managers who treated me well and helped ensure that I was getting the experience and training that I needed to progress. These include several male Store Managers to whom I have reported – Todd Harbaugh, Jim Spencer, Ron Frank, and Brooke Garrison – as well as District Manager Al Jenkins and Division Manager Mike Huffaker. In particular, Al Jenkins has been a mentor to me. He was my District Manager until recently. He frequently took the time to show me the reports with which he worked as a District Manager, and took me from store to store to see what he did. I still feel like I can call him if I need help or advice about my career.

13. As a Store Manager, I am responsible for making decisions about hourly employees' compensation. For new hires, I base decisions about pay upon the job the associate will be doing and the associate's prior experience. For current employees, I base pay decisions on job performance. In no instance do I consider a person's gender in making decisions about pay.

14. As a Store Manager, I also make promotion decisions within the store. I make hourly supervisor opportunities known by posting them on the CBL terminal and by the time clock, and I also announce them at store meetings. I select people to move up within the Company based on merit. I do not consider a person's gender in making promotion decisions.

15. I am very happy with my career at Wal-Mart, and with how I have been treated since joining the Company.

16. I have personal knowledge of the facts contained in this Declaration. If called and sworn as a witness, I would testify to those facts.

17. I make this Declaration entirely of my own free will and choice. No promises of benefits or threats have been made to me to persuade me to sign it.

I declare under penalty of perjury under the laws of the State of New York, the State of California, and the United States of America that the foregoing is true and correct.

Executed this 10th day of June 2003, at Half Moon, New York.

/s/ Stacy Wiggins
Stacy Wiggins

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

WAL-MART STORES, INC.,

Defendant.

Case No. C-01-2252-MJJ

DECLARATION OF LINDA DONATH

[IN REBUTTAL TO DECLARATION OF DESIGNATED CLASS MEMBER SHEILA ACREE]

Date: July 25, 2003
Time: 10:00 a.m.
Courtroom: 11, 19th Floor
Judge: Martin J. Jenkins

Complaint Filed: June 8, 2001
Trial Date: None Set

DECLARATION OF LINDA DONATH

I, LINDA DONATH, declare:

1. I am a female. I am an Assistant Manager at Store # 135 in Chillicothe, Missouri. I have held this position since 1988. From approximately 1994 to April 2001, Sheila Acree was a sales associate at Store # 135. I sometimes supervised Ms. Acree's employment, depending upon the particular department in which she was working.

2. I have read the "DECLARATION OF SHEILA ACREE IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION." In paragraphs 3 and 6 of her declaration, Ms. Acree claims that she was denied a promotion into hourly supervisor positions and the Management Training Program because she is a woman. I am submitting this Declaration in rebuttal to that claim.

3. Throughout her tenure at Store # 135, Ms. Acree had serious attendance problems. For weeks at a time she would call in absent once or twice a week. Store Manager Frank Chaney and the Assistant Managers attempted to accommodate Ms. Acree. We understood that Ms. Acree's absences initially were related to her husband's heart problems and, later, to her divorce from that husband.

4. Ms. Acree's absentee problems made her unqualified for promotion.

5. In paragraph 12 of her declaration, Ms. Acree claims that she left Wal-Mart in 2000 "in frustration with being passed over for promotion and the lack of information about promotional opportunities." This is not true. On or about May 2000, Ms. Acree approached me and asked permission to take the night off so that she could travel to Kansas City with her boyfriend to pick up his truck. At that time we were understaffed. I said to her, "I'm sorry, but I just don't have enough coverage in the store to let you go tonight." Ms. Acree became upset, and soon afterwards approached me again to tell me that she was quitting. She also complained to me that no one at the store liked her.

6. During the majority of the 14 years that I have been at Store # 135, the Assistant Managers have all been female.

7. Store # 135 is a training store. Assistant Manager Trainees from elsewhere in the District come to Store 135 to train. I have seen a number of female Assistant Manager Trainees train in our store.

8. 17 of the 19 department managers at Store # 135 are women.

9. I believe that Store Manager Frank Chaney is extremely fair to his employees, and that he does not discriminate against employees on the basis of their gender.

I declare under penalty of perjury under the laws of the State of California, the State of Missouri and the United States of America that the foregoing is true and correct.

Executed this 7th day of June, 2003, at Chillicothe, Missouri.

/s/ Linda Donath
Linda Donath

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiffs, vs. WAL-MART STORES, INC., Defendant.	Case No. C-01-2252 MJJ **DECLARATION OF SANDRA JEAN ELLISON IN SUPPORT OF DEFENDANT WAL-MART STORES, INC.'S OPPOSITION TO MOTION FOR CLASS CERTIFICATION** (ELLISON DECL. II) Date: July 25, 2003 Time: 10:00 a.m. Courtroom: 11, 19TH Floor Judge: Martin J. Jenkins Complaint Filed: June 8, 2001 Trial Date: None Set

DECLARATION OF SANDRA JEAN ELLISON

I, Sandra Jean Ellison, declare:

1. I have been employed by Wal-Mart Stores, Inc. ("Wal-Mart") since May, 20, 1991. I currently hold the position of District Manager in District # 322, and I have responsibility for eight stores located in Colorado, Nebraska, and Wyoming, and have held this position since November, 2001. Prior to that time, my experience at the Company includes ap-

proximately 3 1/2 years as a Store Manager at two different stores. As such, I have personal knowledge of the facts set forth herein except where stated upon information and belief and, if called as a witness, I would and could competently testify thereto.

1. As a Store Manager during the period October, 1996 through January, 2000, I had responsibility to make or approve all hiring decisions for hourly associates within my store. I also had responsibility to set the minimum Store Start Rate for my individual store based on the local market where my store was located and to determine whether to pay new hires the minimum starting rate based on the Store Start Rate and the pay classification of the new hire or some appropriate higher starting pay rate. After I determined the appropriate starting rate of pay to offer an applicant and the applicant accepted the Company's offer of employment, I advised the Personnel Manager at the store to input the new associate information including his/her starting pay rate into the Company's computerized payroll system called the SMART system. Any starting pay rate for the new hire up to 6% above the minimum starting rates based on the Store Start Rate could be entered into the SMART system without my manual override as the Store Manager. If the Personnel Manager entered a starting pay rate 6% over the minimum starting rate, a "pop-up" notification would appear on the computer screen advising the user that the pay rate does not adhere to the Company's guidelines and that it is necessary to enter the Store Manager's password to override the system and enter a higher starting rate for the new hire. For example, if the Store Start Rate was $7.00 per hour, the Personnel Manager could enter a starting pay rate for a Sales Associate at a pay class 1 an hourly rate of up to

$7.45 (Store Start Rate plus 6% rounded up to nearest nickel) or for a Cashier at a pay class 2 an hourly rate of up to $7.70 (Store Start Rate plus $0.25 plus 6% rounded up to nearest nickel).

2. If I made the decision to pay a new associate more than 6% above the minimum starting rate, I could simply enter my password as a Store Manager and the new associate would be paid whatever amount I designated. There was no maximum amount for this manual override, and I had discretion to pay a new hire up to $2.00 over the minimum starting rate without consulting my District Manager. However, if the minimum starting rate was exceeded by more than 6%, an exception report would be generated and sent to the District Manager to whom I reported. I do not recall any District Manager ever contacting me when I was a Store Manager to question any pay issues that were listed on the exception report. Nor did any District Manager ever change any pay decision that I had already made after receiving an exception report.

3. As a District Manager, I now receive exception reports for all the stores that are within my District. These exception reports and the procedure for handling these reports has not changed during the period of time that I have been a District Manager. Exception reports cover a two-week period, and I generally receive the exception report approximately a week or more after the close of this two week period. These exception reports list all payroll "exceptions" that are outside the pay guidelines, including new hires, merit increases, differentials, job changes, etc. Although the exception report provides information such as the name of the person whose pay was outside the guidelines, the store, the job classifica-

tion, the position, and the date, the report does not identify the starting pay actually paid to the new hire or the excess amount paid over the minimum starting pay. I sometimes quickly review exception reports, but they are not something that is particularly useful to me. I do not recall ever contacting a Store Manager to question him or her about an exception report. I have never changed a payroll decision that already has been made by the Store Manager.

I declare under penalty of perjury under the laws of the State of Wyoming, California and the United States of America, that the foregoing is true and correct.

Executed this 10th day of June, 2003, at Cheyenne, Wyoming.

/s/ Sandra Jean Ellison
Sandra Jean Ellison

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES,
PATRICIA SURGESON,
CLEO PAGE,
CHRISTINE
KWAPNOSKI,
DEBORAH GUNTER,
KAREN WILLIAMSON
AND EDITH ARANA, on
behalf of themselves and
all others similarly
situated,
Plaintiffs,
vs.
WAL-MART STORES,
INC.,
Defendant.

Case No. C-01-2252 MJJ

SUPPLEMENTAL DECLARATION OF CHRISTINE KWAPNOSKI, NAMED PLAINTIFF, IN REPLY TO DEFENDANT'S OPPOSITION TO MOTION FOR CLASS CERTIFICATION

I, Christine Kwapnoski, declare:

1. I have read the references to me in Wal-Mart's brief in opposition to Plaintiffs' Motion for Class Certification. I offer this declaration in response.

2. I was an hourly associate at Sam's Club from 1986 until approximately two weeks after this lawsuit was filed. At that time, I was promoted to Area Manager, which is a management position. Because it was a salaried position, and I no longer received overtime, I actually earned less than I had as an hourly employee. However, because I was told I would be in that position for approximately one year and then be promoted to Assistant Manager, I welcomed the promotion. I remained an Area Manager

for more than eighteen months, until a few days after the deposition of Greg Spragg, Executive Vice President of Sam's Club. At that time, I was promoted into the Management Training Program. I completed the program in May 2003, and assumed the responsibilities of an Assistant Manager (Bakery Manager) at the Sam's Club in Concord, California in June 2003. Contrary to Defendant's representation, I was not "briefly a 'lowest level manager at a Sam's Club" (Opp. Brief, 33:9-10). Instead, I have been an hourly employee, an hourly supervisor, an Area Manager, and now an Assistant Manager. I have held salaried management positions for two years.

3. I am a single mother of two children. My children live in another state with their father. My children have spent summer vacations and Christmas vacations with me for the last nine years. Throughout these years, I was scheduled for vacation from approximately Christmas Day until after the New Year. I have been told by my current General Manager that I cannot have this time off this year. I have attempted to use the Open Door to discuss this issue. I have been diverted in my several attempts to contact Greg Johnston, the Regional Vice President, and instead have been directed to speak with the Regional Personnel Manager. The promised confidentiality of the Open Door was not maintained. I was told I was not going to be permitted to have the time off to be with my children, although I had received this time off for the last nine years. I am aware of no policy which prohibits me from having the time off.

4. It is well known in the store that I have been actively involved in this litigation.

5. I have reviewed the Declaration of Victoria Howard in Support of Wal-Mart's Opposition, who states that Wal-Mart was willing to accommodate her family needs when she went into Management Training. Wal-Mart has refused to accommodate my family needs now that my involvement in this suit has become common knowledge.

6. I have personal knowledge of the foregoing facts and if called, could and would testify competently thereto. I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct. Executed this 2 day of July, 2003 at San Francisco, California.

/s/ Christine Kwapnoski
Christine Kwapnoski

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiffs, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **SUPPLEMENTAL DECLARATION OF DR. RICHARD DROGIN IN SUPPORT OF PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION TO STRIKE PORTIONS OF HAWORTH DECLARATION FOR FAILURE TO COMPLY WITH FED. R. CIV. PRO. 26(a)(2)** **Date: July 25, 2003** **Time: 10:00 a.m.** **Courtroom: 11**

I, Dr. Richard Drogin declare:

I make this declaration of my own personal knowledge and could testify thereto if called as a witness.

1. I have reviewed the declaration of Dr. Joan Haworth submitted in opposition to plaintiffs' Motion to Strike Portions of Haworth Declaration. I have also reviewed the email correspondence attached as exhibit 6 to the Supplemental Seligman Declaration.

2. Neither Dr. Haworth, or defense counsel Nancy Abell identify any computer files or paper documents containing Chow analyses of grocery/non-

grocery subdivisions, or of my regressions, that were produced to plaintiffs prior to Dr. Haworth's deposition.

3. I have reviewed the analyses that were attached to the Abell emails, and have searched the computer files and paper documents produced by Wal-Mart prior to Dr. Haworth's deposition. Based on searches by filename and content, I have not located any Chow analyses of grocery/non-grocery subdivisions, or of my regressions, in the productions.

4. I reviewed Dr. Haworth's Report and Amended Report, and attended her deposition. I understood from her Report and deposition that she had sub-divided the stores into grocery, non-grocery, and specialty sub-divisions, as I explained in my Rebuttal Report and Declaration in Support of Plaintiffs' Reply Brief in Support of Class Certification. I also explained in my rebuttal report and reply declaration that if Dr. Haworth's hourly regression disparities were aggregated over her store sub-units, women were underpaid relative to men by about 12 cents, and this underpayment was statistically significant. To reach this conclusion, I took the regressions labeled grocery and non-grocery from Dr. Haworth's alternative analyses, produced three days before her deposition, and the specialty regressions from her initial, apparently unchanged regressions. I assumed that the initial specialty regressions were unchanged, given the text and labeling in Dr. Haworth's initial and Amended reports. Thus, for example, in her Red-lined Amended Report, Dr. Haworth states at pp 50-51 that she had conducted "a separate analysis of hourly pay rates for each of the major business types: (a)Wal-Mart stores and non-Grocery SuperCenter divisions, (b)Sam's Club, (c)the

Specialty Divisions and (d)Grocery Divisions." She later reports "alternative regressions" for non-grocery and grocery employees. Id at p. 53. These reports made a clear distinction between non-grocery and specialty divisions, a distinction Dr. Haworth continued to make in her deposition testimony. The amended report nowhere stated the fact that the new analyses and amended report had combined specialty sub-units with non-grocery sub-units in the same regressions. Dr. Haworth's Amended Report continued to report separate specialty regressions.

5. My reply declaration in support of class certification did not change any of my analyses, as I clearly state therein. See Drogin Declaration in Support of Plaintiffs' Reply Brief in Support of Class Certification at 2:14-16. After that declaration was filed, I understand that defendant's counsel has asserted that I "double-counted" the specialty employees in my aggregation, and provided supporting documentation to this effect. I have reviewed this material and conclude that Wal-Mart's counsel is correct that I double-counted the specialty employees in my aggregation. I believe, however, that this error is the result of my reliance on Dr. Haworth's Reports and deposition testimony and the failure of her amended report to disclose that she had in fact combined specialty and non-grocery employees in her regressions analyses

6. My over-all conclusion that aggregated Haworth regressions demonstrate women are paid less then men at Wal-Mart based on Dr. Haworth's variables and that this pattern is statistically significant is unchanged. The only change is that the overall difference in pay between men and women is about nine cents, instead of twelve cents, after aggregating

Dr. Haworth's regression disparities from her store sub-units.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Richard Drogin

Dated: July 11, 2003 Richard Drogin

PETITIONER'S BRIEF

No. 10-277

IN THE

Supreme Court of the United States

WAL-MART STORES, INC.,

Petitioner,

v.

BETTY DUKES, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether the class certification ordered under Federal Rule of Civil Procedure 23(b)(2) was consistent with Rule 23(a).

2. Whether claims for monetary relief can be certified under Federal Rule of Civil Procedure 23(b)(2) and, if so, under what circumstances.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption to the petition for a writ of certiorari contains the names of all parties to the proceedings below.

The corporate disclosure statement included in the petition remains accurate.

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BRIEF FOR PETITIONER

INTRODUCTION

The Ninth Circuit's decision allowing this class action to proceed contradicts Federal Rule of Civil Procedure 23, departs from this Court's precedent, and endorses an approach that would abrogate the substantive and procedural rights of both Wal-Mart and absent class members.

The certification order is flatly inconsistent with Rule 23(a)'s prerequisites. The class members—potentially millions of women supervised by tens of thousands of different managers and employed in thousands of different stores throughout the country—assert highly individualized, fact-intensive claims for monetary relief that are subject to individualized statutory defenses. The named plaintiffs' claims cannot conceivably be typical of the claims of the strangers they seek to represent. These intractable problems are compounded by a virtually boundless class definition that produces an across-the-board class pervaded by conflicts among its members. This kaleidoscope of claims, defenses, issues, locales, events, and individuals makes it impossible for the named plaintiffs to be adequate representatives of the absent class members.

Nor can the certification order be reconciled with the requirements of Rule 23(b)(2), which is limited by its terms to claims for "injunctive relief or corresponding declaratory relief." Plaintiffs seek billions of dollars in individual monetary relief, yet seek to evade the additional procedures required for fair adjudication of monetary claims, including notice and opt-out rights for absent class members.

The certification order is harmful to the rights of everyone involved. It distorts basic principles of class-action and anti-discrimination law, eviscerates fundamental procedural protections for class-action defendants, and allows three class representatives to extinguish the rights of millions of absent class members without even telling them about it. The decision below should be reversed, and the class decertified.

OPINIONS BELOW

The Ninth Circuit's en banc opinion (Pet. App. 1a-161a) is published at 603 F.3d 571. Superseded panel opinions are reported at 509 F.3d 1168 and 474 F.3d 1214. The district court's certification order (Pet. App. 162a-283a) is published at 222 F.R.D. 137. A related evidentiary order is published at 222 F.R.D. 189.

JURISDICTION

The Ninth Circuit's judgment was entered on April 26, 2010. Justice Kennedy extended the time for filing the petition for a writ of certiorari to August 25, 2010. No. 10A19. The petition was filed on that date and granted on December 6, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Civil Rights Act of 1964 (as amended), the Rules Enabling Act, and Rule 23 are reproduced in this brief's appendix.

STATEMENT

The district court certified under Rule 23(b)(2) a class of "[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal-

Mart's challenged pay and management track promotions policies and practices." Pet. App. 283a. The Ninth Circuit, in a 6-5 en banc decision, affirmed in substantial part. *Id.* at 99a-102a.

1. Wal-Mart is the Nation's largest private employer. At the time of class certification (in 2004), Wal-Mart's U.S. retail operations comprised 7 divisions, 41 regions, 400 districts, 3,400 stores, and more than 1,000,000 employees. Pet. App. 163a; *see also id.* at 114a (Ikuta, J., dissenting). Each store employed 80 to 500 people, with hourly employees assigned to 53 departments in 170 different job classifications. *Ibid.*

Wal-Mart's company-wide policy, then and now, expressly bars discrimination based on sex, and Wal-Mart has consistently promulgated and enforced equal opportunity policies to foster diversity, ensure fair treatment, and prohibit unlawful discrimination. Pet. App. 196a; J.A. 1576a-1596a. As the district court recognized, "Wal-Mart has earned national diversity awards and its executives discuss diversity and include it in company handbooks and trainings. The company has diversity goals, performance assessments, and penalties for EEO violations." Pet. App. 195a (citations omitted).

When the complaint was filed in 2001, individual store managers had "substantial discretion in making salary decisions for hourly employees in their respective stores" and "promotion decisions for in-store employees." Pet. App. 177a, 180a. Wal-Mart's policies cabined that discretion by setting salary ranges and establishing objective standards for its local managers to apply when making these decisions. J.A. 1468a-1469a, 1498a-1511a, 1609a, 1616a; D.C. Dkt. 270-508.

2. Only three of the named plaintiffs remain members of the certified class. *See* Pet. App. 115a (Ikuta, J., dissenting). They worked at different stores, at different times, in different positions, for different managers. They were promoted to (and demoted from) different jobs, disciplined for different offenses, paid different amounts for performing different jobs, applied for different management training opportunities (or not), and kept working (or not) for different reasons. J.A. 606a–624a, 743a–749a, 997a–1006a. Their testimony illustrates their differing experiences:

a. *Edith Arana* worked at the Duarte, California store from 1995 to 2001. J.A. 606a. She worked in a number of different positions and was promoted and received numerous raises. *Id.* at 606a–618a. In 2000, she approached the store manager regarding management training; on one occasion the manager "did not reply" but "simply shrugged his shoulders and walked away," and on another the manager "did not respond and brushed [her] off." *Id.* at 614a. Ms. Arana concluded that the manager "was denying [her] the opportunity to advance with the Company because [she] was a woman." *Id.* at 614a–615a. She initiated internal complaint procedures, after which a (female) supervisor advised Ms. Arana to "apply directly to the District Manager" if she had concerns with her store manager. *Id.* at 616a–617a. Ms. Arana, however, "decided against this," and she never again applied for management training. *Id.* at 617a–623a. The following year, she was fired for failure to comply with Wal-Mart's timekeeping policies. *Id.* at 623a; C.A. App. 337–340.

b. *Betty Dukes* was hired as a cashier at the Pittsburg, California store in 1994. J.A. 743a–745a. She sought and received a promotion to customer service manager. *Id.* at 745a–748a. Ms. Dukes's "eligibility for [further] promotion was limited," however, by a series of disciplinary violations, which led to her demotion to cashier and then (after an unspecified injury) to greeter. *Id.* at 745a–746a. She does not deny violating company policy, but maintains that the disciplinary actions were "retaliat[ion]" (by a female supervisor) for invoking internal complaint procedures and asserts that she is "not aware of any male employees who have been disciplined for similar transactions." *Ibid.* She also claims that two male greeters in the Pittsburg store are paid at a higher rate than she is. *Id.* at 748a–749a.

c. *Christine Kwapnoski* has "spent most of [her] adult life" working for Sam's Club—a division of Wal-Mart—in Missouri and California. J.A. 997a. She worked in many positions and "received annual raises and merit raises upon occasion," as well as an eventual promotion to a supervisory position. *Id.* at 999a, 1004a–1005a. She claims that a male manager "yelled at [her] frequent[ly]" and "scream[ed] at other female employees, but seldom did he scream at men." *Id.* at 1000a–1001a. Allegedly, the same manager later "told her to 'doll up,' to wear some makeup, and to dress a little better." *Id.* at 1003a.

3. The named plaintiffs seek "injunctive and declaratory relief, back pay, and punitive damages, but not traditional 'compensatory' damages," on behalf of *every* woman employed in *every* Wal-Mart retail store nationwide during the relevant period. Pet. App. 5a. With one exception (pharmacy), the class includes *every* job classification in *every* department—from part-time entry level hourly workers to salaried managers earning well above $100,000 per year. At the time of certification, the class definition

"cover[ed] at least 1.5 million women . . ., thus dwarfing other employment discrimination cases that have come before." *Id.* at 165a.[1]

Plaintiffs moved for class certification, alleging (as they had in their complaint) that Wal-Mart "fosters or facilitates gender stereotyping and discrimination, . . . and that this discrimination is common to all women who work or have worked in Wal-Mart stores." Pet. App. 5a; *see also* J.A. 47a–57a, 73a–76a; D.C. Dkt. 99 at 1–4. They were unable, however, to identify "a specific discriminatory policy promulgated by Wal-Mart." Pet. App. 59a. In "the absence of" such a policy (*ibid.*), plaintiffs premised their motion on statistics, sociology, and anecdotes.

The district court accepted plaintiffs' theory and certified the class. The court "recognize[d] that there is a tension inherent in characterizing a system as having both excessive subjectivity at the local level and centralized control." Pet. App. 192a. It nevertheless concluded that "in-store pay and promotion decisions are largely subjective and made within a substantial range of discretion by store or district level managers, and that this is a common feature which provides a wide enough conduit for gender bias to potentially seep into the system." *Ibid.*

On virtually every contested issue, however, the district court declined to make findings on the ground that the "merits" of the case could not be considered at class certification. Pet. App. 166a, 169a

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[1] Of these, about 500,000 were employed as of the date the complaint was filed. Pet. App. 6a n.3. Wal-Mart has employed more than three million women since then.

170a, 173a, 192a–193a, 196a–198a, 208a, 211a–212a, 222a, 224a–226a.

a. *Statistics.* Plaintiffs' theory is premised on alleged *ad hoc* discrimination by local *store managers*. However, plaintiffs' statistical expert, Richard Drogin, did not identify any store-level pay differentials. Instead, he aggregated the data on a regional or national basis to justify opining that such data show pay and promotion disparities between men and women. Pet. App. 200a–201a.

Wal-Mart's expert, Joan Haworth, explained that "more than 90% of the stores had no pay rate differences between men and women that were statistically significant" (J.A. 1344a), and Drogin submitted nothing to rebut these data.

b. *Sociology.* Plaintiffs' expert, William Bielby, opined that Wal-Mart is "*vulnerable to*" gender bias, although he "conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking." 222 F.R.D. at 192 (emphasis added).

c. *Anecdotes.* Plaintiffs submitted declarations from 112 current and former Wal-Mart employees, only 63 of whom remain members of the class. *See* J.A. 590a–624a, 632a–653a, 660a–685a, 707a–734a, 743a–749a, 772a–778a, 789a–804a, 813a–816a, 822a–826a, 844a–863a, 874a–880a, 896a–906a, 916a–919a, 934a–957a, 964a–991a, 997a–1006a, 1011a–1015a, 1022a–1047a, 1053a–1087a, 1093a–1096a, 1104a–1111a, 1131a–1135a, 1144a–1164a, 1168a–1173a, 1190a–1194a, 1215a–1221a, 1228a–1241a, 1248a–1253a, 1261a–1278a, 1302a–1305a, 1315a–1321a. These declarations depict a relative handful of widely divergent, and often entirely unique, events.

4. The Ninth Circuit en banc majority recognized the error in the district court's approach to contested issues (Pet. App. 52a n.20), but nevertheless affirmed the certification order in substantial part.

a. The majority agreed that plaintiffs had satisfied Rule 23(a)'s requirements of "commonality," "typicality," and "adequacy."

i. The court concluded that plaintiffs' evidence was sufficient "*to raise the common question* whether Wal-Mart's female employees nationwide were subjected to a *single set of corporate policies* . . . that may have worked to unlawfully discriminate against them in violation of Title VII." Pet. App. 78a. Furthermore, "[e]vidence of Wal-Mart's subjective decision-making policies suggests a common legal or factual question regarding whether Wal-Mart's policies or practices are discriminatory." *Ibid.*

The court thus found class treatment appropriate based not on a showing of any commonly applied policy or practice but rather on the basis of a "common question" whether female employees at Wal-Mart had experienced discrimination. Pet. App. 78a. In reaching this conclusion, the court flatly rejected, as a "hypothetical in clear dicta" (*id.* at 42a n.15), this Court's holding that a plaintiff seeking class treatment in this context must offer "[s]ignificant proof that an employer operated under a *general policy of discrimination*" that was implemented "through *entirely* subjective decisionmaking processes." *Gen. Tel. Co. of the Sw.* v. *Falcon*, 457 U.S. 147, 159 n.15 (1982) (emphases added).

ii. The majority declared that the claims were "sufficiently typical," "[e]ven though individual employees in different stores with different managers may have received different levels of pay or may have been denied promotion or promoted at different rates, because the discrimination they claim to have suffered occurred through alleged common practices—*e.g.*, excessively subjective decision making in a corporate culture of uniformity and gender stereotyping." Pet. App. 80a.

iii. The majority's adequacy analysis consisted of its observation that "courts need not deny certification of an employment class simply because the class includes both supervisory and non-supervisory employees." Pet. App. 82a.

b. The Ninth Circuit also found that plaintiffs' claims for billions of dollars in backpay could be certified pursuant to Rule 23(b)(2), which authorizes certification only of claims for injunctive or corresponding declaratory relief. In doing so, the majority rejected the standards previously articulated by other circuits for mandatory certification of monetary claims and announced its own newly formulated standard. Pet. App. 84a–88a. The court also remanded plaintiffs' punitive-damages claims for further consideration. *Id.* at 99a.

c. Judge Ikuta explained in the principal dissent: "Never before has such a low bar been set for certifying such a gargantuan class. The majority's ruling provides scant limits to the types of classes that can be certified. Put simply, the door is now open to Title VII lawsuits targeting national and international companies, regardless of size and diversity, based on nothing more than general and conclusory allegations, a handful of anecdotes, and statistical disparities that bear little relation to the alleged discriminatory decisions." Pet. App. 160a.

d. Chief Judge Kozinski added in a separate dissent that the class members "have little in common but their sex and this lawsuit." Pet. App. 161a.

SUMMARY OF ARGUMENT

Rule 23's requirements cannot be rewritten to facilitate class certification, nor can substantive rights be abrogated or modified to certify a class. *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 612-13 (1997). The courts below repeatedly transgressed these important limitations. The certification order cannot stand.

I. The certification order is not consistent with Rule 23(a).

A. The claims asserted on behalf of millions of individuals do not remotely satisfy Rule 23(a)'s commonality, typicality, or adequacy requirements.

1. The *commonality* requirement ensures that the named plaintiffs' claims are sufficiently like the other class members' that they may be resolved on a collective basis.

a. This Court has recognized the "wide gap" between individualized allegations of discrimination and a company-wide practice that may be challenged in a class action. *Gen. Tel. Co. of the Sw.* v. *Falcon*, 457 U.S. 147, 157 (1982). To bridge this gap, class plaintiffs must submit "[s]ignificant proof that an employer operated under a general policy of discrimination." *Id.* at 159 n.15. But plaintiffs here did not attempt to make such a showing. They could not do so because Wal-Mart's general policies uniformly prohibit discrimination and promote diversity. Pet. App. 195a. Plaintiffs also "failed to identify a specific discriminatory policy at Wal-Mart." *Id.* at 55a.

Moreover, plaintiffs did not offer proof that Wal-Mart implemented its policies in a discriminatory fashion common to all female employees. They have never suggested that Wal-Mart established an "*entirely* subjective decisionmaking process[ ]." *Falcon*, 457 U.S. at 159 n.15 (emphasis added). The discretion exercised by Wal-Mart's local managers was governed not just by the company's anti-discrimination policy but also by a company-wide framework for pay and promotions. Plaintiffs have never offered significant proof that this framework was discriminatory. This precludes any inference that Wal-Mart was misusing discretionary decisionmaking—which is itself lawful (*Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988))—to mask or implement a general policy of discrimination that pervaded all of the individual decisions.

The millions of discretionary decisions by tens of thousands of individual managers around the country defy common treatment under Rule 23(a).

b. Plaintiffs tried to bridge the "*Falcon* gap" by offering statistical, sociological, and anecdotal evidence, all of which serve only to confirm the lack of commonality.

i. Plaintiffs' liability theory turns on decisions made by individual *store* managers, but their aggregated statistical analysis, which purported to show disparities at the *national* or *regional* levels, cannot serve to establish commonality regarding the myriad decisions of local store managers or the impact of those decisions on individual class members. *See Watson*, 487 U.S. at 992 (plurality). The unrebutted evidence established that more than 90% of the stores had no pay rate differences between men and women that were statistically significant.

ii. Plaintiffs rested much of their case on a sociologist's opinion that Wal-Mart is "vulnerable" to gender bias and stereotypes, and that the centralized control exercised by the company over certain aspects of its retail operations (such as "the temperature and music in each store") could serve as a "conduit" for discrimination. Pet. App. 190a, 192a, 195a. The same sociologist conceded that he had no idea how often this phenomenon might occur. 222 F.R.D. at 192. His testimony thus defeats, rather than supports, a finding of commonality.

iii. The 63 class-member declarations submitted by plaintiffs also defeat commonality. While they purport to portray instances of unequal treatment, the unique facts and circumstances of even this small sample vary dramatically. Pet. App. 127a (Ikuta, J., dissenting).

2. The *typicality* requirement "limit[s] the class claims to those fairly encompassed by the named plaintiff's claims." *Gen. Tel. Co. of the Nw.* v. *EEOC*, 446 U.S. 318, 330 (1980). But the declarations of the three remaining class representatives show that their claims—and the defenses to those claims—are *atypical* of those that might be asserted by millions of absent women. Proving (or disproving) any such claim would not make it any more (or less) likely that others' claims are cognizable (or remediable).

3. The *adequacy* requirement serves to prevent conflicts of interest among the class members. *Amchem*, 521 U.S. at 618, 625. The class here, however, is replete with such conflicts. For example, the class includes both managers and hourly employees—plaintiffs thus accuse *other class members* of discriminating against them. A clearer conflict of interest is difficult to imagine, and there are many more.

B. Solely in an effort to satisfy Rule 23(a), the lower courts elected to alter the rules—relieving plaintiffs of the burden of proving elements of their case, and precluding Wal-Mart from presenting otherwise available defenses. The Rules Enabling Act, which mandates that procedural rules may not alter substantive rights, forbids this. 28 U.S.C. § 2072(b).

1. The courts below erred in relieving plaintiffs of their burden of proving key substantive elements of their claims, including (a) an unlawful employment practice, and (b) discriminatory intent.

a. Plaintiffs argue that individual store managers exercised subjective discretion in a manner that uniformly disadvantaged female employees. That is a necessary component of both their disparate-impact and disparate-treatment claims, but it would require store-by-store proof that defeats commonality and typicality.

b. Equally problematic for plaintiffs—yet entirely unaddressed by the lower courts—is the intent element of their disparate-treatment claim. Intent is not subject to classwide proof where, as here, the challenged employment decisions were massively decentralized.

2. Wal-Mart's statutory defenses also preclude commonality and typicality. Such defenses are normally resolved at the second stage of an aggregated employment discrimination proceeding, where the employer has the right to "demonstrate that the individual . . . was denied an employment opportunity for lawful reasons." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 362 (1977). The district court, however, found that holding such individualized hearings would be "impractical," "not feasible," and "inconsistent with the fundamental character of the

class action proceeding." Pet. App. 245a, 251a. Rather than refusing to certify the class, the court eliminated Wal-Mart's right to prove its defenses—once again elevating procedure over substance and depriving Wal-Mart of due process.

II. Nor is the certification order consistent with Rule 23(b)(2).

A. Rule 23(b)(2)'s text authorizes certification of claims for injunctive or corresponding declaratory relief, and is silent as to monetary relief. Monetary claims must proceed under Rule 23(b)(3), which provides additional protections for defendants, absent class members, and the judicial system.

Rule 23(b)'s mandatory provisions must conform to their historical antecedents. *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 845 (1999). Intentional discrimination claims asserted on behalf of millions of disparate individuals seeking monetary relief could not be more different from the injunctive and declaratory relief challenges to *de jure* segregation on which Rule 23(b)(2) was based. And this difference is of constitutional dimension: Rule 23(b)(2) does not require notice to or permit opt-outs by absent class members, which due process requires where individual monetary relief is at stake. *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 811–12 (1985).

B. Some circuits have allowed certain monetary claims to proceed under Rule 23(b)(2), unless the relief sought "relates . . . predominantly to money damages." Advisory Committee Notes, 39 F.R.D. 69, 102 (1966). The substantial monetary awards sought by plaintiffs on behalf of millions of individuals here "predominate" over their claims for injunctive relief under the "incidental damages" standard applied in most circuits, and indeed any other standard.

ARGUMENT

The "class-action device . . . [is] an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano* v. *Yamasaki*, 442 U.S. 682, 700-01 (1979). Because of the dangers inherent in classwide adjudication, Rule 23 imposes prerequisites to class certification designed to ensure that any ensuing trial and judgment will be consistent with the rights of all parties, including the absent class members. *Taylor* v. *Sturgell*, 553 U.S. 880, 900-01 (2008); *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 629 (1997).

This Court adopted Rule 23 pursuant to the Rules Enabling Act, which mandates that procedural rules may not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). This Court has emphasized that Rule 23 "must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view." *Amchem*, 521 U.S. at 629; *see Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 845 (1999). Moreover, class actions certified under Rule 23 must also comply with the Due Process Clause (*Ticor Title Ins. Co.* v. *Brown*, 511 U.S. 117, 121 (1994) (per curiam)), and any uncertainties in the Rule's application should be resolved to avoid constitutional concerns. *Ortiz*, 527 U.S. at 845.

The district court's certification order, as modified by the Ninth Circuit, is not consistent with Rule 23. The wildly divergent claims asserted by the three named plaintiffs on behalf of millions of women cannot satisfy Rule 23(a)'s requirements of commonality, typicality, or adequacy without modifying the substantive elements of plaintiffs' claims and Wal-Mart's defenses. Moreover, mandatory certification under Rule 23(b)(2) does not encompass plaintiffs' request for billions of dollars in backpay and (potentially) punitive damages.

I. THE CERTIFICATION ORDER IS NOT CONSISTENT WITH RULE 23(a)

A "Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982). These prerequisites include "questions of law or fact common to the class," "claims or defenses of the representative parties [that] are typical of the claims or defenses of the class," and "representative parties [who] fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a); *Amchem*, 521 U.S. at 613.

Plaintiffs here bring two types of Title VII claims: disparate impact and disparate treatment. A "plaintiff establishes a prima facie disparate-impact claim by showing that the employer uses a *particular* employment practice that causes a disparate impact on one of the prohibited bases." *Lewis v. City of Chicago*, 130 S. Ct. 2191, 2197 (2010) (internal quotation marks omitted) (emphasis altered); *accord* 42 U.S.C. § 2000e-2; *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986 (1988) (a plaintiff's burden includes showing statistical disparities and a specific employment practice). To maintain a disparate-treatment claim, the plaintiff is also "required to prove that the defendant had a discriminatory intent or motive." *Ibid.* If the plaintiff succeeds on either type of claim, the court may award injunctive relief, backpay, "or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g)(1).

Where the plaintiff proves that she is the victim of intentional discrimination, and thus has made out a disparate-treatment claim, the plaintiff may also be entitled to compensatory damages (including emotional distress). *Id.* § 1981a(a)(1). Punitive damages may be awarded only in disparate-treatment cases, if the plaintiff proves that the employer acted "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." *Id.* § 1981a(b)(1).

Title VII codifies certain defenses. If the employer proves that an adverse employment action concerning an individual was "for any reason other than discrimination," the court shall not order the "hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay." 42 U.S.C. § 2000e-5(g)(2)(A). Even if the employee proves that the adverse employment action was motivated in part by discriminatory intent (*see id.* § 2000e-2(m)), the court *cannot* award backpay or damages if the employer proves that it "would have taken the same action in the absence of the impermissible motivating factor." *Id.* § 2000e-5(g)(2)(B)(ii); *Costa* v. *Desert Palace, Inc.*, 299 F.3d 838, 848 (9th Cir. 2002) (en banc), *aff'd*, 539 U.S. 90 (2003).

The propriety of class certification must be reviewed in light of the substantive elements of these claims and defenses, which would have to be litigated and decided in an eventual trial on the merits. *Amchem*, 521 U.S. at 621, 629. Doing so makes clear that the courts below committed multiple and manifest legal errors in allowing the case to proceed as a class action.[2]

A. The Named Plaintiffs' Interests Are Insufficiently Interrelated With The Absent Class Members' Interests

"The commonality and typicality requirements of Rule 23(a) tend to merge," and "[b]oth serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Falcon*, 457 U.S. at 157 n.13. In turn, the "adequacy inquiry," which "serves to uncover conflicts of interest" among the class members, "tends to merge" with the commonality and typicality requirements. *Amchem*, 521 U.S. at 625, 626 n.20 (internal quotation marks omitted). We address each of them in turn.

1. Commonality

A class may not be certified unless "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). This requirement ensures that the class representatives possess the same interests, and have suffered the same alleged injuries, as the absent class members and are thus qualified to bring claims on behalf of the entire group. *E. Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977).

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[2] A certification order is reviewed for abuse of discretion, but a district court abuses its discretion by misapplying the law. *Koon* v. *United States*, 518 U.S. 81, 100 (1996). Wal-Mart's arguments in this Court turn on the *legal* errors committed by the courts below, and therefore this Court's review is *de novo*. Moreover, the district court's refusal to resolve contested issues means that its "findings" are entitled to no deference. *See In re IPO Sec. Litig.*, 471 F.3d 24, 40-41 (2d Cir. 2006).

The plaintiff in *Falcon* challenged "subjective" promotion practices (457 U.S. at 151 n.4), and this Court held that a named plaintiff's experience of discrimination does not permit the district court simply to infer that "discriminatory treatment is typical of [the employer's employment] practices." *Id.* at 158; *see Rodriguez*, 431 U.S. at 403-04. Indeed, "[i]f one allegation of specific discriminatory treatment were sufficient to support an across-the-board attack, every Title VII case would be a potential companywide class action." *Falcon*, 457 U.S. at 159.

Rather, in asserting a company-wide class action based on discrimination, the plaintiff must bridge the "wide gap" between (1) plaintiff's own claim of discrimination, and (2) the existence of a class of persons who have suffered the same injury as the plaintiff as a result of a company-wide discriminatory policy. *Falcon*, 457 U.S. at 157. Plaintiffs here failed to do so.

a. Plaintiffs' Theory Fails To Bridge The *Falcon* Gap

This Court has held that a plaintiff can potentially bridge the gap between individual and representative claims, and secure authorization to proceed on behalf of absent persons, by adducing "[s]ignificant proof that an employer operated under a general policy of discrimination" that was implemented through "entirely subjective decisionmaking processes" in a manner that affected all class members. *Falcon*, 457 U.S. at 159 n.15.

1. Plaintiffs here made no pretense of offering "significant proof" that Wal-Mart's "general policy"

was discriminatory, as to either pay or promotion. To the contrary, it was undisputed that Wal-Mart operates under a general policy of *anti-discrimination*. The policies actually adopted and implemented by Wal-Mart forbid discrimination and affirmatively encourage diversity. Pet. App. 195a. "Title VII prohibits employment *practices*, not an abstract policy of discrimination." *Falcon*, 457 U.S. at 159 n.15; *see also Watson*, 487 U.S. at 994 (plurality). Yet plaintiffs could find no such practices. Indeed, the court below acknowledged "the *absence* of a specific discriminatory policy promulgated by Wal-Mart." Pet. App. 59a (emphasis added). That should have ended the inquiry.

2. Nor did plaintiffs offer proof that Wal-Mart *implemented* its lawful policies in a discriminatory fashion common to every single female employee.

They do not, and cannot, contend that Wal-Mart maintained an "*entirely* subjective decisionmaking process[ ]" (*Falcon*, 457 U.S. at 159 n.15 (emphasis added)), because the record is undisputed that in addition to its express anti-discrimination policy, Wal-Mart set salary ranges for its employees and established standards for its local managers to apply when making both pay and promotion decisions. J.A. 1468a-1469a, 1498a-1511a, 1609a, 1616a; D.C. Dkt. 270-508; Pet. App. 176a-177a.

Plaintiffs' expert explained that "[w]ritten guidelines for promotion are not absent in the Wal-Mart Personnel System," and that "[c]ompany guidelines specify minimum criteria based on discipline, tenure, and performance evaluations." J.A. 550a-551a; *see also* Pet. App. 203a ("the subjective decision-making in compensation and promotions takes place within parameters and guidelines that are highly uniform").

The district court found only that pay and promotion decisions are "*largely* subjective" (that is, discretionary), and that the "company maintains centralized corporate policies that provide some constraint on the degree of managerial discretion." Pet. App. 192a (emphasis added).

Plaintiffs have never offered significant proof that this framework was discriminatory. Courts have recognized that similar challenges do not satisfy the commonality requirement because the existence of non-subjective criteria cuts against the inference that there was "a common policy of discrimination that pervaded all of the . . . challenged . . . decisions." *Hartman* v. *Duffey*, 19 F.3d 1459, 1472 (D.C. Cir. 1994); *see also, e.g.*, *Denney* v. *City of Albany*, 247 F.3d 1172, 1186 (11th Cir. 2001).

Moreover, the mere fact that an employer delegates discretion to local managers to make pay or promotion decisions is not unlawful. *Watson*, 487 U.S. at 990 ("an employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct"). This Court has recognized that "employment decisions are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify." *Engquist* v. *Or. Dep't of Agric.*, 553 U.S. 591, 604 (2008); *see also* Pet. App. 77a ("Wal-Mart is correct that discretionary decision making *by itself* is insufficient to meet Plaintiffs' burden"); *id.* at 184a ("some level of subjectivity is inherent in, and in fact a useful part of, personnel decisions").

Millions of discretionary decisions by tens of thousands of individual managers constitute the *antithesis* of a common policy that affects everyone in the same manner. *See, e.g.*, *Cooper* v. *Southern Co.*, 390 F.3d 695, 715–16 (11th Cir. 2004); *Stastny* v. *S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 279 (4th Cir. 1980); Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. Chi. Legal F. 475, 508–09 (delegation of discretion to local managers is more logically viewed as a policy that permits many different practices at the local level).

Accordingly, plaintiffs failed to present "significant proof" that Wal-Mart operated under a "general policy" of discrimination, as *Falcon* requires. On the contrary, it is undisputed that Wal-Mart's pay and promotion system includes general policies that prohibit discrimination, as well as objective pay ranges and promotion criteria that impose constraints on the exercise of discretion by individual managers. This system will not support a finding of commonality, on a company-wide basis, for purposes of Rule 23(a).

3. In fact, to secure class certification, plaintiffs have advanced a theory of employment discrimination that simply is not actionable under Title VII.

They have hypothesized a "fundamentally new account of discrimination" that seeks to hold Wal-Mart liable for "broader labor market" characteristics. Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 156–60 (2009). This novel concept, which commonly is known as "structural discrimination," challenges widely accepted corporate structures as creating a "conduit for gender bias to potentially seep into the system." Pet. App. 192a. This theory would remake Title VII to allow claims challenging and seeking to redesign corporate structures to address societal phenomena for which employers are not responsible

(Nagareda, *supra*, at 153–60), an approach this Court has strongly rejected. *See Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 578 (1978) ("Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it"); *see also Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 242 (1989) (plurality) (recognizing "Congress' unwillingness to require employers to change the very nature of their operations in response to the statute"). Courts and commentators agree that the "structural discrimination" theory does not "stand[ ] as current law." Nagareda, *supra*, at 157 & n.234 (citing sources). Plaintiffs' bid for affirmance of the class certification order thus rests on a fundamental—and quite radical—remaking of Title VII law.

b. Plaintiffs' Evidence Fails To Bridge The *Falcon* Gap

Just as plaintiffs' *theory* of discrimination does not suffice, the *evidence* they offered also fails to establish commonality. As shown below, the evidence, at most, indicates that Wal-Mart's pay and promotion system *could* possibly result in individual disparities—not that it was designed to do so, was intended to do so, or would inevitably do so with respect to every single female employee around the country. Isolated instances of discrimination are not sufficient to satisfy the commonality requirement in Title VII cases. *Falcon*, 457 U.S. at 158.

Plaintiffs point to three categories of evidence—statistics, sociology, and anecdotes—but never bridge the wide gap between their own individual assertions and the classwide claims. "Like the proverbial shell game, . . . plaintiffs' circular presentation cannot conceal the fact that they have failed to offer any significant proof of a company-wide policy of discrimination, no matter which shell is lifted." Pet. App. 138a (Ikuta, J., dissenting).

1. *Statistics.* Plaintiffs' statistical expert, Richard Drogin, aggregated the data at the national or regional level to conclude that women were underrepresented in management and paid less than men in comparable positions. J.A. 476a, 493a-516a. Plaintiffs' theory of liability, however, rests on decisions made by individual managers at the store level; as a matter of law, disparities at the regional and national level are not probative of store-level discrimination. This is a failure of proof at the most basic level: Plaintiffs challenge decisions by individual store managers, but failed to adduce *any* statistical evidence of discrimination (or even disparities) at the *store* level. This is critically important because courts have uniformly recognized in multi-facility employment cases that discrimination must be shown in *each* facility or other decisionmaking unit. *Morgan* v. *UPS*, 380 F.3d 459, 464 (8th Cir. 2004); *see also Garcia* v. *Johanns*, 444 F.3d 625, 632 (D.C. Cir. 2006); *Cooper*, 390 F.3d at 715.

In response to plaintiffs' hypothesis of discrimination by individual store managers, Wal-Mart's expert Joan Haworth presented a store-by-store statistical analysis, which established that in more than 90% of the stores there were *no* statistically significant pay disparities between men and women. *See* J.A. 1468a-1515a; Pet. App. 202a-203a n.25. This showing was not rebutted by plaintiffs, who offered no store-by-store analysis of their own, and confirms the lack of commonality.

The district court rejected Wal-Mart's objections that Drogin's statistics were untethered to plaintiffs' store-level theory of discrimination on the ground that it would "engage the Court in a merits evaluation of the expert opinions." Pet. App. 197a. In so doing, the court mistakenly concluded that *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), barred it from making determinations that overlapped with the "merits" at the certification stage, including the appropriate level of aggregation of statistical analyses. Pet. App. 166a, 208a. Even plaintiffs do not defend this approach, recognizing that "the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 469 (1978) (internal quotation marks omitted); *see also Falcon*, 457 U.S. at 161.

The Ninth Circuit majority sidestepped this critical issue, erroneously opining that "[t]he disagreement" between Drogin and Haworth regarding the appropriate level of aggregation "*is* the common question." Pet. App. 71a. But, regardless of the strength of Wal-Mart's statistics, it is *plaintiffs'* burden to produce "significant proof" of a company-wide discriminatory policy; plaintiffs failed to meet that burden by failing to offer any proof of gender-based disparities at the store level.

In any event, as this Court held in *Falcon*, "actual, not presumed, conformance with Rule 23(a) remains . . . indispensable." 457 U.S. at 160. Indeed, plaintiffs concede that "district courts are required to conduct a 'rigorous analysis' of compliance with Rule 23, even when it overlaps with the merits." Pet. Opp. 24. And they take no issue with the "consensus among the circuits" (*ibid.*), holding that courts are not only authorized but obligated to resolve such disputes at the certification stage relating to Rule 23 factors. *See, e.g.*, *In re Hydrogen Peroxide Antitrust*

Litig., 552 F.3d 305, 323–24 (3d Cir. 2008); *In re IPO Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006).

With respect to commonality, the appropriate level of aggregation is not an evidentiary issue, but a legal one. *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642, 650–55 (1989), *superseded on other grounds by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 2, 105 Stat. 1071, 1071. The nationally or regionally aggregated statistics presented by plaintiffs do not show, one way or the other, whether their theory of discrimination—which turns on decisions made by individual store managers—can be proved on a classwide basis. *Cf. Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379, 388 (2008).

Plaintiffs never identified a corporate policy or practice to which the aggregated disparities Drogin identified could be attributed. Nothing in his analysis purports to link any alleged disparities in pay or promotion to subjective decisionmaking or any other aspect of Wal-Mart's pay and promotion system. Disparities in the abstract are not actionable under Title VII. *Lewis*, 130 S. Ct. at 2197. Plaintiffs thus failed to establish that a crucial element of their prima facie case could be proved on a classwide basis. *See ibid.*; *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U.S. 618, 624 (2007), *superseded on other grounds by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5, 5–6.

As Justice O'Connor observed in *Watson*, "[i]t is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance." 487 U.S. at 992 (plurality). "It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces." *Ibid.*; *see also* Pet. App. 193a (noting that plaintiffs' sociology expert agreed that "there are many reasons why men and women can have different career trajectories, some of which are not generally considered discriminatory, such as differing job-related skill requirements"); *id.* at 193a n.18.

Plaintiffs' suggestion that liability can be premised on aggregated disparities, if accepted, would require employers to treat people differently despite the absence of any previous departures from legal requirements. That is contrary to Congress's express instruction in Title VII (42 U.S.C. § 2000e-2(j)), and this Court therefore already has rejected such an approach to Title VII. *Ricci* v. *DeStefano*, 129 S. Ct. 2658, 2674-75 (2009); *see also Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 729-33 (2007) (plurality); *Watson*, 487 U.S. at 992 (plurality).

2. *Sociology.* Plaintiffs rely heavily on the notion, propounded by their sociologist William Bielby, that Wal-Mart and other large organizations are "'vulnerable' to gender bias." Pet. App. 195a. Bielby's testimony, however, defeats rather than supports a finding of commonality.

a. Bielby opined that Wal-Mart has a "strong corporate culture." Pet. App. 54a. The district court elaborated, explaining that this is reflected by such things as the way "the Home Office controls the temperature and music in each store throughout the country." *Id.* at 190a. And "employees at Wal-Mart stores attend a daily meeting held at shift changes, where managers discuss the company culture and employees do the Wal-Mart cheer." *Id.* at 188a.

189a. Bielby observed that Wal-Mart "employees achieve a common understanding of the company's way of conducting business" (J.A. 535a), but he could not say that this "way" was discriminatory or explain how this "common understanding" actually causes discrimination. Pet. App. 55a; *see Price Waterhouse*, 490 U.S. at 294 & n.5 (Kennedy, J., dissenting) (explaining that "Title VII creates no independent cause of action for sex stereotyping" and questioning validity of sociologist expert testimony regarding such stereotyping).

As the Ninth Circuit acknowledged, Bielby merely "interpret[ed] and explain[ed] the facts that *suggest* that Wal-Mart has and promotes a strong corporate culture—a culture that *may* include gender stereotyping." Pet. App. 54a (emphasis added). Bielby did not opine, however, that Wal-Mart's culture *does* include stereotyping, and the district court recognized that Bielby did not purport to opine on how often gender stereotyping *actually* occurred, let alone claim that it was common to all class members. 222 F.R.D. at 192; *see also* Pet. App. 195a ("Defendant rightly points out that Dr. Bielby cannot definitively state how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart").

The district court found that "Bielby's opinions have a built-in degree of conjecture." Pet. App. 195a. Bielby even "conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking." 222 F.R.D. at 192.

As the district court described it, Bielby's testimony suggests only that Wal-Mart's delegation of "a substantial range of discretion" to local managers "provides a wide enough conduit for gender bias *to potentially seep* into the system." Pet. App. 192a.

(emphasis added). The most that Bielby could do was critique Wal-Mart's equal employment policies and pay and promotion systems as potentially "vulnerable" to discrimination. J.A. 525a. But alleged "'[v]ulnerability' to sex discrimination is not sex discrimination." 509 F.3d at 1194 (Kleinfeld, J., dissenting); *see also Price Waterhouse*, 490 U.S. at 294 (Kennedy, J., dissenting) (While "[e]vidence of use by decision-makers of sex stereotypes is . . . relevant to the question of discriminatory intent," "[t]he ultimate question . . . is whether discrimination caused the plaintiff's harm"); Nagareda, *supra*, at 159-60.

Bielby's hypothesis that Wal-Mart may be "vulnerable" to gender stereotypes because it (like other organizations, including government agencies) has a "strong corporate culture" does not identify any discriminatory practices or procedures actionable under Title VII. By Bielby's lights, one would have to examine each individual pay or promotion decision—and there are millions of them—to determine whether it was actually infected with bias. As a result, Bielby's testimony affirmatively does not support, but affirmatively defeats, any finding of commonality in this case.

b. Because Bielby conceded that he could not conclude whether sex-based animus was responsible for all of the employment decisions at Wal-Mart or none of them, it is unclear what the probative value of his testimony, with respect to the Rule 23 prerequisites, could possibly be. As the authors of the seminal article on "social framework" analysis upon which Bielby purported to rely (J.A. 524a n.1) have explained, Bielby's "research into conditions and behavior at Wal-Mart did not meet the standards expected of social scientific research into stereotyping and discrimination." John Monahan et al., Essay, *Contex-*

tual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks," 94 Va. L. Rev. 1715, 1747 (2008). Moreover, "Dr. Bielby's social framework analysis fails because it lacks a reliable, scientific basis for linking general research to the corporate setting." *Id.* at 1745 n.83. Thus, his testimony "explicitly link[ing] general research findings on gender discrimination to specific factual conclusions about Wal-Mart in particular, exceeded the limitations on expert testimony established by the Federal Rules of Evidence and by . . . 'social framework' evidence." *Id.* at 1719.

The district court rejected Wal-Mart's motion to strike Bielby's opinion as unreliable and inadmissible. D.C. Dkt. 263 at 1-4; *see Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (where "opinion evidence . . . is connected to existing data only by the *ipse dixit* of the expert," a "court may conclude that there is simply too great an analytical gap between the data and the opinion proffered"). In affirming this ruling, the Ninth Circuit held that *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), does not have "exactly the same application at the class certification stage as it does to expert testimony . . . at trial." Pet. App. 57a n.22.

But Federal Rule of Evidence 702, which governs the reliability of expert testimony and implements *Daubert*, ensures that expert testimony is relevant and reliable. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). It is not limited to trial and is particularly important at the class certification stage, where the district court must "assess all of the relevant evidence admitted . . . and determine whether each Rule 23 requirement has been met, just as the judge would resolve a dispute about any other threshold prerequisite for continuing a lawsuit." *IPO*, 471 F.3d at 42. Expert evidence introduced to "establish a component of a Rule 23 requirement" therefore must be reliable. *Ibid.* Bielby's is not.

3. *Anecdotes.* Plaintiffs also submitted declarations from 63 remaining class members to support their theory that individual store managers wielded their discretion to make pay and promotion decisions in an intentionally discriminatory manner. These anecdotes included just 126 of Wal-Mart's more than 3,400 stores; plaintiffs thus presented *no* evidence of even a single act of discrimination in the vast majority of stores, including entire States, regions, and districts. *Cf. Mooney* v. *Aramco Servs. Co.*, 54 F.3d 1207, 1221 (5th Cir. 1995) (holding that ten instances of discrimination were insufficient to support a class of just 154 employees, because "[t]estimony of anecdotal witnesses with different supervisors, working in different parts of the company was simply too attenuated").

In *Teamsters*, the government proved 40 specific instances of discrimination out of a class of about 400 employees—a ratio of 1:10. *Int'l Bhd. of Teamsters* v. *United States* 431 U.S. 324, 338-39 (1977). Even if *all* of the declarations submitted by class members in this case recited actionable claims of discrimination (which they do not), plaintiffs fell far short of that kind of showing.

Plaintiffs' relative handful of declarations is, at most, evidence of nothing more than "isolated or sporadic" instances of (alleged) misconduct. *Cooper* v. *Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984). Here, the "affiants claim discrimination in different forms, at the hands of different people, in different stores, in different parts of the country, at different times, and under a constellation of facts unique to each individual," thereby undermining any claim of a common, company-wide policy. Pet. App. 127a (Ikuta, J., dissenting). Indeed, as explained in the next section, the declarations of both the named plaintiffs and the other class members demonstrate the varied and individualized nature of their claims.

Wal-Mart also submitted declarations from female employees that further refute the notion of any company-wide policy of discrimination. One such employee testified, "[w]hen I expressed interest in being promoted, various Store Managers and District Managers mentored me and assisted me in achieving my goals." J.A. 1609a. Another explained, "[i]n my career at Wal-Mart, I have never felt that I was denied an opportunity because I am a woman." *Id.* at 1635a. And there are many more. *See id.* at 1598a-1599a, 1615a-1616a, 1619a-1620a, 1625a-1628a, 1638a-1644a, 1650a, 1653a-1654a.

Far from establishing commonality, the declarations submitted by putative class members refute it.

2. Typicality

The named plaintiffs' claims and defenses are not "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The typicality requirement "limit[s] the class claims to those fairly encompassed by the named plaintiff's claims." *Gen. Tel. Co. of the Nw. v. EEOC*, 446 U.S. 318, 330 (1980). But the widely divergent claims of each named plaintiff "are not even typical with respect to each other, let alone with respect to the class." 509 F.3d at 1195 (Kleinfeld, J., dissenting).

For example, Ms. Dukes has alleged both race and sex discrimination. J.A. 76a-77a; C.A. App. 29-32. Her claim turns almost entirely on her allegations of *retaliation* for invoking the company's internal grievance procedures. J.A. 745a–746a. An element of such a claim is the employer's knowledge of an underlying discrimination charge or other protected activity (42 U.S.C. § 2000e-3(a)), which is incapable of classwide proof. Indeed, the district court correctly *excluded* retaliation claims from this case. Pet. App. 166a–167a n.4. Ms. Dukes's experience is decidedly not "typical."

Similarly, if Ms. Kwapnoski could prove that her store manager was unequally abusive, and that his "yell[ing]" violated Title VII (J.A. 1000a–1001a), such proof would not establish that any other woman in any other store was the victim of intentional discrimination. The same is true with respect to Ms. Arana's contention that her store manager discouraged her from applying for management training. *Id.* at 614a–616a.

This stark atypicality is apparent from the other declarations submitted by plaintiffs. Many of them do not even arguably allege employment discrimination. *See, e.g.*, J.A. 676a–678a, 729a–734a, 822a–826a, 1059a–1063a, 1081a–1087a; *see also* 509 F.3d at 1195–96 (Kleinfeld, J., dissenting). Indeed, it is simply inconceivable that *every single* female employee suffered intentional discrimination, which is what plaintiffs' theory posits. While some of the class members still work for Wal-Mart, many more do not. *See, e.g.*, J.A. 620a–623a, 727a, 859a. Some claim retaliation, while others merely claim unequal treatment. *See, e.g.*, *id.* at 676a–678a, 707a–715a, 822a–826a. "Some thrived while others did poorly." Pet. App. 161a (Kozinski, C.J., dissenting); *see also* J.A. 640a–644a, 947a–951a, 1030a–1034a, 1131a–1135a, 1315a–1321a.

Even if the named plaintiffs could prove their individual allegations of discrimination, such proof would not establish liability for any absent class member. "[A] class plaintiff's attempt to prove the existence of a companywide policy, or even a consistent practice within a given department, may fail even though discrimination against one or two individuals has been proved." *Cooper*, 467 U.S. at 879.

In addition, Wal-Mart's defenses to plaintiffs' claims are not identical as to all female employees. Ms. Dukes, for example, would be subject to unique defenses based on her long and uncontroverted history of disciplinary violations. Wal-Mart cannot be held liable for employment actions taken "for any reason other than discrimination," and in all events cannot be liable for backpay if it would have taken the same action regardless of motivation. 42 U.S.C. § 2000e-5(g)(2). Yet Ms. Dukes's repeated disciplinary issues are hardly "typical" of other employees. And proving (or failing to prove) an employee-specific defense may not make it any more or less likely that the next employee is subject to the same defense. *See Cooper*, 390 F.3d at 719.

3. Adequacy

Plaintiffs have also failed to demonstrate that the named plaintiffs "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent" and "tends to merge" with the commonality and typicality requirements. *Amchem*, 521 U.S. at 625, 626 n.20 (internal quotation marks omitted); *see Gen. Tel. Co. of the Nw.*, 446 U.S. at 331 ("the adequate-representation requirement is typically construed to foreclose the class action where there is a conflict of interest between the named plaintiff and the members of the putative class"). The class here is rife with such conflicts.

For example, the named plaintiffs waived any claim for compensatory damages, forfeiting the rights of individual class members to recover damages authorized by Congress solely in order to facilitate class treatment. It therefore is not true that, as plaintiffs have suggested, "[t]he members of the class are united in seeking the maximum possible recovery." *Amchem*, 521 U.S. at 610 (internal quotation marks omitted).

Moreover, the class includes both the alleged *victims* of discrimination (hourly employees) and the alleged *perpetrators* of that same discrimination (salaried managers). Plaintiffs accuse other class members of intentionally discriminating against them. Female manager class members will be called to testify against other class members regarding their decisions as managers, and thus will be cross-examined by class counsel. A clearer conflict is difficult to imagine, since the interests of each group in establishing liability (and maximizing recovery) are diametrically opposed. *Cf. Gen. Tel. Co. of the Nw.*, 446 U.S. at 331; *Hansberry* v. *Lee*, 311 U.S. 32, 44–46 (1940).

And the list goes on. The class here includes both former and present employees. Those who still work at Wal-Mart may have an interest in an injunction, but injunctive or corresponding declaratory relief cannot benefit those women who no longer work at the company and who therefore are interested *only* in individual monetary relief. 509 F.3d at 1196 (Kleinfeld, J., dissenting); *see also infra* Part II.B.1. Some class members (including the named plaintiffs) have poor performance records and are subject to unique defenses to liability. *See* 42 U.S.C. § 2000e-5(g)(2)(B)(ii). These individuals may have an interest in settlement, in part to avoid public recitation of their faults, while those who have strong performance records could have an interest in taking the case to trial. *See* 509 F.3d at 1196 (Kleinfeld, J., dissenting).

Another intractable conflict arises from the undisputed fact that "nonvictims might also benefit from the relief." Pet. App. 110a n.57 (internal quotation marks omitted). The district court acknowledged that allowing the class claims to proceed would "generat[e] a windfall for some employees . . . and undercompensat[e]" others. *Id.* at 254a (internal quotation marks omitted). But Title VII relief is limited to the "actual victims" of illegal discrimination. *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561, 579 (1984). Allowing nonvictims to share in any recovery creates an impermissible conflict with those who may have valid claims. Far from constituting "rough justice" (Pet. App. 254a), the decisions below would work an injustice. *See Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 812 (1985) (the "Due Process Clause . . . requires that the named plaintiff at all times adequately represent the interests of the absent class members").

Where subsets of plaintiffs have different interests in the litigation, "the interests of those within the single class are not aligned." *Amchem*, 521 U.S. at 626 (adequacy not satisfied when conflicts exist regarding nature and timing of relief); *see also Rodriguez*, 431 U.S. at 405. Inadequate representation violates the Due Process Clause as well as Rule 23. *Hansberry*, 311 U.S. at 44–45. This Court therefore has warned district courts to exercise "caution when individual stakes are high and disparities among class members great." *Amchem*, 521 U.S. at 625. Here, the stakes could not be higher, yet the "certification in this case does not follow the counsel of caution." *Ibid.*

In short, if plaintiffs were adequate representatives, they would not be forced to forfeit the rights of absent class members to persuade the courts to allow them to represent the class, and their desire to be class representatives would not conflict with their duty to act in the best interests of the absent class members. *See Amchem*, 521 U.S. at 618; *Broussard* v. *Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 337–39 (4th Cir. 1998). These conflicts are heightened because certification under Rule 23(b)(2) does not permit absent class members to opt out of the litigation. Absent class members are powerless to extricate themselves from the class even though their interests squarely conflict with those of the named plaintiffs purporting to represent them.

Plaintiffs sought to lump together in one lawsuit every female Wal-Mart employee without regard to the staggering number of differences—in jobs, performance, experience, advancement, location, and a host of other factors—that exist within that divergent group of individuals. *See* Pet. App. 161a (Kozinski, C.J., dissenting). This Court has condemned the practice of certifying "across-the-board" employment class actions. *Falcon*, 457 U.S. at 157. The decision below cannot be reconciled with that directive or with the Court's admonition against "judicial inventiveness" in class-action procedure. *Amchem*, 521 U.S. at 620.

As this case well illustrates, "the rulemakers' prescriptions for class actions may be endangered by those who embrace Rule 23 too enthusiastically just as they are by those who approach the Rule with distaste." *Amchem*, 521 U.S. at 629 (internal quotation marks and alterations omitted).[3]

B. Procedural Defects Cannot Be Remedied By Altering The Substantive Law

A court cannot certify a class without finding that the class claims and defenses, as certified, can be tried to judgment in a manner that protects the rights of all parties and the judicial system. Fed. R. Civ. P. 23(c)(2); *see Amchem*, 521 U.S. at 621, 629. The Rule 23(a) factors are designed to ensure that only those cases that are sufficiently cohesive to permit such a trial will be certified. *Id.* at 623 (it is "class cohesion that legitimatizes representative action in the first place"). A case that does not meet one or more of the Rule 23(a) prerequisites, in contrast, likely could not be tried consistently with due process and therefore may not be certified as a class action. *Cf. Taylor*, 553 U.S. at 901.

But because this case, properly analyzed, does not meet the prerequisites imposed by Rule 23(a), a trial on the merits would be completely unmanageable and unfair. The courts below recognized as much; but rather than denying certification, they elected to relieve plaintiffs of the burden of proving elements of their case and to preclude Wal-Mart from proving elements of its defenses. This Court has repeatedly instructed the lower courts that the Rules Enabling Act prohibits elevating procedural rules over substantive rights in the class-action context. *Ortiz*, 527 U.S. at 845 ("no reading of [Rule 23] can ignore the Act's mandate"); *Amchem*, 521 U.S. at 612-13. The decisions below, however, omit any substantive discussion of this crucial statute.

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[3] This is not to suggest that Title VII cases cannot proceed as class actions. Rather, where (as here) an employment discrimination claim is premised on discretionary decisionmaking, the class at minimum must bear some relation to the decisionmaking unit (store, department, etc.). *See Morgan*, 380 F.3d at 464; 42 U.S.C. § 2000e-5(f)(3).

1. Plaintiffs' Burden

Plaintiffs' disparate-impact claim requires them to prove "a particular employment practice that causes a disparate impact" on a prohibited basis. 42 U.S.C. § 2000e-2(k)(1)(A)(i); *Lewis*, 130 S. Ct. at 2197. Their disparate-treatment claim "comprises two elements: [a] an employment practice, and [b] discriminatory intent." *Ledbetter*, 550 U.S. at 631. Plaintiffs have failed to demonstrate how they could establish either, much less both, on a classwide basis.

a. *No Unlawful Employment Practice.* As previously discussed, the Ninth Circuit acknowledged "the *absence* of a specific *discriminatory practice* promulgated by Wal-Mart." Pet. App. 59a (emphases added). In the absence of such a practice, plaintiffs are forced to argue that individual store managers unilaterally exercised discretion in a common manner that disadvantaged female employees.

Because store-by-store proof would indisputably destroy commonality, the district court simply relieved plaintiffs of the burden of proving their own theory: "Because the focal point will be the practice of utilizing excess subjectivity, *rather than the facts concerning each individual decision*, the . . . subjective nature of [Wal-Mart's] personnel practices does not defeat commonality in this case." Pet. App. 187a (emphasis added). By relieving plaintiffs of proving a statutory element of their case, the district court committed clear legal error. *Hohider* v. *UPS*, 574 F.3d 169, 184 (3d Cir. 2009); *McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 223-25 (2d Cir. 2008).

If this case were to proceed to trial, and judgment, without requiring plaintiffs to prove that individual employment decisions were unlawful, then Wal-Mart could be held liable for backpay under Title VII to persons who did not suffer any actionable discrimination. The class device cannot be used to subvert the substantive law in this manner. *See Philip Morris USA Inc.* v. *Scott*, 131 S. Ct. 1, 3-4 (2010) (Scalia, Circuit Justice).

b. *No Discriminatory Animus.* Moreover, the Ninth Circuit and the district court failed even to address the intent element, let alone grapple with the fact that determining whether "excess subjectivity" was exercised in an intentionally discriminatory fashion requires individualized proof. *See, e.g., Garcia*, 444 F.3d at 632.

Where, as here, a multi-facility discrimination class action requires proof of intentional decisionmaking by managers in separate facilities, it cannot be certified. *See Cooper*, 390 F.3d at 715. Indeed, under Title VII, plaintiffs would have to prove that the motive for *every single* discretionary pay and promotion decision affecting every single class member was discriminatory. *See* 42 U.S.C. § 2000e-5(g)(2). But just as it "does not follow . . . that the particular supervisors to whom this discretion is delegated always act without discriminatory intent" (*Watson*, 487 U.S. at 990), it also does not follow that each of them acted *with* discriminatory intent regarding millions of distinct pay and promotion decisions made within the context of Wal-Mart's express anti-discrimination policies.

The intent element cannot be eliminated simply to achieve class certification. If holding plaintiffs to their burden of proving each element of their claim would foreclose one or more of the Rule 23(a) prerequisites, then the consequence is that the class may not be certified, not that the substantive element of the liability claim can be ignored. *See Hohider*, 574 F.3d at 184; *see also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (plurality) (a "class action . . . leaves the parties' legal rights and duties intact").

2. Wal-Mart's Defenses

Wal-Mart has a right to present statutory defenses that would by their very nature destroy commonality and typicality (and, for that matter, adequacy). The lower courts, recognizing that allowing Wal-Mart to present the defenses ordinarily available to employers in Title VII cases would undo the cohesiveness necessary for aggregated adjudication of plaintiffs' claims, elected to deny Wal-Mart the right to defend itself. This too was error.

Aggregated disparate-treatment claims normally proceed in two stages. *Cooper*, 467 U.S. at 876 n.9; *Teamsters*, 431 U.S. at 336, 361-62. First, the plaintiffs must prove that "discrimination was the company's standard operating procedure." *Teamsters*, 431 U.S. at 336. If they carry this burden, a rebuttable presumption arises that each class member is entitled to appropriate relief. *Id.* at 361. At the second stage, "a district court must usually conduct additional proceedings . . . to determine the scope of individual relief" and afford the employer the opportunity "to demonstrate that the individual . . . was denied an employment opportunity for lawful reasons." *Id.* at 361-62; *see also* 42 U.S.C. § 2000e-5(g)(2)(A).

Like the right to a jury trial, the second stage of a *Teamsters*-bifurcated proceeding may be dispensed with only on the consent of both parties. Moreover, at that second stage, the court's task will "not be a simple one" because it has to "make a substantial number of individual determinations" to determine which class members "were actual victims." *Teamsters*, 431 U.S. at 371; *see also Price Waterhouse*, 490 U.S. at 266 (O'Connor, J., concurring in judgment). It would be totally infeasible to make such determinations in this case, as plaintiffs "implicitly concede[d]" below. Pet. App. 251a.

While the district court acknowledged that holding such individual hearings "is impractical on its face," and "not feasible here" (Pet. App. 251a), it certified the class anyway. The court's solution was simply to extinguish Wal-Mart's right to individualized hearings altogether on the theory that such hearings are "inconsistent with the fundamental character of the class action proceeding." *Id.* at 245a. By elevating procedure over substance, yet again, the district court transgressed the most critical dictate of the Rules Enabling Act—that the desire to certify a class action must not override substantive rights.

Under Title VII, Wal-Mart is entitled to prove that an individual employment action was taken for non-discriminatory reasons, 42 U.S.C. § 2000e-5(g)(2)(A), or that it "would have taken the same action in the absence of the impermissible motivating factor." *Id.* § 2000e-5(g)(2)(B). Thus, even if plaintiffs could prove actionable discrimination, Wal-Mart would be entitled to rebut the claims of each individual class member. *See Reeb v. Ohio Dep't of Rehab.*

& *Corr.*, 435 F.3d 639, 651 (6th Cir. 2006). Moreover, only injured individuals are entitled to recover backpay under Title VII. 42 U.S.C. § 2000e-5(g)(2); *Price Waterhouse*, 490 U.S. at 245 n.10 (plurality) ("Title VII does not authorize affirmative relief for individuals as to whom, the employer shows, the existence of systemic discrimination had no effect").

The Ninth Circuit expressly recognized that, as to some class members, "unequal pay or non-promotion was due to something *other* than gender discrimination," but nonetheless endorsed procedures that would let them recover anyway while barring Wal-Mart from presenting its otherwise available defenses to those claims. Pet. App. 110a n.56. The district court was equally explicit: "[Wal-Mart] is not . . . entitled to circumvent or defeat the class nature of the proceeding by litigating whether every individual store discriminated against individual class members." *Id.* at 247a. There could not be a clearer violation of the Rules Enabling Act.

The Ninth Circuit's decision also violates Wal-Mart's "right to litigate the issues raised . . . guaranteed . . . by the Due Process Clause" (*United States* v. *Armour & Co.*, 402 U.S. 673, 682 (1971)), which includes the right "to present every available defense." *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) (internal quotation marks omitted). Corporations, even large ones, do not forfeit their constitutional rights when they are sued. *See BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 585 (1996).

In short, in the face of this Court's admonitions that the Rules Enabling Act counsels against "adventurous application" of Rule 23 (*Ortiz*, 527 U.S. at 845), the courts below refashioned Title VII in service of the procedural class-action device. Had they adhered to the requirements of both governing substantive law and Rule 23(a), they would have reached the inescapable conclusion that this class cannot be certified.

II. THE CERTIFICATION ORDER IS NOT CONSISTENT WITH RULE 23(b)(2)

Rule 23(b)(2) authorizes certification only where "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." In addition to injunctive and declaratory relief, plaintiffs seek backpay and punitive damages — monetary relief that, in the aggregate, would amount to billions of dollars. Rule 23(b)(2), however, does not authorize certification of any monetary claims, and certainly not individual monetary claims that predominate over the injunctive and declaratory claims, as the monetary claims here clearly do.

In the 1966 amendments to Rule 23, an older set of class-action categories — "true," "hybrid," and "spurious" — was replaced, and the modern class action was born. *Amchem*, 521 U.S. at 613. Subdivision (b)(1) captures a defined subset of cases — such as those involving riparian landowners, security holders, or claimants to a limited fund — that inherently required classwide resolution. Fed. R. Civ. P. 23(b)(1); *Ortiz*, 527 U.S. at 833; Advisory Committee Notes, 39 F.R.D. 69, 100-01 (1966). Subdivision (b)(2) is premised on "the absence of a claim for monetary relief and the nature of the claim asserted." *Sosna v. Iowa*, 419 U.S. 393, 398 n.4 (1975); *accord Amchem*, 521 U.S. at 614. And subdivision (b)(3) added a more flexible category of action to address "situations in which class action treatment is not as clearly called for as it is in Rule 23(b)(1) and (b)(2)," yet is nevertheless "convenient and desirable." *Id.* at 615 (internal quotation marks omitted).

Subdivision (b)(3) was an "'adventuresome' innovation" (*Amchem*, 521 U.S. at 614) designed to accommodate the "Rule's growing edge." *Ortiz*, 527 U.S. at 862. To prevent abuse, this subdivision was supplemented by "further protective devices" and procedural requirements not applicable to the other categories of class actions. Statement on Behalf of the Advisory Committee on Civil Rules 9 (June 10, 1965), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV06-1965.pdf. Specifically, safeguards in the form of mandatory notice and opt-out procedures were designed for subdivision (b)(3) alone. Fed. R. Civ. P. 23(c)(2). And (b)(3) certification was deemed appropriate only where "questions of law or fact common to class members predominate over any questions affecting only individual members" *and* "a class action is superior to other available methods" of adjudication. Plaintiffs here cannot meet this "predominance" requirement, which is a "vital prescription" governing monetary claims that is "far more demanding" than Rule 23(a)'s commonality requirement. *Amchem*, 521 U.S. at 622-24.

In contrast, Rule 23(b)(2) does not require notice to absent class members, nor does it permit class members to opt out of the lawsuit. For that reason, courts considering certification under Rule 23(b)(2), like those contemplating certification under Rule 23(b)(1) (the other "mandatory" provision), must take the "prudent course" of staying "close to the historical model" and the Advisory Committee's "traditional paradigm." *Ortiz*, 527 U.S. at 842, 864; *see also Amchem*, 521 U.S. at 614, 625; *Califano*, 442 U.S. at 700-01.

Here, the Ninth Circuit sanctioned a mandatory class of potentially millions of women asserting highly individualized claims for billions of dollars in backpay (and possibly punitive damages). That class finds no support in Rule 23(b)(2)'s plain language or in the provision's historical antecedents.

A. Rule 23(b)(2) Does Not Encompass Claims For Monetary Relief

Rule 23(b)(2) does not on its face authorize certification of any class claims seeking monetary relief. *Sosna*, 419 U.S. at 397 n.4. This Court has long recognized that the starting point for determining a Federal Rule's meaning and scope is its text. *Schmuck* v. *United States*, 489 U.S. 705, 716 (1989) (interpretation "is grounded in the language and history of the Rule"); *cf. Krupski* v. *Costa Crociere S.p.A.*, 130 S. Ct. 2485, 2493 (2010); *Libretti* v. *United States*, 516 U.S. 29, 38 (1995).

Rule 23(b)(2)'s text—noticeably absent from the Ninth Circuit's analysis—is plain: Certification is appropriate if the requirements of Rule 23(a) and Rule 23(c) are met, *and* when "the party opposing the class has acted . . . on grounds that apply generally to the class, so that *final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole*." Fed. R. Civ. P. 23(b)(2) (emphasis added). The Rule is silent as to monetary relief, or indeed any kind of equitable relief other than injunctive or corresponding declaratory relief. *See Leatherman* v. *Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (*expressio unius est exclusio alterius*).

This Court therefore has noted the substantial probability that monetary claims cannot be certified under Rule 23(b)(2). *Ticor*, 511 U.S. at 121. Due process *requires* an opportunity for absent class members to opt out of claims for monetary relief. *Shutts*, 472 U.S. at 811–12; *see also S. Cent. Bell Tel. Co.* v. *Alabama*, 526 U.S. 160, 167–68 (1999); *Richards* v. *Jefferson Cnty.*, 517 U.S. 793, 799–802 (1996). Rule 23(b)(2)'s prohibition of opt-outs therefore admits of only two conclusions: Either this subdivision is unconstitutional, or it does not apply to monetary claims. The doctrine of constitutional avoidance requires choosing the second option, and limiting Rule 23(b)(2) to the injunctive or corresponding declaratory relief it expressly encompasses. *Ortiz*, 527 U.S. at 845.

Although some courts, including the district court here (Pet. App. 243a), have purported to confer opt-out rights on (b)(2) class members, Rule 23 does not authorize this procedure, and this Court has repeatedly warned the lower courts against re-writing the Rule. *Amchem*, 521 U.S. at 620; *see also Leatherman*, 507 U.S. at 168; *Harris* v. *Nelson*, 394 U.S. 286, 298 (1969). Such unauthorized judicial modifications "undo the careful interplay between Rules 23(b)(2) and (b)(3)" by permitting plaintiffs to pursue substantial monetary claims without "requiring [them] to meet the rigorous Rule 23(b)(3) requirements" of predominance and superiority. *McManus* v. *Fleetwood Enters., Inc.*, 320 F.3d 545, 554 (5th Cir. 2003); *see also Bolin* v. *Sears, Roebuck & Co.*, 231 F.3d 970, 976 (5th Cir. 2000); *Jefferson* v. *Ingersoll Int'l Inc.*, 195 F.3d 894, 897–99 (7th Cir. 1999). If a court must amend the Rule to satisfy due process, then the Rule simply does not apply. *Ortiz*, 527 U.S. at 848.

The natural reading of Rule 23(b)(2)'s text and structure is also consistent with the historical model for Rule 23(b)(2). *Ortiz* held that pre-1966 cases on which the Advisory Committee drew when amending

Rule 23 provided both sufficient and presumptively necessary preconditions to certification. 527 U.S. at 842; Pet. App. 148a (Ikuta, J., dissenting). Only those limited categories of cases could proceed as mandatory class actions without the additional requirements and procedural safeguards required under Rule 23(b)(3).

Rule 23(b)(2) was written to encompass "actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration." Advisory Committee Notes, 39 F.R.D. at 102; *see also Amchem*, 521 U.S. at 614. That does not mean, of course, that all "civil rights" cases, including any variety of discrimination claims under Title VII, are covered by (b)(2), as plaintiffs have suggested. Pet. Opp. 15. That position would entirely ignore the "illustrative" civil rights actions that the Advisory Committee took care to include. Advisory Committee Notes, 39 F.R.D. at 102.

Every single one of the cases on which the mandatory Rule 23(b)(2) was based involved a challenge to racial segregation. *See* Pet. App. 149a n.22 (Ikuta, J., dissenting) (citing cases); *see also, e.g., Bailey* v. *Patterson*, 369 U.S. 31, 32 (1962) (per curiam); *Evers* v. *Dwyer*, 358 U.S. 202, 202 (1958) (per curiam). Litigated before the Civil Rights Acts of 1964 and 1991, these cases sought neither backpay, nor compensatory or punitive damages; they were not tried before juries; and no individual relief was sought. *Bailey*, 369 U.S. at 32; *Evers*, 358 U.S. at 203.

None of the historical antecedents allowed class resolution of monetary claims or addressed individual injury. *See, e.g., Potts* v. *Flax*, 313 F.2d 284, 289-90 (5th Cir. 1963) (noting in school desegregation case "considerable doubt" that relief could be confined to certain children). Instead, the drafters permitted only adjudication of injunctive and declaratory claims—a distinction between remedies well-known at the time of both the 1938 and 1966 versions of Rule 23.

All of the historical antecedents involved conduct (a facially discriminatory policy) that affected every class member alike and a naturally cohesive request for injunctive relief to the exclusion of individualized monetary relief. Such challenges to open segregation are a far cry from the novel claims alleged here, which are essentially tort claims for unliquidated damages (*see Price Waterhouse*, 490 U.S. at 264 (O'Connor, J., concurring in judgment)), based on individualized pay and promotion decisions, made through the exercise of discretion within a system of identified criteria governed by express anti-discrimination and diversity policies meant to foster equal treatment. To say the least, these claims are at the "growing edge" of class-action law contemplated by Rule 23(b)(3), not the well-known desegregation cases captured in Rule 23(b)(2)'s historical antecedents. *Ortiz*, 527 U.S. at 862; *cf. Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 746-47 (5th Cir. 1996).

Fidelity to the text, structure, and historical antecedents does not prevent class-based litigation of employment cases. Rather, it simply instructs that the appropriate class certification analysis for claims for monetary relief, or for novel theories of decentralized, intentional discrimination not contemplated by the antecedents, is that described in Rule 23(b)(3). *See, e.g., Reeb*, 435 F.3d at 651. That category, with its due process protections for absent class members and defendants (including finality and security from later collateral attack), is the appropriate vehicle for such cases. *See Falcon*, 457 U.S. at 161 (critiquing the "tacit assumption" that "all will be well for surely the plaintiff will win and manna will fall on all members of the class") (internal quotation marks omitted).

B. Plaintiffs' Monetary Claims "Predominate"

Several circuits have ruled that *some* monetary claims may proceed under Rule 23(b)(2). These decisions rest entirely on an inference drawn from the Advisory Committee's statement that a class cannot be certified under Rule 23(b)(2) where the relief sought "relates . . . predominantly to money damages." Advisory Committee Notes, 39 F.R.D. at 102; *see also Krupski*, 130 S. Ct. at 2498–99 (Scalia, J., concurring) (explaining that Advisory Committee Notes cannot supersede the plain text of a Rule).

The circuits have developed three approaches for determining when monetary claims "predominate": the "incidental damages" approach articulated by the Fifth Circuit and adopted by most others, the "ad hoc" approach applied only in the Second Circuit, and the "superior-in-strength" approach announced for the first time in the decision below. Pet. 10–12. Under any of these three approaches, the billions of dollars of monetary relief sought here predominate and may not, therefore, be certified under Rule 23(b)(2).

If the Court elects to depart from Rule 23(b)(2)'s text, structure, and history, and allow some claims for monetary relief to be certified under that subdivision, it should adopt a variant of the "incidental damages" standard. That approach, followed by the majority of the circuits, provides that Rule 23(b)(2) certification is prohibited where plaintiffs seek monetary relief unless the relief sought will "flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief." *Allison* v. *Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998); *see also Reeb*, 435 F.3d at 649–50; *Thorn* v. *Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 330 n.25 (4th Cir. 2006); *Cooper*, 390 F.3d at 720; *Lemon* v. *Int'l Union of Operating Eng'rs*, 216 F.3d 577, 580–81 (7th Cir. 2000).

Unlike the alternatives articulated by the Second and Ninth Circuits, the incidental damages standard comes closest to capturing the two key elements of an appropriate Rule 23(b)(2) class. First, the relief provided extends, as the Rule itself requires, to the class "as a whole." Fed. R. Civ. P. 23(b)(2). Second, when properly applied, the standard permits only those forms of monetary relief that occur automatically or naturally flow from the injunctive relief, without the necessity of further individualized hearings. The prototypical examples are attorneys' fees and costs. *See, e.g.*, 42 U.S.C. § 1988. Such relief does not necessarily undermine Rule 23(b)(2) cohesion because it benefits the class as a whole and does not require individualized entitlement determinations—and it furthers civil rights enforcement consistent with Rule 23(b)(2)'s historical antecedents.

1. The Majority Of The Class Has Standing To Seek Only Monetary Relief

Rule 23(b)(2) authorizes certification where "final injunctive or corresponding declaratory relief is appropriate *respecting the class as a whole.*" Fed. R. Civ. P. 23(b)(2) (emphasis added). That is not the case here.

A majority of the members of this purported class are former employees who lack standing to secure injunctive or declaratory relief. *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937). More than half of the declarations submitted by plaintiffs are from former employees, and plaintiffs themselves have pointed to a 55.6% annual turnover rate in the retail industry. C.A. Dkt. 150 at 4 n.1 (No. 04-16688).

The Ninth Circuit purported to "solve" this problem by limiting the class to those persons who were employed on or after the date the complaint was filed. Pet. App. 100a–102a. But that arbitrary line-drawing ignores fundamental principles of constitutional law. A plaintiff who left the company the day after the complaint was filed no more has standing to obtain injunctive or declaratory relief than a person who quit the day before; each plaintiff must have standing to secure the requested relief *throughout* the lawsuit. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Deakins v. Monaghan*, 484 U.S. 193, 199–200 (1988); *see also Ortiz*, 527 U.S. at 831 (Rule 23 "must be interpreted in keeping with Article III constraints") (internal quotation marks omitted); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974).

Because more class members are seeking *only* individual monetary relief than may seek the relief authorized by Rule 23(b)(2), the injunctive and declaratory relief requests cannot possibly predominate over the monetary relief requests under *any* standard. *Cooper*, 390 F.3d at 721.

2. Plaintiffs' Backpay Claims "Predominate"

The fact that plaintiffs are seeking monetary relief in the form of backpay, as opposed to compensatory damages, does not alter the conclusion that the request for monetary relief predominates.

While some lower courts have certified Rule 23(b)(2) classes seeking backpay on the basis that such claims are "equitable," none of those courts has attempted to reconcile a backpay request with the fact that Rule 23(b)(2) is expressly limited to declaratory and injunctive relief. *See, e.g., Domingo* v. *New England Fish Co.*, 727 F.2d 1429, 1445 (9th Cir. 1984) (per curiam) (citing cases); *Pettway* v. *Am. Cast Iron Pipe Co.*, 494 F.2d 211, 259-60 (5th Cir. 1974). If the "Rule's drafters had intended the Rule to extend to *all* forms of equitable relief"—rather than just to injunctive or corresponding declaratory relief—"the text of the Rule would say so." *Thorn*, 445 F.3d at 331. Instead, Rule 23(b)(2)'s text says "nothing whatsoever about equitable relief." *Ibid.*

While backpay is a form of monetary relief that is sometimes characterized as equitable, it is ultimately nothing more than monetary compensation for past harm. "Congress treated backpay as equitable in Title VII only in the narrow sense that [Title VII] allowed backpay to be awarded *together with* equitable relief." *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 218 n.4 (2002) (internal quotation marks, alteration, and citation omitted).

Moreover, the features that make backpay "an integral part of an equitable remedy, a form of restitution" (*Curtis* v. *Loether*, 415 U.S. 189, 197 (1974)), are those that render it particularly ill-suited to Rule 23(b)(2) certification. That is because even after a determination of liability, backpay awards are discretionary, not automatic, and therefore require an individual analysis with respect to each plaintiff to determine whether the court should exercise its discretion. 42 U.S.C. § 2000e-5(g)(2); *see also Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 226 (1982) (confirming that "backpay is not an automatic or mandatory remedy") (internal quotation marks omitted); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 424 (1975) (Title VII backpay awards are discretionary in reaching "a just result in light of the circumstances peculiar to the case") (internal quotation marks omitted); *cf. eBay Inc.* v. *MercExchange, L.L.C.*, 547 U.S. 388, 391–93 (2006) ("injunctive relief is an act of equitable discretion" that does not follow "automatically" from liability determination).

And as this Court has repeatedly made clear, Title VII bars "affirmative relief" where the employer shows that an individual suffered no injury. *Compare Price Waterhouse*, 490 U.S. at 245 n.10 (plurality), *and Stotts*, 467 U.S. at 579, *with Pettway*, 494 F.3d at 257 (assuming relief need not relate to who was injured or the extent of the injury).

Although in most cases, including this one, the highly individualized nature of a backpay claim should preclude (b)(2) certification because the claim is not based on grounds generally applicable to the class, some courts have suggested that such certification *might* be appropriate where injunctive and declaratory relief predominate *despite* the presence of a request for backpay. *See Hohider*, 574 F.3d at 202 ("it [is] necessary . . . to determine whether plaintiffs' back-pay request actually conforms with the requirements of Rule 23, including Rule 23(b)(2)'s monetary-predominance standard"); *Thorn*, 445 F.3d at 331; *Heffner* v. *Blue Cross & Blue Shield of Ala.*, *Inc.*, 443 F.3d 1330, 1340 (11th Cir. 2006); *Eubanks* v. *Billington*, 110 F.3d 87, 95 (D.C. Cir. 1997).

But those courts would not permit certification in this case. The backpay sought here is not a "uniform group remed[y]" unrelated to the "merits of each class member's individual case." *Allison*, 151 F.3d at 414; *see Lemon*, 216 F.3d at 581. Given that it would take a trier of fact years (if not decades) to conduct additional proceedings—which nearly every court to consider the issue has required as part of the (b)(2) certification—the backpay request is anything but "incidental." *See Shipes* v. *Trinity Indus.*, 987 F.2d 311, 315 (5th Cir. 1993) (explaining that it took from 1985 to 1992 to process the backpay claims of a class of 400 employees). And awarding backpay without individualized hearings to determine each class member's entitlement to such recovery, through a "formula" or otherwise, would violate the Rules Enabling Act and due process. *McLaughlin*, 522 F.3d at 231–32; *In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974). Under any and all standards, therefore, the billions of dollars of backpay claims predominate—indeed, they engulf every other issue in the case.

3. Punitive Damages Will Always Predominate

No court of appeals has *ever* before suggested that punitive damages could be certified under Rule 23(b)(2). In seeking such certification, plaintiffs pursued a novel and aggressive litigation strategy; in not foreclosing that strategy, the Ninth Circuit broke ranks with every other circuit.

This Court has "admonished that 'punitive damages pose an acute danger of arbitrary deprivation of property.'" *State Farm Mut. Auto. Ins. Co.* v. *Camp-*

bell, 538 U.S. 408, 417 (2003) (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994)). These due process concerns are magnified in class actions. *See Allison*, 151 F.3d at 418; *Cooper*, 390 F.3d at 721.

The Ninth Circuit wrongly noted in passing that "this case does not require individualized punitive damages determinations." Pet. App. 98a. In fact, *every* case litigated under Title VII requires individualized determinations before punitive damages can be awarded, because only an "aggrieved individual" can collect punitive damages. 42 U.S.C. § 1981a(b)(1). And Title VII unequivocally precludes any monetary award to nonvictims. *See id.* § 2000e-5(g)(2); *Price Waterhouse*, 490 U.S. at 245 n.10 (plurality); *Costa*, 299 F.3d at 857.

Moreover, due process forbids courts from "punish[ing] and deter[ing] conduct that bore no relation to the [plaintiffs'] harm." *State Farm*, 538 U.S. at 422. In *Philip Morris USA v. Williams*, 549 U.S. 346 (2007), this Court squarely held that "the Due Process Clause prohibits a State from punishing an individual without first providing that individual with an opportunity to present *every* available defense." *Id.* at 353 (emphasis added) (internal quotation marks omitted). And the Seventh Amendment, which guarantees the right to a jury trial, also preserves Wal-Mart's right to have those defenses resolved by the same jury that decided liability. *See Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 355 (1998); *Tull v. United States*, 481 U.S. 412, 422-23 (1987).

Thus, to recover punitive damages, in addition to proving intentional discrimination, class members here must "make an *additional* 'demonstrat[ion]' of their eligibility for punitive damages." *Kolstad v.*

Am. Dental Ass'n, 527 U.S. 526, 534 (1999) (emphasis added; alteration in original) (citing 42 U.S.C. § 1981a(b)(1)). As with plaintiffs' backpay claims, that highly individualized proof fatally undermines the cohesion necessary under Rule 23(b)(2). *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998).

* * *

Class actions serve a valuable role in our civil justice system. But while some aggregation may increase efficiency without sacrificing fairness, aggregation for its own sake, especially on the excessive scale and unlimited scope presented here, is neither efficient nor fair to anyone. Courts must ensure that the substantive rights of the parties—including defendants and absent class members—are not sacrificed on the altar of procedure. *Amchem*, 521 U.S. at 629. The courts below failed to do so.

CONCLUSION

The judgment should be reversed and the case remanded with instructions to decertify the class.

Respectfully submitted.

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APPENDIX

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28 U.S.C. § 2072 provides:

§ 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

42 U.S.C. § 1981 provides:

§ 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981a provides:

§ 1981a. Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5, 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [42 U.S.C. 2000e-2, 2000e-3, 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(2) Disability

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5, 2000e-16] (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of title 29 and the regulations implementing section 791 of title 29, or who violated the requirements of section 791 of title 29 or the regulations implementing section 791 of title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(3) Reasonable accommodation and good faith effort

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 [42 U.S.C. 12112(b)(5)] or regulations implementing section 791 of title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5(g)].

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

(4) Construction

Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title.

(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section—

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.

(d) Definitions

As used in this section:

(1) Complaining party

The term "complaining party" means—

(A) in the case of a person seeking to bring an action under subsection (a)(1) of this section, the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

(B) in the case of a person seeking to bring an action under subsection (a)(2) of this section, the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under section 794a(a)(1) of title 29, or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 [42 U.S.C. 12111 et seq.].

(2) Discriminatory practice

The term "discriminatory practice" means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a) of this section.

42 U.S.C. § 2000e-2 provides in relevant part:

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C. 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

* * *

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

* * *

42 U.S.C. § 2000e-3 provides in relevant part:

§ 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

* * *

42 U.S.C. § 2000e-5 provides in relevant part:

§ 2000e-5. Enforcement provisions

* * *

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

* * *

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office

shall in all cases be considered a district in which the action might have been brought.

* * *

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

* * *

Federal Rule of Civil Procedure 23 provides:

Rule 23. Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) ***Certification Order.***

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment.

(2) ***Notice.***

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) ***Judgment.*** Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) ***Particular Issues.*** When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) ***Subclasses.*** When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) ***In General.*** In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require–to protect class members and fairly conduct the action–giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) ***Combining and Amending Orders.*** An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) ***Appointing Class Counsel.*** Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) ***Standard for Appointing Class Counsel.*** When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) ***Interim Counsel.*** The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) ***Duty of Class Counsel.*** Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

RESPONDENT'S BRIEF

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Supreme Court of the United States

◆

WAL-MART STORES, INC.,

Petitioner,

v.

BETTY DUKES, et al.,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

◆

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3 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 10:2 (4th ed. 2002) 47

Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Fed. R. Civ. P. (I)*, 81 Harv. L. Rev. 356 (1967) 52

Manual for Complex Litigation § 11.64 (4th ed. 2009) 48

Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Court, 34 F.R.D. 325 (1964) 51

STATEMENT

This case challenges Wal-Mart's uniform pay and promotion policies for its retail store employees. Those policies fail to provide any application or posting process for promotions to store management or job-related criteria for setting pay or making promotion decisions – standard practices in the American workplace. Instead, Wal-Mart has chosen to adopt and maintain highly subjective policies, which are implemented, monitored and enforced on a daily basis by its Home Office to ensure consistency in results.

These subjective personnel decisions are exercised within a corporate culture that is rife with gender stereotypes demeaning to female employees: Wal-Mart executives refer to women employees as "Janie Qs," approve holding business meetings at Hooters restaurants, and attribute the absence of women in top positions to men being more aggressive in seeking advancement. The record supporting class certification was replete with evidence of the same kind of gender bias attributable to managers at all levels of the company. Thus, for example, named plaintiff Christine Kwapnoski was told that her male co-worker received a large raise "because [he] had a family to support." Wal-Mart's subjective personnel policies have operated as a vehicle for perpetrating gender bias in its pay and promotion decisions.

As Wal-Mart has long recognized, its female workforce has borne the brunt of these subjective policies. Even though its own data shows that its female employees are, on average, better performers and more experienced than their male counterparts, women's pay lags far behind that of male employees in every major job in each of the company's 41 regions. Women at Wal-Mart also face a classic glass ceiling – while women comprise over 80% of hourly supervisors, they hold only one-third of store management jobs and their ranks steadily diminish at each successive step in the management hierarchy.

Relying on long-standing statutory and Supreme Court authority, plaintiffs allege that Wal-Mart's policies discriminate against women in violation of Title VII. The class is limited to female retail store workers, the majority of whom hold one of only five hourly jobs. Regardless of their job titles or store location, these women are subject to the same uniform personnel policies. After a searching review of the substantial evidentiary record, the district court concluded that plaintiffs had satisfied Rule 23.

With this appeal, Wal-Mart attempts to dismantle several fundamental pillars of this Court's employment discrimination class action jurisprudence.

- It disputes that a policy of subjective decision-making is an employment practice that may be challenged under Title VII and would impose heightened Rule 23(a) standards for such cases.

- It would eliminate the use of pattern or practice methods of proof established by this Court in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336 (1977). It would instead require that each woman's claim be litigated individually, even though the company failed to retain records that would allow the district court to conduct reliable individual remedies hearings.
- It would limit certification under Rule 23(b)(2) to cases seeking *exclusively* injunctive or declaratory relief.

These radical and far-reaching proposals to change the law find no support in Rule 23 or Title VII. Instead, they would subvert the goal of allowing workers to vindicate their rights as a class, precluding certification of all but the smallest employment discrimination cases, and would require this Court to overrule 45 years of civil rights and class action precedent. Wal-Mart's arguments also largely ignore – and are inapplicable to – plaintiffs' disparate impact claims where proof of intent is unnecessary.

In place of a single class action in which all common questions would be resolved – one way or the other – Wal-Mart would burden the federal courts with potentially thousands of store-level cases. This outcome would not only waste judicial resources, it would deprive plaintiffs of the ability to challenge and seek relief from Wal-Mart's systemic, company-wide practices. A multiplicity of cases could mask the otherwise unmistakable pattern of discrimination against women throughout the company and obscure the role of senior management in maintaining this discriminatory system. Finally, many of these claims, which amount to an average annual wage loss of $1,100, would be too small to pursue.

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SUMMARY OF ARGUMENT

1. The district court conducted a searching and rigorous analysis of the substantial evidentiary record and correctly applied Rule 23. App. 48a. Wal-Mart ignores the extensive findings of fact below and urges this Court to reweigh a daunting array of factual questions. The district court's decision to certify the class is subject to review for abuse of discretion; its findings are entitled to deference, unless clearly erroneous.

2. With respect to Rule 23(a), plaintiffs have identified an "employment practice" – subjective decision-making adversely affecting women – that may be challenged under either disparate treatment or disparate impact analysis. *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 301, 302 (1977); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 989-91 (1988). Contrary to Wal-Mart's claim that the case is nothing more than a challenge to millions of local decisions, the district court found that Wal-Mart operates through *common* subjective policies implemented by managers at all levels, and that plaintiffs demonstrated a sufficient nexus between

the challenged practices and the adverse outcomes for women to satisfy Rule 23(a). App. 77a-78a, 186a. Cases involving local decisions have long been addressed under the pattern or practice method of proof. *Teamsters*, 431 U.S. at 338, 342 n.24; *Hazelwood*, 433 U.S. at 301, 302.

3. The district court's commonality findings rested on extensive evidence of excessive subjectivity in personnel decisions, guided by a strong corporate culture infused with sexual stereotyping; centralized oversight of decision-making; robust statistical evidence of gender disparities caused by discrimination; and anecdotal evidence of gender bias. App. 226a. The court evaluated the record as a whole and made findings that turned significantly on company documents and testimony, in addition to "statistics, anecdotes and social science."

4. Wal-Mart seeks to impose a host of "heightened" certification requirements, applicable only to Title VII cases challenging a pattern or practice of discrimination facilitated by a policy of excessively subjective decision-making. To satisfy Rule 23, civil rights plaintiffs would bear the burden of proving the merits of their claims to a degree that exceeds the standard required to demonstrate liability under Title VII. Wal-Mart's argument is at odds with the language of Rule 23 and Title VII and this Court's decision in *Falcon*. *See Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982).

5. Wal-Mart seeks to impose *per se* rules on the kinds of evidence upon which a district court may rely in finding commonality satisfied under Rule 23(a)(2).

a. *Statistics* – Wal-Mart argues that, as a matter of law, only statistical proof disaggregated to the smallest possible unit may support commonality. This view contradicts the pattern or practice theory and ignores the court's finding that managers above the store level make *all* promotion and management pay decisions and must approve *all* hourly pay decisions in excess of a minimal range.

Wal-Mart wrongly asserts that its statistical regressions were "unrebutted" and showed no statistically significant pay rate differences in most stores. Pet. Br. 7, 11, 24. In fact, its regressions were subdivided below "store level," premised on a factual predicate so unreliable that the court struck it from the record, and thoroughly rebutted.

The district court credited plaintiffs' statistical analyses and found that they raised "an inference of company-wide discrimination in both pay and promotions." App. 281a. It analyzed the parties' competing claims concerning statistical aggregation and concluded that plaintiffs' regional analysis raised common issues appropriate for class adjudication. App. 73a.

b. *Anecdotal Evidence of Bias* – The district court properly relied on 120 class member declarations to further support its commonality finding. They vividly confirmed the uniformity of pay and promotion policies, and the pervasiveness of sexual stereotypes within the company culture. They need not demonstrate claims of individual discrimination or a pattern or practice of discrimination to support commonality.

c. *Social Science* – The district court properly relied on the conclusions of plaintiffs' social science expert – that Wal-Mart's strong centralized common culture sustained uniformity of decision-making, that its highly subjective system was vulnerable to sexual stereotyping, and that its diversity policies failed to mitigate the effect of stereotyping – as additional evidence supporting its commonality finding. The court fully considered Wal-Mart's motion under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and made findings sufficient to satisfy *Daubert's* admissibility threshold.

6. The district court made extensive findings to support its conclusion that the class satisfied the typicality and adequacy of representation requirements. Wal-Mart presents no legal argument, but instead asks the Court to revisit factual determinations made below.

7. Wal-Mart would eliminate the "pattern or practice" method of proof, requiring instead that systemic discrimination cases be litigated for both liability and remedies, individual-by-individual and store-by-store. Plaintiffs would be required to prove that "the motive for *every single* discretionary pay and promotion decision affecting every single class

member was discriminatory." Pet Br. 40. Wal-Mart claims a right to mount an individual defense to each class member's claim using Title VII's "mixed motive" provision, even though plaintiffs here do not rely on the mixed motive theory of discrimination. Despite unanimous circuit authority, Wal-Mart argues that back pay determinations could never be performed on a statistical basis, even where, as here, defendant's conduct and record-keeping would make individual determinations unreliable.

8. Wal-Mart would restrict the application of Rule 23(b)(2) to cases seeking *solely* injunctive and corresponding declaratory relief. Its interpretation is inconsistent with the text of the Rule, the Advisory Committee Notes, and the decisions of every circuit court to address the question. The Advisory Committee drafted Rule 23(b)(2) with the intention of permitting certification unless final relief "relates exclusively or predominantly to money damages." Fed. R. Civ. P. 23 Advisory Committee's Note (1966).

a. Back pay, when accompanying claims for injunctive relief, is consistent with (b)(2) certification, as every circuit court addressing the issue has concluded. Such claims are integral to Title VII's equitable remedies, can be objectively determined, and arise out of the same conduct generally applicable to the class that supports injunctive relief. Similarly, total back pay will result from the same factor that makes injunctive relief substantial – the size of the affected class.

b. Wal-Mart's contention that monetary claims must predominate because the former employee class members lack standing to seek injunctive relief confuses standing with the test for eligibility for relief under Rule 23(b)(2). Wal-Mart's one-sided calculus discounts the benefits of injunctive relief to current, future, and returning employees. Wal-Mart's rule would require a continual re-examination of the certification decision with normal employee turnover.

c. This Court need not resolve whether punitive damages may be certified under Rule 23(b)(2) because the Ninth Circuit vacated and remanded that claim. There is no support in Rule 23 for Wal-Mart's claim that punitive damages, which focus on defendant's conduct rather than individual harm, may never be so certified.

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ARGUMENT

Plaintiffs contend that Wal-Mart engaged in a pattern or practice of discrimination in violation of Title VII's prohibition on disparate treatment. 42 U.S.C. § 2000e-2(a); *Teamsters*, 431 U.S. at 336-38. Wal-Mart's top management implemented and maintained its pay and promotion policies, even though they knew the system disadvantaged qualified female employees and perpetuated a corporate culture rife with gender stereotyping. As this Court has recognized, evidence of a policy pursued with knowledge of its adverse effect on a protected group supports a finding of intentional discrimination. "[W]hen the adverse consequences of a law upon an identifiable group are as inevitable as the gender-based consequences [here], a strong inference that the adverse effects were desired can reasonably be drawn." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 n.25 (1979); *see also Teamsters*, 431 U.S. at 335 n.15.

Plaintiffs also challenge these subjective practices under the disparate impact theory of discrimination. 42 U.S.C. § 2000e-2(k); *Watson*, 487 U.S. at 989-91. They allege that the subjective pay and promotions policies, while neutral on their face, have disproportionately affected female employees and cannot be justified by business necessity. Wal-Mart's practices – far below the industry norms for corporate personnel practices – have resulted in statistically significant disparities in both pay and promotion for women.

Plaintiffs seek injunctive relief as well as back pay and punitive damages. They do not seek compensatory damages or retroactive promotions. App. 5a. Class Cert. Hearing Tr. at 68-70, 92, Dkt. 618 (N.D. Cal. Sept. 24, 2003).

I. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT DETERMINED THAT RULE 23(a) REQUIREMENTS HAD BEEN SATISFIED

After extensive discovery, including over 200 depositions, production of more than a million pages of documents, and electronic personnel data, plaintiffs assembled a massive record to support class certification. The district court issued a detailed 84-page class certification opinion as well as a lengthy opinion addressing challenges to the parties' expert evidence. App. 162a-283a; Pet. Opp. Add. 4-15. In reaching its conclusion, the district court weighed the evidence, as necessary, to determine whether the elements of Rule 23 had been satisfied, even when Rule 23 elements overlapped with the merits. App. 52a n.20, 65a; *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006); *see, e.g.*, App. 191a (rejecting claim that managers operate stores independently); App. 226a (finding evidence "raises an inference that Wal-Mart engages in discriminatory practices"). The district court's interlocutory decision to certify the class is subject to review for abuse of discretion and its findings are entitled to deference, unless "clearly erroneous." *Cooter & Gell v. Hartmarx*, 496 U.S. 384, 400-01 (1990); *In re Initial Pub. Offerings*, 471 F.3d at 40-41. It properly exercised its discretion in finding Rule 23(a) satisfied.

Wal-Mart asks this Court to start from scratch. It audaciously claims that the district court's extensive factual "'findings' are entitled to no deference." Pet. Br. 18 n.2. It raises a host of objections to the district court's findings, based upon a selective description of the evidence, and invites the Court to decide anew whether each of the Rule 23(a) elements has been satisfied. That is not the proper role for this Court.

Cooter & Gell, 496 U.S. at 400-01; *Califano v. Yamasaki*, 442 U.S. 682, 703 (1979).

A. The District Court Properly Held that Plaintiffs Demonstrated Common Questions of Law or Fact

Rule 23(a)(2) requires that plaintiffs demonstrate there are "questions of law or fact common to the class." "The threshold of 'commonality' is not high." *Jenkins v. Raymark Indus.*, 782 F.2d 468, 472 (5th Cir. 1986) (citation omitted); 1 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 3:10 n.9 (4th ed. 2002) (commonality "is easily met in most cases"), and contrasts with the "far more demanding" predominance showing required by Rule 23(b)(3). *Amchem Products v. Windsor*, 521 U.S. 591, 623-24 (1997).

At the certification stage, "the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (quoting *Miller v. Mackey Int'l*, 452 F.2d 424, 427 (5th Cir. 1971)). As the Ninth Circuit observed below, Rule 23(a)(2), by its terms, requires plaintiffs to demonstrate questions of law or fact, not to answer them. App. 36a, 40a; *see* Fed. R. Civ. P. 23 Advisory Committee's Note (2003) ("an evaluation of the probable outcome on the merits is not properly part of the certification decision"); *cf. Schleicher v. Wendt*, 618 F.3d 679, 686 (7th Cir. 2010) ("We do not think it appropriate for the judiciary to make its own . . . adjustments by reinterpreting Rule 23 to make likely success on the merits essential to class certification . . .") (Easterbrook, J.).

1. A System of Subjective Decision-Making Can Constitute a Common Employment Practice

Wal-Mart's principal objection is that company-wide certification was improper because it contends all pay and promotion decisions are made at the store level where managers have wide-ranging discretion and, as such, plaintiffs failed to identify a common policy or practice sufficient for either Title VII or Rule 23(a).

Wal-Mart is wrong. This Court established the standards of proof for pattern or practice cases in *Teamsters*, in which managers at 51 different terminals made hiring and promotion decisions purportedly by choosing the "best qualified." *Teamsters*, 431 U.S. at 336, 338, 342 n.24. This Court has held that a policy of subjective decision-making processes that leaves unguided discretion to managers is an employment practice subject to challenge under Title VII where, as here, it has resulted in a pattern of discrimination against women. *Hazelwood*, 433 U.S. at 301-302; *Falcon*, 457 U.S. at 159 n.15; *Watson*, 487 U.S. at 989-91. This Court recognized that subjective criteria, while not themselves unlawful, can be a conduit for biased decision-making. *Watson*, 487 U.S. at 989-91.

Cognizant of this potential threat to equal employment opportunity, federal courts have for more than three decades certified challenges to subjective employment practices under both disparate treatment and disparate impact theories. *See* App. 79a (citing cases); *Brown v. Nucor Corp.*, 576 F.3d 149, 150, 153, 157 (4th Cir. 2009); *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 272 (5th Cir. 2008).

Wal-Mart repeatedly asserts that the Ninth Circuit observed that plaintiffs were unable to identify "a specific discriminatory policy promulgated by Wal-Mart." Pet. Br. 6, 20, 39. Wal-Mart quotes this language from the opinion entirely out of context. The quotation, in its entirety, reads:

> While a *jury* may ultimately agree with Wal-Mart that, in the absence of a specific discriminatory policy promulgated by Wal-Mart, it is not more likely than not, based solely on Dr. Bielby's analysis, that Wal-Mart engaged in actual gender discrimination, that question must be left to the merits stage of the litigation (and presumably will not have to be decided as there will be other evidence).

App. 59a.

2. The Evidence Supports the Finding that Wal-Mart's Practices Raised Common Questions

After weighing all the evidence, the district court concluded that plaintiffs had "exceeded" their burden of establishing commonality and had demonstrated that Wal-Mart's company-wide policy of subjective decision-making, within a consistent compensation and promotion structure, raised questions of fact and law common to the class. App. 226a. Those common questions include, for example: 1) does Wal-Mart have a largely subjective compensation and promotion system? App. 173a-174a; 2) does that system result in lower pay and fewer promotions for women? App. 199a, 225a; 3) does Wal-Mart's strong corporate culture contribute to discrimination against women in pay and promotion? App. 186a; 4) which statistical analysis most accurately measures the disparities between male and female employees? App. 211a-212a; 5) was Wal-Mart's senior management aware that its subjective personnel system was resulting in adverse outcomes for women? and, 6) can Wal-Mart's subjective personnel system be justified as a "business necessity" and, if so, were there "less discriminatory alternatives"?

The district court's findings were based on an enormous record, including testimony from senior management and internal company documents – vastly more than Wal-Mart's rhetorical reduction ("sociology, statistics and anecdotes"). Pet. Br. 23. Those findings are summarized below.

Uniform Structure and Central Control – The district court found Wal-Mart stores are operated "with a high degree of store-to-store uniformity" and centralized control. App. 190a. "[T]he personnel structure within each store operates in a basically similar fashion. . . ." App. 174a-175a. "[E]ach individual store is subject to oversight from the company's Home Office" that includes "a very advanced information technology system which allows managers in the Home Office to monitor the operations in each of its retail stores on a close and constant basis." App. 190a, 192a; J.A. 529a. Wal-Mart has a far higher concentration of its regional and senior management based in its Home Office than its competitors do, further confirming its unusually centralized nature. App. 191a n.17.

The district court found that Wal-Mart's unique culture "promotes and sustains uniformity of operational and personnel practices," and "guide[s] managers in the exercise of their discretion." App. 188a, 192a. It found "no genuine dispute that Wal-Mart has carefully constructed and actively fosters a strong and distinctive, centrally controlled, corporate culture." App. 188a. The court noted that culture is an integral part of all management training programs. App. 188a-189a. Wal-Mart's practice of "promoting from within" means that "the culture lessons learned by junior-level employees contribute to building a foundation of common understanding and practice among the management team." App. 189a. Further, the company regularly moves store-level managers across stores and districts, and thereby "ensure[s] that a uniform Wal-Mart Way culture operates consistently throughout all stores." App. 189a-190a. Plaintiffs offered evidence that Wal-Mart "cultivates and maintains a strong corporate culture which includes gender stereotyping." App. 173a.

The district court expressly rejected Wal-Mart's factual assertions that "each of its stores is a virtual 'main street' of stores within a store, all run by independent managers" and that "each division of stores has its own unique hierarchical structure." App. 191a.

Uniform Departments and Jobs – The court found that stores had similar jobs categories and descriptions. App. 175a. While there are several dozen departments within each store, most hourly workers fall within five job positions: Support Manager, Department Manager, Cashiers, Sales Associates and Stockers. App. 174a-176a; J.A. 482a. Employees are assigned and moved among departments frequently and pay policies make no distinction by department. R.A. 23-24;[1] J.A. 1402a. There are no minimum or preferred education or experience requirements for *any* hourly job. J.A. 373a.

Uniformity of Promotion Policies and Practices – Regional and district managers, who are mostly male, make *all* promotion decisions for *all* store management positions. App. 180a-182a; J.A. 481a; J.A. 1370a-1373a. The district court found that "[t]he subjectivity in promotion decisions occurs in two fundamental ways: (a) a largely subjective selection practice hindered by only minimal objective criteria, combined with (b) a failure to post a large proportion of promotional opportunities." App. 180a. As a result, "class members had no ability to apply for, or otherwise formally express their interest in, openings as they arose" and "[m]anagers did not have to consider all interested and qualified candidates, thus further intensifying the subjective nature of the promotion process." App. 182a-183a. More than a year after this case was filed, a Senior Vice President admitted that there was nothing at Wal-Mart that would explain to "an hourly associate how to get promoted." R.A. 41.

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[1] Five documents are attached and designated as Respondent's Appendix ("R.A.").

Uniformity of Compensation Policies and Practices – "All hourly employees at every Wal-Mart store are compensated pursuant to the same general pay structure." App. 176a. The Home Office establishes minimum starting rates for each hourly job in the retail stores. *Id.* While store managers are granted substantial discretion in making hourly pay decisions, any pay increase above a certain percentage is automatically reported to higher management and requires special approval. App. 177a.

The Home Office sets broad pay ranges for each in-store salaried position, but pay rates are set within these ranges "primarily by District Managers (the first level in the management hierarchy above Store Managers) and their superiors, the [Home Office-based] Regional Managers." App. 178a. For both hourly and salaried compensation policies and practices, the district court found that there "is significant uniformity across stores, and that Defendant's policies all contain a common feature of subjectivity." App. 180a.

Gender Stereotyping – Relying on a broad range of evidence, the district court found "significant evidence" of "gender stereotyping." App. 226a. That evidence included testimony from plaintiffs' expert, Dr. Bielby, App. 196a, and abundant examples of stereotypes adverse to women, starting at the highest levels of management.

As far back as 1992, founder Sam Walton conceded that Wal-Mart's "old way" of requiring its managers to move frequently "put good, smart women at a disadvantage," and was unnecessary, J.A. 368a-369a, a view echoed by female managers. J.A. 414a, 417a. This policy nonetheless remained in effect after this action was filed. J.A. 220a-221a, 419a.

At Home Office executive meetings, senior officers for Sam's Club often referred to female store employees as "Janie Qs" and "girls." J.A. 303a-306a. The most senior human resource official saw nothing wrong with district managers holding their management meetings at Hooters restaurants. J.A. 232a. Numerous Wal-Mart managers admitted that they regularly go to strip clubs when they attend company management meetings. *See, e.g.*, Riggs Dep. at 196:1, Ex. 40, Dkt. 100 (N.D. Cal. Apr. 28, 2003); J. Brown Dep. at 185:8-12, Ex. 41, Dkt. 100; Seaman Dep. at 321:1-3, Ex. 42, Dkt. 100; Sherman Dep. at 259:10-23, Ex. 43, Dkt. 100. Female store managers were required to attend these meetings at Hooters and strip clubs as part of the job. J.A. 924a-933a.

The company communicated stereotyped views of women to store managers who attended mandatory training at the Walton Institute in Bentonville. Participants were told that the reason so few women have reached senior management at Wal-Mart was because "men have been more aggressive in achieving those levels of responsibility . . . ." R.A. 44.

A Women in Leadership Group identified a number of problems afflicting women employees, including that "[s]tereotypes limit opportunities for women," "[c]areer decisions are made for associates based on gender," and "[m]en's informal network overlooks women." R.A. 48. In 1998, a consultant retained by Wal-Mart advised the company that a "glass ceiling is perceived by many women" at Wal-Mart and "some [district managers] . . . do not seem personally comfortable with women in leadership roles." R.A. 63-64.

One former Wal-Mart Vice President described the company's diversity efforts as "lip service," J.A. 302a, a conclusion confirmed by a comprehensive analysis of Wal-Mart's diversity programs. App. 194a-195a.

The district court cited class member testimony about the common stereotypes prevalent throughout Wal-Mart. App. 225a-226a; *see also* J.A. 754a (female assistant manager told repeatedly by store manager that retail is "tough" and not "appropriate" for women); J.A. 1188a-1189a (male store manager said "[m]en are here to make a career and women aren't. Retail is for housewives who just need to earn extra money"); J.A. 931a (district manager told female store manager that she should not be running a Wal-Mart store and "needed to be home raising [her] daughter"); J.A. 1001a (store manager said male associate received larger raise because he had "a family to support").

Unequal Promotional Opportunities – The district court found that "roughly 65 percent of hourly employees are women, while roughly 33 percent of management employees are women." App. 176a. Women hold only 14% of Store Manager positions yet disproportionately occupy 80 to 90% of the hourly supervisory positions. J.A. 479a (chart). When Wal-Mart's proportion of women in management was compared to that of its 20 largest competitors, 80% of its stores had significantly fewer female managers. App. 223a-225a. The district court credited plaintiffs' proof that, after controlling for relevant factors, "a statistically significant shortfall of women [were] being promoted into each of the in-store management classifications over the entire class period." This shortfall was "consistent in nearly every geographic region at Wal-Mart." App. 212a. Women also consistently took longer than men to advance to management positions. App. 198a, 214a; J.A. 484a-485a (average 4.4 years for women versus 2.9 years for men to Assistant Manager). These differences existed even though female employees at Wal-Mart generally have more seniority and better performance ratings than male employees. J.A. 483a-485a.

The record shows that Wal-Mart executives were long aware of these promotion shortfalls and failed to remedy them. Executive Vice President Coleman Peterson made regular presentations to top management about the company's workforce. Shortly before this case was filed, Peterson informed management that, based upon the company's own internal benchmarking, "Wal-Mart's women in management percent . . . is significantly behind several of the other retailers reporting . . . [Wal-Mart] trails both the retail industry . . . and workforce averages." J.A. 408a. This report, like others that Peterson made to management and the Board, highlighted the troubling lack of women in the company's management jobs. J.A. 397a-404a, 410a, 413a. As Peterson candidly expressed in another memo about the treatment of women and minorities, "[w]e're behind the rest of the world." J.A. 405a. Until December 2000, Wal-Mart's Executive Committee was entirely male. J.A. 205a-208a.

Unequal Pay – Plaintiffs' statistical regressions for hourly and salaried employees showed that in every one of Wal-Mart's 41 regions women were paid significantly less than men, and this pay gap increased each year. J.A. 518a-519a. This pattern was consistent for all store classifications even when seniority, turnover, store, job performance, job position, part-time or full-time status, and other relevant factors were taken into account. App. 200a, 209a.

After careful consideration of the parties' competing analyses, the district court concluded that plaintiffs' statistical analysis raises "an inference of company-wide discrimination in both pay and promotions." App. 281a.

3. Neither Rule 23 nor Title VII Imposes a Heightened Commonality Standard for Challenges to Subjective Criteria

To satisfy commonality, plaintiffs must demonstrate that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2).

Wal-Mart proposes a long list of additional requirements to these simple terms. These "add-ons" are not found in either the text of Rule 23 or Title VII. Indeed, they would make satisfying Rule 23(a)(2) far more exacting than even proving liability for a pattern or practice claim. According to Wal-Mart, Title VII plaintiffs must demonstrate:

- that there is "significant proof" of discrimination; Pet. Br. 19-20;
- "a policy that is entirely subjective;" Pet. Br. 20-21; and,
- the policy is a "general policy of discrimination" that is itself unlawful; Pet. Br. 20;
- the policy was implemented "in a discriminatory fashion common to *every single female employee*." Pet. Br. 20

> (emphasis added), and "the motive for *every single* discretionary pay and promotion decision affecting every single class member was discriminatory." Pet. Br. 40.

This Court has rejected the notion that Rule 23 includes special, unwritten rules for certain cases. "Rule 23 provides a one-size-fits-all formula for deciding the class-action question." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, ___ U.S. ___, 130 S. Ct. 1431, 1437 (2010). Nothing in Rule 23 or Title VII imposes such heightened certification standards for employment discrimination cases challenging a policy providing for subjective personnel decisions. Wal-Mart mistakenly relies on a footnote from *Falcon*, 457 U.S. at 159 n.15, for these enhanced burdens.

In *Falcon*, this Court addressed the application of Rule 23(a) requirements to a proposed Title VII "across the board" class action that sought to include job applicants denied hire and incumbent employees denied promotions. In support of class certification, the sole named plaintiff offered nothing more than his own personal claim of promotion discrimination and failed to make "any specific presentation identifying the questions of law or fact that were common" to himself and the proposed class. *Id.* at 158. The Court held that district courts may not presume compliance with Rule 23 from a single allegation of discrimination. Instead, they must conduct a "rigorous analysis" to ensure that each Rule 23 requirement is satisfied.

Id. at 161. The Court concluded that plaintiff's claim was insufficient to "bridge the gap" between an individual claim of promotion discrimination and a class claim challenging a pattern of discrimination. *Id.* at 157-58. Here, plaintiffs went far beyond presenting individual claims to address all elements of Rule 23. *See, e.g.*, App. 51a-53a, 188a, 192a, 226a, 231a n.43, 232a-234a. Nothing in *Falcon* supports Wal-Mart's claim that pattern or practice cases are subject to unique requirements under Rule 23.

Significant Proof – Wal-Mart asserts that plaintiffs did not satisfy Rule 23(a)(2) because they failed to adduce "*[s]ignificant proof* that [the] employer operated under a general policy of discrimination" implemented through "entirely subjective decision-making processes." Pet. Br. 19. It derives this standard from an incomplete quotation of one sentence in a footnote from *Falcon*:

> Significant proof that an employer operated under a general policy of discrimination conceivably could justify *a class of both applicants and employees* if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decision-making processes.

Falcon, 457 U.S. at 159 n.15 (emphasis added).

The *Falcon* footnote, read in context, presents a hypothetical scenario under which applicants and employees could be included within the same certified class. In other words, in circumstances where plaintiffs challenge "two distinct processes" – hiring and promotion – they must show significant proof of "a common policy *alleged* to be discriminatory" to unite applicants and employees in a single class. App. 42a-43a; *Staton v. Boeing Co.*, 327 F.3d 938, 955 (9th Cir. 2003); *Griffin v. Dugger*, 823 F.2d 1476, 1486-87 (11th Cir. 1987). The language was not intended to create a new requirement that plaintiffs *prove* intentional discrimination at the certification stage. App. 43a. Moreover, this case is not, like *Falcon*, an "across the board" class where one class representative who has experienced only one form of discriminatory practice seeks to challenge a broad range of employment practices. *Falcon*, 457 U.S. at 153. Here, the named plaintiffs, current and former employees, challenge only discrimination in pay and promotion, which each has suffered.

The heightened standard Wal-Mart would impose on challenges to subjective decision making finds no support in the text of Rule 23(a)(2). It also runs afoul of the central holding of *Falcon* that there are no special class certification rules for particular kinds of cases. *Falcon*, 457 U.S. at 161 ("a Title VII class action, *like any other class action*, may only be certified if . . . the prerequisites of Rule 23(a) have been satisfied.") (emphasis added). Nor does Title VII suggest a heightened standard for challenges to subjective decision-making practices. 42 U.S.C. § 2000e-2(a) & (k). Where the statutory language of Title VII does not indicate a clear intent by Congress to impose a heightened evidentiary standard, this Court has declined to do so. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98-101 (2003).

To require that plaintiffs adduce "significant proof" of discrimination where subjective practices are challenged also conflates the merits with the Rule 23(a) certification inquiry. App. 44a. The court's role at certification is limited to determination of whether common questions exist, not to answer them.

But, even if a heightened standard were to be applied, Wal-Mart's proposed "significant proof" standard was met here. The district court expressly found, in more than 24 pages of findings, that plaintiffs had offered "significant evidence" that raised an inference of classwide discrimination in the pay and promotion practices. App. 226a. These findings amply meet any new heightened showing of "significant proof" of discrimination. App. 46a-47a.

Entirely Subjective – Wal-Mart, again citing the *Falcon* footnote, argues that plaintiffs may only challenge a practice of subjective decision-making if they can establish that the system is "entirely subjective," an argument not raised below. Pet. Br. 20-21; App. 174a (parties agree that decisions are "largely subjective"). This argument is also at odds with the text of Rule 23(a)(2) and with Title VII. Wal-Mart would create a nonsensical rule that addition of one objective criterion (e.g., being of legal age) to an otherwise subjective process would insulate employers from liability. In *Watson*, this Court rejected just such an assertion: "However one might distinguish 'subjective' from 'objective' criteria . . . selection systems that combine both types would generally have to be considered subjective in nature." *Watson*, 487 U.S. at 989-91; *see also Griffin*, 823 F.2d at 1486-87. The 1991 amendments to Title VII, which codified the adverse impact standard, make no distinction between an "employment practice" that is objective or subjective. *See* 42 U.S.C. § 2000e-2(k). Here, the district court found that subjectivity was a common feature of all challenged pay and promotion policies, satisfying commonality under Rule 23(a). App. 180a-183a.

General Policy of Discrimination – In its final misapprehension of the *Falcon* footnote, Wal-Mart claims that plaintiffs can only satisfy commonality by challenging a "general policy of discrimination" that must itself be unlawful. Pet. Br. 22. Title VII does not require that plaintiffs identify a *facially* discriminatory policy. Disparate impact claims, by definition, challenge "employment practices" that are "fair in form, but discriminatory in operation." *Lewis v. City of Chicago*, ___ U.S. ___, 130 S. Ct. 2191, 2197 (2010) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)); 42 U.S.C. § 2000e-2(k). Disparate treatment claims may challenge employment policies or practices, including a "policy of leaving promotion decisions to the unchecked discretion of lower level supervisors." *Watson*, 487 U.S. at 990. The existence and nature of the challenged practice may be proven through direct or circumstantial evidence. *Desert*

Palace, 539 U.S. at 100; *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983).

As a corollary, Wal-Mart asserts that plaintiffs cannot demonstrate a "general policy of discrimination" since Wal-Mart has a written anti-discrimination policy. Pet. Br. 19-20. But an employer cannot insulate itself from liability for discrimination simply by promulgating a written anti-discrimination policy. *See, e.g., EEOC v. Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1248 (10th Cir. 1999).

Proof that Every Class Member Was Injured – Finally, Wal-Mart asserts, without authority, that plaintiffs must demonstrate that its policies operated "in a discriminatory fashion common to *every single female employee*." Pet. Br. 20 (emphasis added). Rule 23(a)(2) imposes no such requirement. *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1105 (5th Cir. 1993); *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1198 (10th Cir. 2010); *cf. Kohen v. Pacific Inv. Mgmt. Co., LLC*, 571 F.3d 672, 676 (7th Cir. 2009) (Posner, J.).

A requirement that plaintiffs prove a policy has discriminated against every single class member to obtain certification would be far more demanding than the standard for proving liability, which requires a showing that discrimination was Wal-Mart's "regular rather than . . . unusual practice." *Teamsters*, 431 U.S. at 336-37. Were absolute uniformity required, an employer could defeat certification in every case by sparing just one class member or department from an otherwise uniform and discriminatory policy. *Cf. Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998). The language of Rule 23(a)(2) requires evidence of "common" questions, not that the challenged practices raise "identical" or "universal" questions. *See also* Fed. R. Civ. P. 23(b)(2) Advisory Committee's Note (1966) ("[a]ction or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened *only as to one or a few members of the class*, provided it is based on grounds which have general application to the class.") (emphasis added).

4. Rule 23(a)(2) Does Not Restrict the Evidence that May Be Proferred to Support the Presence of Common Questions

Wal-Mart takes a similar approach to the evidence that plaintiffs may use to demonstrate the presence of common questions of law or fact, ignoring entire categories of evidence and seeking to impose restrictions not found in the Federal Rules of Evidence, Rule 23 or Title VII.

Statistics – Wal-Mart argues that the only statistical proof that can support commonality is analysis disaggregated to the store-by-store level. Wal-Mart's assertion hinges on its contention – unsupported by the record – that relevant decisions are made there. It entirely ignores the central role its senior management plays in making promotion and management pay decisions and reviewing hourly pay decisions. Its basic premise is flawed because, in a pattern or practice case, the relevant question is whether there is a pattern of discriminatory decision-making, not whether the decisions of individual managers are discriminatory. *Teamsters*, 431 U.S. at 336. Subdividing a company into ever smaller units "to the point where it [is] difficult to demonstrate statistical significance" can mask a pattern of discrimination, while aggregated data may more likely reveal one. *Capaci v. Katz & Besthoff*, 711 F.2d 647, 654 (5th Cir. 1983); *Segar v. Smith*, 738 F.2d 1249, 1286 (D.C. Cir. 1984) (disapproving statistical analysis that "repeatedly disaggregate[ed] until groups were too small to generate any statistically significant evidence of discrimination").

Plaintiffs' statistician prepared hourly pay regressions at the regional level, because of the scope of Wal-Mart's policies and decision-making. He relied upon corporate policies under which the subjective decisions were made, the oversight of pay decisions by district and regional managers, company-wide training and culture, and the frequent movement of store managers among districts and regions. App. 202a-204a; R.A. 18-26, 36-38. To account for any differences at the store level, these regressions included a variable for "store" to capture any difference in pay rates and staffing. App. 209a. The district court found this approach to be a "reasonable means of conducting a statistical analysis." App. 208a.

In contrast, Wal-Mart's expert offered a highly atomized analysis, which sub-divided the workforce even within stores into small sub-units that obscured any pattern of discriminatory decision-making and was far below the level of *any* relevant decision-maker in this case. Rather than a store-level analysis, each store was broken into at least three separate sub-parts for analysis – grocery, non-grocery and specialty departments – resulting in over 7,600 regressions. These artificial divisions were further segmented by 21 variables in the regressions, including department, which reduced the statistical unit of analysis. R.A. 19-20. This wholly artificial model, which tracks neither Wal-Mart pay policy nor decision-making, offered two advantages to Wal-Mart. It resulted in regressions with too few employees to yield statistically significant results, R.A. 19-20, and obscured Wal-Mart's broader discriminatory pay pattern. R.A. 24.

Nor is Wal-Mart correct in asserting that its expert's conclusion – that "90% of the stores" had no statistically significant gender pay differences – was "unrebutted." Pet. Br. 7, 11. Plaintiffs' expert comprehensively rebutted Wal-Mart's expert's methodology and conclusions. R.A. 19-39. Even more significantly, the district court struck the central justification for analyzing pay by store – a survey conducted by defense counsel – after Wal-Mart's expert admitted she could not vouch for its reliability. App. 203a-204a; Pet. Opp. Add. 17-23. Yet even these analyses, flawed as they were, showed an overall adverse impact. J.A. 1663a-1665a.

Wal-Mart faults the district court for failing to resolve conclusively which statistical model was more persuasive. Pet. Br. 25. In fact, the district court devoted 18 pages of analysis to the competing models and "weighed evidence and made findings" in its Rule 23 determinations. App. 49a. It "did not shy away" from issues overlapping with the merits "to the extent necessary to satisfy itself . . . that Plaintiffs raised common questions." App. 65a. For example, the court rigorously analyzed why plaintiffs' "statistical method best reflected the alleged discrimination" in crediting plaintiffs' regional analysis over defendant's challenges. App. 66a-67a, 71a, 204a. In evaluating each side's promotion analysis, the court determined that plaintiffs have "shown" reasons to accept their statistics and concluded that defendant's "assertion that its approach is necessarily superior does not withstand scrutiny." App. 73a, 222a.

The circuits agree that the district court must analyze the underlying factual and legal issues relevant to Rule 23, even if they overlap with the merits. App. 15a-22a. As the Ninth Circuit noted, "this does not mean a district court should put the actual resolution of the merits cart before the motion to dismiss, summary judgment, and trial horses." *Id.* In a Title VII case where statistical proof will form the basis of both the certification showing and the merits, a determination of whether plaintiffs' statistics prove discrimination goes beyond Rule 23, which requires only a finding of common questions. App. 36a.

Wal-Mart seeks to convert this fact-laden statistical dispute into a single legal issue. It argues that the appropriate level of statistical aggregation is a legal issue that must be resolved as part of the Rule 23 inquiry. Pet. Br. 26. It cites only this Court's decision in *Wards Cove*, which addressed neither statistical aggregation nor Rule 23 criteria. *Wards Cove Packing Co., v. Antonio*, 490 U.S. 642, 650-55 (1989), *abrogated on other grounds by* Civil Rights Act of 1991, Pub. L. No. 102-166, S. 1745, 105 Stat. 1071 (1991). The question in *Wards Cove* was the proper definition of the qualified labor pool for evaluation of plaintiffs' claim of disparate impact in hiring. *Id.* at 650. That case provides no support for an inflexible standard on the proper level of statistical aggregation, divorced from the facts in the case, which would impermissibly straitjacket the Rule 23 inquiry in employment discrimination cases.

Anecdotal Evidence – This Court has observed that, in a Title VII pattern or practice case, anecdotal evidence "[brings] the cold numbers convincingly to light." *Teamsters*, 431 U.S. at 339. At the Rule 23 stage, anecdotal declarations may be relevant to demonstrating the presence of common questions of law or fact. *Brown*, 576 F.3d at 153, 156-57.

Here, among the many types of evidence upon which the district court relied were "over a hundred declarations by designated class members showing common subjective practices." App. 186a. These remarkably similar accounts, from hourly and management level women in 30 different states, attest to the uniform and centralized control of operations, unequal pay for the same work, ever-shifting subjective criteria for promotion, and gender stereotyping. App. 186a; J.A. 420a (map of declarant locations); J.A. 586a, 607a-608a, 643a, 697a-698a, 707a-709a, 752a, 845a, 887a, 899a-900a, 1001a, 1019a, 1020a, 1079a, 1188a. They illustrate how a single corporate culture influences the way in which subjective pay and promotion decisions are made.

Wal-Mart suggests that courts may only credit such evidence if each declaration recounts "actionable claims of discrimination" and, together, they prove the existence of a "pattern or practice" of discrimination. Pet. Br. 31-32. Nothing in Rule 23 or Title VII provides any support for such a *per se* rule. Nor is there any basis for excluding declarations from former employees, as Wal-Mart implies by arbitrarily reducing of the number of declarations offered from 114 to 63. Pet. Br. 31. Probative evidence may come from a wide variety of percipient witnesses. Fed. R. Evid. 601; *cf. Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002). It was well within the discretion of the trial court to rely on this evidence in finding Rule 23(a)(2) was satisfied.

Social Science – Plaintiffs' expert, Dr. Bielby, offered an opinion concerning the uniform and centralized nature of Wal-Mart's operations ("[c]entralized coordination, reinforced by a strong organizational culture, creates and sustains uniformity in personnel policy and practice"), and a separate opinion about the risks associated with its subjective personnel practices ("[s]ubjective and discretionary features of the company's personnel policy and practice make decisions about compensation and promotion vulnerable to gender bias."). J.A. 525a. Dr. Bielby's conclusion that Wal-Mart's system increased the risk of gender stereotyping tended to show why, in the circumstances of this case, there was a common question as to whether subjectivity was a "ready mechanism for discrimination." J.A. 545a-546a.

Wal-Mart conflates these two opinions and mischaracterizes Bielby's hypothesis as stating "Wal-Mart may be 'vulnerable' to gender stereotyping *because* it . . . has a 'strong corporate culture.'" Pet. Br. 29 (emphasis added). That is not what he said. Instead, Dr. Bielby concluded that the company's strong corporate culture, about which the district court itself made separate findings, "sustains uniformity in personnel policy and practice." J.A. 525a.

Wal-Mart complains that Dr. Bielby failed to quantify how many employment decisions were the product of stereotyped thinking. Pet. Br. 28. In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235-36, 255-56 (1989), *abrogated on other grounds by* Civil Rights Act of 1991, Pub. L. No. 102-166, § 1745, 105 Stat. 1071 (1991), this Court endorsed the use of expert testimony regarding gender stereotyping in discrimination cases and did so even though that expert (like any credible expert) could not specify which particular decisions were the product of stereotyping. Expert testimony need not provide quantifiable knowledge to be admissible. Fed. R. Evid. 702 (the "scientific . . . knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.").

Wal-Mart moved to strike Dr. Bielby's opinions. The district court conducted a thorough assessment of Wal-Mart's arguments, "guided by *Daubert*," and concluded that the opinions were "based on valid principles" and "sufficiently probative to assist the Court in evaluating the class certification requirements." Pet. Opp. Add. 5-6. The Ninth Circuit found no abuse of discretion. App. 57a-58a & n.22. The Ninth Circuit opted not to reach the unresolved legal question whether a *Daubert* inquiry is required at the class certification stage as the district court had conducted an equivalent analysis. This Court need not reach the question either.

B. The District Court Properly Held that Plaintiffs Demonstrated Typicality

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Typicality ensures that the class representatives share the issues common to other class members and tends to merge with commonality. *Falcon*, 457 U.S. at 158 n.13. The interests and claims of the named plaintiffs and class members "need not be identical to satisfy typicality." *Stricklin*, 594 F.3d at 1198.

Here, the *six* named plaintiffs are all current or former employees, who allege they were injured by the same challenged pay and promotion practices. App. 80a. Plaintiff Christine Kwapnoski repeatedly sought management promotions that went to less qualified men. Although she was assigned to supervise the receiving dock, her General Manager encouraged her "to doll up, to wear some makeup, and to dress a little better." J.A. 1001a-1003a (internal quotations omitted). When she complained about a male co-worker receiving a larger raise, the same manager told her the male employee "had a family to support." *Id.* Plaintiff Betty Dukes, who has worked for Wal-Mart since 1994, has been paid significantly less than men with less seniority performing similar work, and was passed over for several Support Manager promotions. J.A. 743a-749a; *see* J.A. 606a-624a (Arana); J.A. 827a-838a (Gunter); J.A. 1242a-1247a (Surgeson); and J.A. 1298a-1301a (Williamson).

Wal-Mart raises a number of factual issues about the claims and defenses relevant to the named plaintiffs. Pet. Br. 32-34. It selects snippets from their declarations and argues that those individual facts render them atypical. Pet. Br. 32-33. The district court thoroughly evaluated these same arguments and found that the named plaintiffs' claims were "reasonably co-extensive" with those of the class. App. 228a-231a. While it is plainly dissatisfied with these findings, Wal-Mart presents no legal issue for this Court.

C. The District Court Properly Concluded that the Named Plaintiffs Were Adequate Representatives

Rule 23(a)(4) requires that the named plaintiffs "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23. To satisfy adequacy, a "class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *Amchem*, 521 U.S. at 625-26 (citation omitted). In such circumstances, class representatives are adequate because they are likely to "vigorously prosecute the interests of the class." *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 563 (6th Cir. 2007).

Wal-Mart contends that the mere possibility of disagreements among the class renders the named plaintiffs inadequate. But, to defeat adequacy, a "conflict must be fundamental" and "must go to the heart of the litigation." *Gunnells v. Healthplan Servs. Inc.*, 348 F.3d 417, 430-31 (4th Cir. 2003) (citation omitted); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006). A conflict is not fundamental where the named plaintiffs share common objectives and factual and legal positions with the class. *Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 180 (4th Cir. 2010). Moreover, a conflict will not defeat adequacy where it is "merely speculative or hypothetical." *Id.* at 180 (citation omitted).

No inherent conflict exists just because a class includes supervisory and non-supervisory employees; rather, adequacy depends upon the specific facts and claims presented. *Staton*, 327 F.3d at 958-59; *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 595-96 (2d Cir. 1986). After a detailed factual inquiry, the district court concluded that no substantive conflict existed because: 1) the named plaintiffs held supervisory as well as non-supervisory positions; 2) the requested injunctive and monetary relief would be available throughout the class; and 3) Wal-Mart's alleged discriminatory policies affect supervisory and non-supervisory employees alike. App. 232a-234a, 280a-81a.

In contesting this finding, Wal-Mart offers only speculation that the interests of supervisory and nonsupervisory employees are "diametrically opposed" without identifying any evidence of a substantive conflict. Pet. Br. 35; *cf. Hansberry v. Lee*, 311 U.S. 32, 43-44 (1940) (homeowner opposing racial covenant inadequately represented by named plaintiffs with diametrically opposed interest in enforcing it). Wal-Mart offers no evidence that class members endorsed the challenged gender bias or practices. "To deny class certification now, because of a potential conflict of interest that may not become actual, would be premature." *Kohen*, 571 F.3d at 680.

Nor is there any merit to Wal-Mart's assertion, first raised on appeal, that the named plaintiffs are inadequate because they have not pursued class compensatory damages. Pet. Br. 35-36. Courts recognize that plaintiffs are permitted to press those claims that afford them the best chance of certification and success for the class. *See, e.g., Wal-Mart Stores, Inc. v. Visa USA Inc.*, 396 F.3d 96, 113 (2d Cir. 2005) ("due process does not require that all class claims be pursued"); *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 219 F.R.D. 661, 668-70 (D. Kan. 2004). Likewise, Wal-Mart's assertion that non-victims might benefit from the case simply ignores the findings of the district court. *See* App. 166a n.4, 275a (actual victims can be identified and compensated).

D. Certification Has Not Altered Substantive Law

Wal-Mart argues that the certification order violates the Rules Enabling Act by relieving plaintiffs of the burden of proving their claims individually and depriving it of the ability to present its defenses. Pet. Br. 38-44. The argument boils down to one false premise: that an employment discrimination class action may only be litigated decision-by-decision and class member-by-class member. This radical claim, never accepted by any court, is at odds with the plain language of Title VII and decades of employment discrimination class action jurisprudence.

1. Discriminatory Intent May Be Proven Classwide

Wal-Mart asserts that Title VII requires plaintiffs to "prove that the motive for *every single* discretionary pay and promotion decision affecting every single class member was discriminatory." Pet. Br. 40. It faults the district court for allegedly failing to "grapple" with the question of whether the element of intent requires individualized proof of intent for each manager at each facility.

Plaintiffs' disparate impact claim requires no proof of intent. *Lewis*, 130 S. Ct. at 2199; *Watson*, 487 U.S. at 990-91. As for plaintiffs' disparate treatment claim, Wal-Mart ignores the "crucial difference between an individual's claim of discrimination and a class action alleging a general pattern or practice of discrimination. . . ." *Cooper v. Fed. Reserve Bank*, 467 U.S. 867, 876 (1984). The focus in a pattern or practice case is not on individual employment decisions, "but on a pattern of discriminatory decision-making." *Teamsters*, 431 U.S. at 360 n.46. Plaintiffs must demonstrate that the discrimination was the employer's "standard operating procedure the regular rather than the unusual practice." *Id.* at 336; *Cooper*, 467 U.S. at 875-76, n.9 (*Teamsters* standards apply to private class actions). A finding of an unlawful pattern or practice, "without any further evidence" supports the issuance of prospective relief and creates a presumption that every member of the class is entitled to relief. *Teamsters*, 431 U.S. at 360-62. And the pattern or practice method of proof, in which intent can be inferred from, among other evidence, significant statistical disparities, is consistent with this Court's consideration of proof of intent under the most demanding standards. *Feeney*, 442 U.S. at 279 n.25; *Teamsters*, 431 U.S. at 335 n.15, 339 & n.20.

The application of "pattern or practice" theory applies equally to single and multi-facility cases. *See, e.g.*, *Teamsters*, 431 U.S. at 328, 329 n.2 (challenging "nationwide operations" at 51 terminals in 26 states); *Bazemore v. Friday*, 478 U.S. 385, 389, 405-06 & n.17 (1986); *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 291-92 (2d Cir. 1999) (certifying class of all African Americans employed throughout commuter railroad), *disagreed with on other grounds by In re Initial Pub. Offerings*, 471 F.3d at 39-42; *Staton*, 327 F.3d at 956; *see also Califano*, 442 U.S. at 702.

Wal-Mart relies on *Hohider v. UPS, Inc.*, 574 F.3d 169, 184 (3d Cir. 2009), which expressly distinguished requirements for proof of liability in an ADA case, at issue there, from pattern-or-practice cases under Title VII. *Id.* at 184-85.

2. Mixed Motive Defense Does Not Apply to Plaintiffs' Claims

Wal-Mart argues that 42 U.S.C. § 2000e-5(g)(2)(A), added to Title VII by the Civil Rights Act of 1991 to address "mixed motive" claims, guarantees it the right to present a "mixed motive" defense to each class member's claim. Wal-Mart makes this claim even though plaintiffs in this case have never alleged a mixed motive claim, and Wal-Mart never pled an affirmative defense to one. J.A. 47a-80a, 100a-103a.

Title VII provides distinct methods of proving discrimination: plaintiffs may establish intentional discrimination either by proof of disparate treatment *or* by the "mixed motive" provisions of Title VII. *Compare* 42 U.S.C. § 2000e-2(a) *with* § 2000e-2(m). Plaintiffs may also avail themselves of the disparate impact theory to prove a violation of Title VII. 42 U.S.C. § 2000e-2(k).

The text of the mixed motive provisions make clear that it is an *alternative* theory of liability. 42 U.S.C. § 2000e-2(m) ("Except as otherwise provided in this subchapter, an unlawful employment practice is established. . . . "). *See Desert Palace*, 539 U.S. at 94 ("The first [provision] establishes an alternative for proving that an 'unlawful employment practice' has occurred") (citation omitted). Its companion provision, section 2000e-5(g)(2)(B), permits an employer to limit remedies if it proves that it would have taken the same action in the absence of the impermissible factor, *but only* "[o]n a claim in which an individual proves a violation under section 2000e-2(m) of this title. . . ."

A mixed motive defense may not be used to rebut a single motive disparate treatment claim. *Fogg v. Gonzales*, 492 F.3d 447, 453-54 (D.C. Cir. 2007). As this Court observed last Term, Title VII's methods of proof are not "coextensive." *Lewis*, 130 S. Ct. at 2199 (defense to disparate treatment claim inapplicable to disparate impact claim). Thus, where plaintiffs have not elected to use the "mixed motive" method of proof, Wal-Mart may not defend on this basis. Finally, Wal-Mart's mixed motive argument has no application to plaintiffs' disparate impact claim, which requires no proof of intent.

3. Individual Stage II Trials Are Not Required

Wal-Mart claims the right to individual class member trials, citing language from *Teamsters*, in which this Court articulated the standards for bifurcated litigation of Title VII pattern-or-practice cases. Pet. Br. 41-42. *Teamsters* noted that, after a liability determination, "additional proceedings" will "usually" be conducted. *Teamsters*, 431 U.S. at 361. No court has read this language to *require* individualized hearings in every case. Instead, *Teamsters* vested trial courts with broad discretion to "fashion such relief as the particular circumstances of a case may require to effect restitution." *Id.* at 364 (quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 764 (1976)).

Where the defendant's practices make it impossible to recreate the employment decisions that would have been made absent discrimination, individual Stage II remedies hearings may be inappropriate, as the circuits have unanimously held. *See McClain*, 519 F.3d at 280-81; *Pitre v. W. Elec. Co.*, 843 F.2d 1262, 1274-75 (10th Cir. 1988); *Segar*, 738 F.2d at 1289-91;

Domingo v. New England Fish Co., 727 F.2d 1429, 1444-45 (9th Cir. 1984); *Pettway v. Am. Cast Iron Pipe Co.*, 681 F.2d 1259, 1266 (11th Cir. 1982); *Hameed v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers Local Union No. 396*, 637 F.2d 506, 520-21 (8th Cir. 1980); *Stewart v. GM Corp.*, 542 F.2d 445, 452-53 (7th Cir. 1976). *Teamsters* does not require individual class member hearings if they would lead to a "quagmire of hypothetical judgments." *Pettway v. Am. Cast Iron Pipe, Co.*, 494 F.2d 211, 260 (5th Cir. 1974). Where, as here, the employer's system has been infected with subjective decision-making and lacks records to document the employment decisions at issue, courts have concluded that allocating relief based upon economic models that replicate the decisions at issue "has more basis in reality . . . than an individual-by-individual approach." *Id.* at 263.

Here, the district court made findings to support the need for a classwide approach. App. 256a, 270a-276a. "Wal-Mart's database contains the critical information necessary to perform such an analysis for each employee individually, including job history, seniority, job review ratings, weeks worked, full-time versus part-time status, regular-time versus overtime, and store location." App. 271a-272a. While it determined that there was "no need to assess individual interest levels with respect to equal pay," the district court limited promotion back pay claims because of the absence of data demonstrating individual class member interest in promotion. App. 269a, 271a.

Moreover, Wal-Mart's claim that individual hearings would somehow produce a more reliable result does not withstand scrutiny. Wal-Mart has maintained no contemporaneous records of the reasons for the tens of thousands of pay or promotion decisions at issue here. Many of the decisions were made more than ten years ago by managers who, at any one time, had hundreds or thousands of employees under their supervision. If individual hearings mean that Wal-Mart will offer little more than *post hoc* rationales for decisions it chose not to document, the district court was within its discretion not to require them. 3 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 10:2 (4th ed. 2002). ("[A]ggregate evidence of the defendant's liability is more accurate and precise than would be so with individual proofs of loss.").

4. There Is No Due Process Right to Defend Claims Individually

Finally, Wal-Mart invokes the Due Process Clause to assert a constitutional right to "present every available defense," which the company interprets here as the "right" to defend any class action individual-by-individual. Pet. Br. 43. The cases from which it derives this sweeping (and heretofore unrecognized) constitutional right – one which would foreclose the use of class actions entirely – do not support the claim. *Lindsey v. Normet*, 405 U.S. 56, 64 (1972) (state statute requiring trial within six days in landlord-tenant actions does not violate Due Process

Clause); *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971) ("the scope of a consent decree must be discerned within its four corners").

This Court has never recognized a constitutional right to present one's defense using *particular* forms and methods of proof. Such case management decisions lie within the discretion of the trial courts, subject to appellate review after final judgment. *See, e.g.*, Fed. R. Civ. P. 16(c)(2); Manual for Complex Litigation § 11.64 (4th ed. 2009). Likewise, Rule 23 explicitly empowers trial courts to "determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument." Fed. R. Civ. P. 23(d)(1).

II. CLAIMS FOR MONETARY RELIEF MAY BE CERTIFIED UNDER RULE 23(b)(2)

A. Rule 23(b)(2) Does Not Limit Certification to Cases Seeking Exclusively Injunctive or Corresponding Declaratory Relief

Wal-Mart argues that a case may be certified under Rule 23(b)(2) only if it seeks *exclusively* injunctive and declaratory relief. This novel reading of Rule 23 is unsupported by the language of the Rule, the Advisory Committee Notes and more than 45 years of case law interpreting the Rule and Title VII.

The text of Rule 23 provides in relevant part:

> A class action may be maintained if Rule 23(a) is satisfied and if . . . (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive or corresponding declaratory relief is appropriate respecting the class as a whole.

Fed. R. Civ. P. 23.

By its terms, whether a class may be certified under Rule 23(b)(2) depends on the nature of the defendant's conduct *and* whether that conduct may be addressed through injunctive or declaratory relief for the class.

The text does *not* limit Rule 23(b)(2) actions to cases which seek *only* injunctive or declaratory relief. Indeed, nothing in the text of the Rule places any limit on relief available in a (b)(2) class action. Rather, "the language describes the type of conduct by the party opposing the class which is subject to equitable relief by class action under (b)(2)." *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239, 251 (3d Cir. 1975). The term "making appropriate final injunctive relief" is thus a description of the conduct that justifies a 23(b)(2) class, not the relief that is available:

> This is not to be read as saying "thereby making appropriate *only* final injunctive relief. . . ." All that need be determined is that conduct of the party opposing the class is

> such as makes such equitable relief appropriate.

Pettway, 494 F.2d at 256-57 (emphasis added); *accord Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998) ("Rule 23(b)(2), by its own terms, does not preclude all claims for monetary relief.").

Nor may such limitation be read into the Rule. Rule 23 "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action." *Shady Grove*, 130 S. Ct. at 1437. "[T]he rule as now composed sets the requirements [courts] are bound to enforce. . . . Courts are not free to amend a rule outside the process Congress ordered. . . ." *Amchem*, 521 U.S. at 620.

The Advisory Committee Notes, to which this Court often refers in interpreting the Rules, *Amchem*, 521 U.S. at 615-17; *Eisen*, 417 U.S. at 173-74, confirm this interpretation of Rule 23. The Notes provide that Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates *exclusively or predominantly* to money damages." Fed. R. Civ. P. 23(b)(2) Advisory Committee's Note (1966) (emphasis added). The Committee plainly anticipated final relief in a Rule 23(b)(2) action could include money damages, in addition to injunctive or declaratory relief. This language quite consciously reflects the distinction that the modern Rule drew between Rule 23(b)(2) cases, where money damages will not predominate, and Rule 23(b)(3) where damages may predominate. For the latter, the Rule imposes additional safeguards to ensure the interests of the class are adequately protected.

Notwithstanding the unmistakably clear meaning of the Advisory Committee Notes, Wal-Mart would infer a contrary – and unspoken – intention to reserve Rule 23(b)(2) for exclusively injunctive relief claims from a list of pre-1966 cases cited in the Notes in which only non-monetary relief was sought. The Notes explain, however, that the list is intended to be "illustrative" of actions "in the civil rights field where a party is charged with discriminating unlawfully against a class" – in other words, where defendant "has acted or refused to act on grounds that apply generally to the class." Fed. R. Civ. P. 23(b)(2) Advisory Committee's Note (1966).

That the Advisory Committee list of cases did not include Title VII or other types of civil rights actions that authorized monetary relief is explained, not by an intention to exclude such claims, but by the timing of the Rules amendment process. The draft of the Committee Notes for the modern Rule 23 was completed and published in March 1964. *Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Court*, 34 F.R.D. 325 (March 1964). It was not until July 2, 1964, that Congress passed the Civil Rights Act of 1964, which provided comprehensive civil rights protections in employment, public accommodations, housing and education. Pub. L. No. 88-352, 78 Stat. 241 (1964). The Notes, thus, cannot be read to implicitly limit the types of civil rights cases nor the types of relief that may be sought under Rule 23(b)(2).

Wal-Mart also relies on *Ortiz v. Fibreboard*, 527 U.S. 815, 842 (1999), to argue that Rule 23(b)(2) must be limited to its "historical antecedents." *Ortiz* did not address – nor even mention – the proper scope of Rule 23(b)(2).

The Advisory Committee plainly did not intend to limit the new provision to its "historical antecedents." It sought to facilitate civil rights cases. *Amchem*, 521 U.S. at 614 (Rule 23(b)(2) "build[s] on experience mainly, but not exclusively, in the civil rights field") (quoting Benjamin Kaplan, *Continuing Work of the Civil Rules Committee*, 81 Harv. L. Rev. 356, 389 (1967)); *In re Monumental Life Insurance Co.*, 365 F.3d 408, 417 n.16 (5th Cir. 2004) (quoting 7A Charles A. Wright et al., Federal Practice and Procedure § 1775 (2d ed. 1986)). As Professor Kaplan explained, the new (b)(2) provision was intended to avoid the inefficiency of individual suits where the conduct was directed at a group: "individual lawsuits . . . would nevertheless be inadequate and inefficient [because] . . . the party opposing a class had acted on grounds apparently applying to the whole group." 81 Harv. L. Rev. at 389.

Wal-Mart argues in the alternative that, if *any* form of monetary relief is permitted under Rule 23(b)(2), the Court must find Rule 23(b)(2) unconstitutional. Pet. Br. 47. It rests this claim on two assertions: that the Due Process Clause *requires* notice and opt-out rights for any class action in which *any* amount or form of monetary relief is sought, and that Rule 23(b)(2) *prohibits* notice and opt-out to class members. Neither Rule 23 nor this Court's Due Process jurisprudence supports these sweeping conclusions.

This Court has never held that the Due Process Clause mandates opt-out rights whenever any kind of monetary relief is sought in a class action. "It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *see Wilkinson v. Austin*, 545 U.S. 209, 224 (2005) ("we generally have declined to establish rigid rules"). The requirements of Rule 23(a) and (b)(2) afford class members important due process protections. The Rule 23(b)(2) requirement that the district court determine whether injunctive relief predominates over monetary relief, which tests the cohesiveness of the class interests, "serves essentially the same functions as the procedural safeguards . . . mandated in (b)(3) class actions." *Allison*, 151 F.3d at 414-15. In addition, class members' rights are protected by the determination that both the named plaintiffs and their counsel will adequately represent the interests of the class. *Kincade v. Gen. Tire & Rubber Co.*, 635 F.2d 501, 507 (5th Cir. 1981) (no due process right to opt out of a 23(b)(2) class settlement); *Wetzel*, 508 F.2d at 257 (declining "to hold that due process ineluctably requires notice in all (b)(2) class actions").

This Court's decision dismissing *certiorari* as improvidently granted in *Ticor Title Insurance Co. v. Brown*, 511 U.S. 117 (1994), did not address – much less decide – whether due process may be satisfied through other safeguards built into Rule 23(b)(2) where claims for back pay accompany proper claims for injunctive relief. App. 96a n.44. *Shutts* did not address these questions either. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). The Court limited its holding in *Shutts* to "claims wholly or predominately for money judgments" and mandated protections for state court class actions equivalent to those provided by Rule 23(b)(3) for damages cases. *Id.* at 812 n.3. It expressed "no view concerning other types of class actions, such as those seeking equitable relief." *Id.* No court has ever held that notice and opt out rights are always required when any monetary relief is sought.

In any event, Rule 23 empowers a district court to take steps to protect a class in (b)(2) or other class cases. Fed. R. Civ. P. 23(d)(1) confers broad discretion on the district court to issue orders "to protect class members and fairly conduct the action," which include notice of "members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims and defenses, or to otherwise come into the action." Fed. R. Civ. P. 23(d)(1)(B). This subsection is, thus, part of the protections "designed to fulfill requirements of due process to which the class action procedure is of course subject." Fed. R. Civ. P. 23(d)(2) Advisory Committee's Notes (1966).

The 2003 amendments to Rule 23(c)(2) confirmed a court's authority to order notice in Rule 23(b)(1) and (b)(2) actions. The Notes explain that the amendment did not confer new authority but instead "call[s] attention to the court's authority – already established in part by Rule 23(d)(2) – to direct notice of certification to a Rule 23(b)(1) or (b)(2) class." Fed. R. Civ. P. 23 Advisory Committee's Note (2003). Several circuits, and the district court below, have found that the language of Rule 23 permits, but does not require, notice and opt-out rights in (b)(2) actions. *See, e.g.*, *Eubanks v. Billington*, 110 F.3d 87, 94-95 (D.C. Cir. 1997) ("we join those circuits holding that the language of Rule 23 is sufficiently flexible to afford district courts discretion to grant opt-out rights in (b)(1) and (b)(2) class actions."); *In re Monumental Life*, 365 F.3d at 417; *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 165-66 (2d Cir. 2001).

B. The Back Pay Remedy in Title VII Class Actions Is Consistent with Certification Under Rule 23(b)(2)

Although Wal-Mart did not dispute in the district court that "claims for . . . lost pay readily fall within the ambit of a (b)(2) class action," App. 236a, it now challenges the inclusion of back pay claims in any Rule 23(b)(2) class. Pet. Br. 53-55. Both the district court and the Ninth Circuit concluded that plaintiffs' back pay claims were properly certified under Rule 23(b)(2). App. 90a-94a, 269a, 276a.

The circuits unanimously concur that back pay relief may be sought in a Rule 23(b)(2) action. *See Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 650 (6th Cir. 2006); *Cooper v. S. Co.*, 390 F.3d 695, 720 (11th Cir. 2004), *overrruled on other grounds by Ash v. Tyson Foods Inc.*, 546 U.S. 454, 457 (2006) (per curiam); *Robinson*, 267 F.3d at 169-170; *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 896 (7th Cir. 1999); *Allison*, 151 F.3d at 415-16; *Kirby v. Colony Furniture Co.*, 613 F.2d 696, 699-700 (8th Cir. 1980); *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 342 (10th Cir. 1975); *Pettway*, 494 F.2d at 257-258; *Robinson v. Lorillard Corp.*, 444 F.2d 791, 802 (4th Cir. 1971). This is true even for courts that have adopted the so-called "incidental damages" test for (b)(2) certification. *See, e.g.*, *Allison*, 151 F.3d at 415-16.

The equitable nature of the Title VII back pay remedy and its close relationship with injunctive relief means that such a remedy is generally available in (b)(2) actions. The purpose of Title VII is to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) (quoting *Griggs*, 401 U.S. at 429-30). As this Court has noted, back pay "has an obvious connection" to that purpose:

> If employers faced only the prospect of an injunctive order, they would have little

> incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that "provide(s) the spur or catalyst which causes employers . . . to endeavor to eliminate [discriminatory practices]."

Albemarle, 422 U.S. at 417-18 (citation omitted). Back pay is an integral component of Title VII's "make whole" remedial scheme. *Id.* at 419-21.

Title VII back pay awards are not "money damages," which the Advisory Committee Notes address. *Wetzel*, 508 F.2d 239, 250-51 n.21. Back pay is an equitable remedy under Title VII, rather than a form of compensatory damages, and is awarded by the court. 42 U.S.C. § 2000e-5(g); *Albemarle*, 422 U.S. at 416-17, 421; *Allison*, 151 F.3d at 423 n.19. When Congress amended Title VII in 1991 to add compensatory and punitive damage remedies, it left intact the equitable nature of back pay, explicitly excluding back pay from the definition of compensatory damages. *See* 42 U.S.C. § 1981a(b)(2) ("Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under [42 U.S.C. § 2000e-5(g)]."); *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 527 (1999) (citing "the 1991 Act's distinction between equitable and compensatory relief"); *see also United States v. Burke*, 504 U.S. 229, 238-39 (1992), *superseded by statute on other grounds*, Pub. L. No. 104-188, § 1605 (1996), 26 U.S.C. § 104 (concluding that a Title VII back pay award was not excludable from income for tax purposes since it did not compensate for personal injuries).

The discretion to deny back pay is extremely limited and justified only, in the rare instance, where an award would "frustrate the central statutory purposes" of Title VII. *Albemarle*, 422 U.S. at 405. Wal-Mart claims back pay is "nothing more than monetary compensation for past harm." Pet. Br. 53; *see Great-West Life & Annuity Ins. Co v. Knudson*, 534 U.S. 204, 218 (2002). While the ERISA claim in *Great Western* may be so described, this Court distinguished Title VII back pay as "an integral part of an equitable remedy." *Id.* at 218 n.4 (citation omitted).

Moreover, like injunctive relief claims, back pay claims are "rooted in grounds applicable to . . . the class." *Allison*, 151 F.3d at 415-16 (quoting *Pettway*, 494 F.2d at 257). Both injunctive relief and class entitlement to back pay derive from defendant's conduct that applies "generally to the class." Such conduct forms the basis for a liability determination that settles "the legality of the behavior with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2) Advisory Committee's Note (1966). This liability determination is the predicate both for class injunctive relief and an award of back pay to the class, establishing for each class member a presumptive right to back pay. *Teamsters*, 431 U.S. at 361-62.

Finally, unlike damage claims, back pay proceedings under Title VII are tried to the court, not a jury, and do not turn on highly individualized factors such as causation or the subjectivity inherent in claims for emotional harm. *Allison*, 151 F.3d at 416-17. Back pay awards typically involve "less complicated factual determinations," *Reeb*, 435 F.3d at 650, and may be calculated for the class based upon objective information found in the employer's payroll records. This is particularly true for the equal pay claims here, where there is no need to assess individual interest levels, and where objective computerized data "is readily available." App. 271a.

Wal-Mart contends that back pay is highly individualized and may be awarded *only* through individual hearings. Pet. Br. 55. As noted above, individual hearings are not required in all pattern or practice cases. Moreover, even where Stage II hearings are required, Rule 23(b)(2) certification remains appropriate because of the equitable nature of back pay, and the common interest of class members in obtaining back pay that follows a pattern or practice liability finding. To hold otherwise would undermine this Court's determination that the *Teamsters'* pattern or practice method of proof is fully compatible with a Rule 23 class action. *Cooper*, 467 U.S. at 876 n.9 ("it is plain that the elements of a prima facie pattern-or-practice case are the same in a private class action.").

Wal-Mart projects potentially "billions of dollars of back pay claims" which it argues, makes this case categorically ineligible for back pay relief. Pet. Br. 55. Wal-Mart's simplistic calculus of the total potential back pay ignores the value of the corresponding injunctive claims in this case. Here, a potentially large back pay award for the class as a whole simply reflects the size of the class and thus results from the same facts that convinced the district court that injunctive relief claims had a broad scope. App. 89a, 238a-239a. Wal-Mart's approach would simply insulate defendants from (b)(2) classes whenever the class is large, no matter how significant the corresponding injunctive relief, a position that finds no support in either Rule 23 or Title VII. Wal-Mart would foreclose the use of 23(b)(2) in precisely the circumstances that the class action can provide the greatest efficiencies for redressing the effects of pervasive workplace discrimination. *Cf. Carnegie v. Household Fin.*, 376 F.3d 656, 660-61 (7th Cir. 2004) (Posner, J.).

Significantly, individual class claims for back pay in this case are likely to be relatively small, amounting to an average of $1,100 per year for hourly workers. J.A. 475a. Prosecution of such claims individually would be largely impracticable, and thus would not implicate the preference for individual litigation that may arise where damages predominate. *See* Fed. R. Civ. P. 23(b)(3) Advisory Committee's Note (1966); App. 89a. In contrast, the injunctive claims are substantial and would lead to "very significant long-term relief" for the class. App. 239a.

C. Former Employees Are Properly Included in a Rule 23(b)(2) Class

Wal-Mart asserts that back pay must predominate over injunctive relief because class members who leave Wal-Mart at any time prior to judgment lack standing to seek injunctive relief. Pet. Br. 52. Wal-Mart thus reduces the Rule 23(b)(2) "predominance" determination to tallies of class members with an interest in injunctive relief, and those allegedly without, a calculation that would have to be performed continuously throughout the litigation, as current workers leave and new workers are hired.

Wal-Mart confuses two very different issues – standing of individual class members and the criteria for (b)(2) certification.[2] Under this Court's precedents, plaintiffs and the class they represent have standing to seek injunctive relief. Two named plaintiffs are still Wal-Mart employees as are a substantial number of class members, and thus they unquestionably have standing to seek injunctive relief on behalf of themselves and the class. *See United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 403 (1980); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 755-56 (1976).

Rule 23(b)(2) focuses on a defendant's conduct that gives cohesion to the class. This cohesion is not lost if injunctive relief subsequently becomes unavailable for some or even all class members. "The conduct of the employer is still answerable 'on grounds generally applicable to the class.'" *Wetzel*, 508 F.2d at 251.

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[2] The Ninth Circuit's more limited holding, excluding employees who left employment prior to the filing of the action, also conflated class member standing with the Rule 23(b)(2) inquiry. App. 100a-102a.

Where a group of victims challenge the same discriminatory employment practice, Rule 23 provides an efficient and economical means of adjudicating these claims. *See Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 349 (1983) (recognizing "the principal purposes of the class action procedure" are the "promotion of efficiency and economy of litigation"). Treating current and former employees as members of the same class serves this goal because a pattern or practice liability finding establishes the common predicate for injunctive *and* monetary relief. *Teamsters*, 431 U.S. at 361-62.

Wal-Mart's formulation once again relies on an incomplete calculus for assessing whether monetary claims predominate. First, it assumes that back pay claims of former employees undermine 23(b)(2) status, a view at odds with the role of back pay in Title VII. *See supra* at 55-60. Moreover, predominance cannot be determined solely by a head count of former and current employees, because injunctive relief will benefit not only class members who are current employees, but also "all future female employees as well." App. 239a. Former employees could also benefit from an injunction, since they may seek employment with Wal-Mart in the future once discriminatory conditions are eliminated. *Wetzel*, 508 F.2d at 253 (former employees "may desire to renew their employment . . . if the discriminatory practices are terminated."); *see Gratz v. Bollinger*, 539 U.S. 244, 262 (2003) (applicant denied admission to university who expressed a desire to reapply may challenge admission practices).

It is inevitable that the class of victims affected by an allegedly discriminatory workplace practice will include both current and former employees. This is, of course, because employee turnover is common, especially in the retail industry. Pet. Br. 52. One would expect turnover to be even higher in a workplace where discrimination is prevalent. Wal-Mart's approach would encourage employers to prolong the EEOC process and subsequent litigation, so that normal turnover may do its work to undermine any potential 23(b)(2) class. Even ordinary non-class litigation is lengthy:

> Delays in litigation unfortunately are now commonplace. . . . In a better world, perhaps, lawsuits brought under Title VII would speed to judgment so quickly that the effects of legal rules on the behavior of the parties during the pendency of the litigation would not be as important a consideration. We do not now live in such a world. . . .

Ford Motor Co. v. EEOC, 458 U.S. 219, 228 (1982). The delays in this case, filed nearly 10 years ago, are by no means unique. *See, e.g., Lewis*, 130 S. Ct. at 2196 (complaint filed in 1998).

Wal-Mart's misconception also creates a "perverse incentive" for employers to fire employees who might initiate – or simply be a member of – a Title VII class action. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (concluding that similar concerns support protection of former as well as current employees under Title VII's anti-retaliation provision); *Wetzel*, 508 F.2d at 247 (if former employee could not be a class representative for current employees, "employers would be encouraged to discharge those employees suspected as most likely to initiate a Title VII suit").

D. Punitive Damages May Be Certified Under Rule 23(b)(2) in Some Cases

This case does not now present the question whether class punitive damages may be certified under Rule 23(b)(2). The Ninth Circuit vacated and remanded the district court's certification of the claim of punitive damages, directing the court to consider a variety of factors in order to determine whether punitive damages may be awarded to a class certified under Rule 23(b)(2) or (b)(3). Respondents briefly address Wal-Mart's contentions although the Court need not address this issue.

Wal-Mart argues that punitive damages will always predominate. Pet. Br. 55 (citing *Allison*, 151 F.3d at 418). Its categorical approach finds no support in the text of Rule 23(b)(2) and cannot be reconciled with the Advisory Committee's explanation that (b)(2) certification is appropriate unless relief sought is "exclusively or predominantly" monetary damages. *See id.* at 426 (Dennis, J., dissenting); App. 87a.

Wal-Mart asserts that punitive damages must be assessed on an individual basis, even in a class case. Pet. Br. 56. The availability of punitive damages in a class case that challenges company-wide policies and practices turns on facts that are common to the class. Here, class members have a cohesive interest in ensuring that a punitive damage award will punish and deter defendant's conduct consistent with Rule 23(b)(2). *See Allison*, 151 F.3d at 417 (punitive damages might be certified under (b)(2) under some circumstances). Punitive damages in a Title VII case are not compensatory, but focus on the defendant's state of mind. *Kolstad*, 527 U.S. at 538; *see Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). The defense to a punitive damage claim in a corporate setting does not turn on the acts of lower level subordinates, but on the employer's "good-faith efforts to comply with Title VII." *Kolstad*, 527 U.S. at 545-46.

Wal-Mart relies on the use of the term "aggrieved individual" in Title VII's punitive damage provision. 42 U.S.C. § 1981a(B)(1). Nothing in that provision or its legislative history suggests that punitive damages must be assessed on an individual basis. This Court has held that use of the term "individual" in a statute does not preclude class treatment of claims. *Califano*, 442 U.S. at 698-701.

Wal-Mart's reliance on *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 422 (2003), and *Phillip Morris USA v. Williams*, 549 U.S. 346, 353 (2007), is similarly misplaced. These cases both involved punitive damage awards in *individual* state personal injury cases, where the jury's award took into account similar harm inflicted on non-parties to the litigation. In contrast, in a class action like this, the injured parties are all before the court and the court can ensure that any award of punitive damages is based "solely on . . . conduct that was directed toward the class." App. 241a.

* * *

Wal-Mart assumes that Rule 23 certification is an all-or-nothing proposition: either the case must be certified under Rule 23(b)(2) in its entirety or, as it advocates, not at all. Rule 23 is not so inflexible. The text of Rule 23 and the Advisory Committee Notes set forth the appropriate framework for Rule 23; the application of the Rule is left to the "broad discretion" of the district court. *Falcon*, 457 U.S. at 160. Courts have certified for trial as to specific common issues, *In re Nassau Strip Search Cases*, 461 F.3d 219, 226 (2d Cir. 2006); *Allen v. Int'l Truck & Engine Corp.*, 358 F.3d 469, 471-72 (7th Cir. 2004), or adopted a "hybrid" approach, certifying liability under Rule 23(b)(2) and damage claims under 23(b)(3). *Jefferson*, 195 F.3d at 898; *see* Fed. R. Civ. P. 23 Advisory Committee's Note (2003) (endorsing hybrid certification).

The district court is in the best position to evaluate the "pragmatic ramifications of adjudication in each situation," particularly in making a Rule 23 (b)(2) determination. *Pettway*, 494 F.2d at 256-57 (quoting 3B Moore's Federal Practice ¶ 23.45 at 703 (2d ed. 1969)). Here, the district court understood and fulfilled this pragmatic role. While recognizing "the importance of the courts in addressing the denial of equal treatment under the law wherever and by whomever it occurs," App. 166a, the district court conducted a thorough and rigorous Rule 23 inquiry, evaluating the evidence and arguments presented by each side. It determined to certify the class but limited the promotion claims and approved a right to opt out. App. 243a, 267a. The district court's order was a proper exercise of discretion.

◆

CONCLUSION

This Court should affirm the certification of the class.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, CHRISTINE KWAPNOSKI, DEBORAH GUNTER, KAREN WILLIAMSON AND EDITH ARANA, on behalf of themselves and all others similarly situated, Plaintiff, vs. WAL-MART STORES, INC., Defendant	Case No. C-01-2252 MJJ **DECLARATION OF DR. RICHARD DROGIN IN SUPPORT OF PLAINTIFFS' REPLY BRIEF IN SUPPORT OF CLASS CERTIFICATION** (Filed Jul. 3, 2003) **Date:** **July 25, 2003** **Time:** **10:00 a.m.** **Courtroom: 11**

I, Dr. Richard Drogin declare:

I make this declaration of my own personal knowledge and could testify thereto if called as a witness.

A. INTRODUCTION

1. I have been retained by Plaintiffs' counsel to analyze statistical questions raised in the *Dukes v. Wal-Mart Stores, Inc.* litigation. The purpose of my study was to obtain descriptive summaries of computer data, and prepare various statistical analyses relevant to the issues in the case. I have previously submitted a report in this litigation, dated February 3, 2003. Subsequently, defendant's expert Dr. Joan Haworth submitted a report dated April 1, 2003 giving her opinion and results regarding her review of my February 3 report. On April 18, 2003 she provided an amended report and revised analyses. Then, on April 21, 2003, at her deposition, she provided additional backup materials for her revised analyses. I attended that deposition. Subsequently, she filed a declaration in Opposition to Class Certification. The declaration below gives my rebuttal to Dr. Haworth's report and deposition testimony. Except for the addition of citations to Dr. Haworth's declaration in Opposition to Class Certification, the attachment of cited documents, and the correction of typos, this declaration is identical to the rebuttal report I wrote dated May 6, 2003.

2. Dr. Haworth's report covers several issues regarding plaintiff's expert reports. My rebuttal will address those areas where she has presented her opinions regarding issues covered in my February 3 report. In this declaration I will explain the flaws in her conclusions regarding the promotion process and compensation system at Wal-Mart. Unless otherwise noted, all references given below to her report will refer to the original report dated April 1, 2003 and corresponding references in her Declaration. She has testified at her deposition that there are no substantive differences between her April 1, 2003 report and the revised report of April 18, 2003. Her declaration adds additional analyses and material, which I have not analyzed. Some of the tables in her Declaration also cover a shorter time frame than those utilized in her report, and thus the numbers do not always correspond to those in her report. My rebuttal report, and this declaration, do not address these changed numbers.

B. SUMMARY OF FINDINGS

3. Dr. Haworth's analysis and conclusions are defective because she:

a. Relies on incomplete and "nearly useless" job posting data in her analysis of promotions to hourly jobs;

b. Fails to note that job posting selections contribute to gender segregation by department;

c. Fails to note that the average percentage of women in the appropriate pool of most qualified applicants determined from the MIT program is nearly identical to the average percentage of women in the availability pool I used in my promotion analysis presented in my February 2003 report, thus corroborating my earlier analysis of promotions into MIT;

d. Relies on Management Career Selection data that is incomplete and biased, thereby ignoring all promotions to salaried jobs except Store Manager;

e. Inappropriately disaggregates hourly employees into 7500 separate subunits to perform her regression analysis of hourly pay rates because she:

- Ignores documented company policy for setting pay rates in her decision to analyze stores separately;
- Incorrectly applies statistical methodology in deciding to analyze stores separately;
- Arbitrarily subdivided stores further into smaller grocery/non-grocery and specialty subunits, which is unsupported by any written company policy;

f. Relies on a Store Manager Survey to justify her regression model, despite admitting that the survey methodology violates accepted scientific standards, and was conducted by defense counsel contrary to her recommendations;

g. Erroneously excludes from her hourly pay rate analyses persons who were Department Heads;

h. Arbitrarily and inexplicably excludes from her hourly pay rate regressions persons who were ever demoted and persons who ever had been salaried;

i. Includes tainted variables in her compensation regression analyses despite her testimony in other litigations stating that this should not be done;

j. Includes variables in her compensation regressions without justification or explanation;

k. Fails to report statistically significant aggregated results of her subunit regressions even though she has testified in other litigations that such aggregation is appropriate to determine if there is an overall disparity;

l. Fails to report compensation regressions for salaried employees other than Store Manager even though these are included in her backup materials.

C. PROMOTIONS

4. Dr. Haworth criticized my promotion analyses, and presented various analyses of her own derived from the Job Posting System, Management Training Posting, and Management Career Selection System. Each of these is addressed below.

Job Posting Data - Nearly Useless

5. Dr. Haworth presents a lengthy discussion of the job posting system at Wal-Mart and does several analyses concluding that "[w]hen all of the job postings for all the stores in all districts and all regions are all aggregated there are 3,266 more female job offers than expected in a gender-neutral process when controlling for department and job code."[1] Dr. Haworth's analysis and conclusion are misleading, and not probative, because the job posting data upon which she relies is incomplete and is not utilized systematically.

6. For example, for promotions into Support Manager, a job where it is possible to determine the completeness of the job posting data relative to actual promotions recorded in the PeopleSoft job history data, the job posting data includes posting and acceptances in only 20% of the total number of actual promotions found in the PeopleSoft data.[2] With such a large percent of vacancies filled outside the job posting system, and no policy or explanation regarding when the system was utilized or by-passed, no meaningful analysis of promotions can be conducted from this dataset.

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[1] See middle of page 24 of her report; Declaration at 47:17-19.

[2] See Table 19, pages 28-29 of Drogin, February 2003 report. Lateral moves are not counted in the PeopleSoft promotions in this study.

7. Dr. Haworth relied on the job posting data, but made no attempt to evaluate or study the completeness of the job posting data.[3] At her deposition, when asked whether she had done any " ... analysis for any position in the job posting data versus Global PeopleSoft", she answered, "I don't recall doing such."[4] Further, when asked "So you don't know what proportion of positions that were filled in the Global PeopleSoft were filled by posting for any hourly job?" she answered " ... I do not know what proportion of the moves into support manager, whether demotions, promotions or laterals, were therefore covered by the posting."[5]

8. In fact, it can only be concluded that the job posting data is "nearly useless" according to Dr. Haworth's published statements in the Employee Relations Law Journal. Dr. Haworth's failure to note the high degree of incompleteness of the job posting data, the apparent lack of any system governing when the job posting was used, and her failure to present any study of these obvious problems directly contradict the first caveat she espoused in an article

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[3] Dr. Haworth was aware there was or might be a problem with the job posting data, since she had read my report, which indicated the job posting data was incomplete, and also attended my deposition at which I described the problem.

[4] Haworth deposition page 101, line 14.

[5] Haworth deposition, page 101, lines 15-24.

co-authored with her husband published in the Employee Relations Law Journal:[6]

> "The information collected from applicants must be sufficient to allow a proper analysis of the selection process in a race- and gender-neutral environment. To this end, there are two general caveats. First, information that is collected but never verified or checked for accuracy is nearly useless."

Job Posting Selections Contribute to Gender Segregation by Department

9. Ignoring the defects with job posting data described above, Dr. Haworth fails to note, or present any explanation of, obvious gender segregation patterns indicated by her job posting promotion analysis. For example, her analysis shows that female bidders for Department Head jobs receive significantly more promotions in the departments with the highest percent female than would be expected based on their application rate, and significantly fewer promotions in departments with highest percent men. Tables 1a and 1b below list the ten departments with the

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[6] The article appears in Volume 12, pages 352-369 of the Employee Relations law Journal, and has been designated in this litigation as Bates WMHO1234046-WMHO1234063. Quote appears on WMHO1234058, attached as Ex. 1

highest percent women, and the lowest percent women[*] as of year-end 2001.

Table 1a

Dr. Haworth Job Posting Analysis for 10 Departments with Highest Percent Women

Target Department	% Wom	Diff.	Z-Value
34 Ladies Sportswear	99.2	35.10	5.20
27 Hosiery	99.1	66.30	6.90
19 Piece Goods	99.1	61.50	7.40
46 Health & Beauty	98.7	56.40	6.70
26 Infants & Toddlers	98.6	79.90	6.60
32 Jewelry	97.3	58.30	6.20
910 Back Office	94.2	203.20	9.30
23 Men's Wear	92.5	92.80	6.90
20 Domestic Goods	92.4	20.90	1.90
40 Pharmacy	88.8	54.20	5.00
Total		728.60	19.41

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[*] '% Women' is the % women among active employees at year-end 2001, restricted to departments with at least 5000 employees, shown in Table 14 of my February 2003 report. 'Diff' and 'Z-Value' are taken from Dr. Haworth's table on page 22-23 of her report. See Declaration at 43-44.

Table 1b

Dr. Haworth Job Posting Analysis for 10 Departments with Lowest Percent Women

Target Department	% Wom	Diff.	Z-Value
16 Horticulture	39.3	8.30	0.40
8 Pets and Supplies	37.6	-77.00	-3.10
284 Div 28 Receiving	30.7	7.50	1.40
9 Sporting Goods	30.2	14.20	0.70
4 Paper Goods	29.5	-33.40	-1.30
11 Hardware	27.7	-26.90	-1.20
90 Dairy Products	25.9	-30.20	-2.70
93 Meat	21.9	-4.10	-0.70
94 Produce	9.4	-10.70	-1.90
37 TBO Service	6.7	-170.70	-3.60
Total		170.00	-3.18

10. Tables 1a and 1b show that women received 728.6 more offers for Department Head jobs in highly female departments than expected, and 170 fewer offers than expected in highly male departments, based on their percent among applicants. These disparities are statistically significant: For the over-promotion of women into Department Head in highly female departments with Z-value of 19.41, there is only 1 chance in 10 to the 70th power that a disparity this large would occur under random selection. For the under-promotion of women into Department Head in departments with the lowest percent female the Z-value of -3.18 indicates there is less than 1 chance in 700 that a disparity this large would occur under

random selection.[9] For both of these analyses, the expected number is based on the percent of women among applicants who applied for the positions, as determined from the job posting data. Thus, Dr. Haworth's job posting analysis demonstrates that gender segregation by department is perpetuated, in part, through the job posting system.

2003 Assistant Manager Training Program Corroborates Plaintiff's Analysis

11. Prior to January 2003 Wal-Mart had no system for hourly employees to express interest or apply for any entry level salary management positions. In January 2003 Wal-Mart introduced for the first time a system for accepting applications for their new Assistant Manager Trainee Program (also referred to as the Management-In-Training Program, or, simply, MIT Program). During a one week period Wal-Mart received about 30,000 applications through

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[9] Dr. Haworth's table on page 22 of her report shows that women received 62.6 fewer promotions into Department Head jobs in the Home Furnishing Department, resulting in a Z-value for this disparity of -3.35. The Home Furnishing Department had only 23% women among its employees at year-end 2001, but was not included in Table lb above, because the number of employees in this department was below the 5000 level that I used for selecting departments. If Home Furnishings had been included in Table lb, then the disparity, and pattern of under-promotion of women in predominately male departments would be more pronounced. Her declaration uses similar, although somewhat changed numbers, reflecting a shorter time frame. Declaration at 43-44.

this system, and about 1400 selections were made during March.

12. Dr. Haworth presents an analysis of the data from this MIT Program, and reports that "The percentage of females who voluntarily expressed interest in 2003 in promotion to management levels (44%) is similar to the 41% women were among those who were promoted in the Assistant Manager Trainee positions in the five years prior to the inception of this program."[9] Her statement ("44% is similar to 41%") suggests that the 2003 MIT program indicates the selection of female hourly employees to positions as MIT during 1998-2002 was consistent with their interest and qualifications for such positions.[10] In fact, the MIT data she presents shows the exact opposite, and corroborates the analysis of promotions into MIT positions that I presented in my report.

13. Assume, as Dr. Haworth does, that the January 2003 MIT program was fair and unbiased with respect to gender[11]. Under this assumption, the

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[9] Page 25 of Haworth report. Declaration at 51:7-10.

[10] She also suggests the bid rate for Support Manager positions in the job posting data is consistent with the actual promotions into MIT positions, on page 25 of her report. However, in her deposition testimony, page 116, lines 6-10, she admitted that this comparison is not meaningful. Her Declaration does not include this suggestion.

[11] At her deposition, page 122, line 24 through page 123, line 16 Dr. Haworth indicated her opinion that the MIT selections were the "most qualified" applicants among those "interested and

(Continued on following page)

data from the MIT program might be used to obtain the correct unbiased percentage of women among the most qualified hourly employees who want to enter salary management positions. Dr. Haworth incorrectly suggests the fair availability percentage would be 44%, i.e. the percentage of women among all those applying in the MIT program. However, the correct percentage of females among the "true, unbiased" availability pool would be those interested and available, and also most qualified. There may be many men and women who submitted applications in the 2003 MIT program who expressed interest in promotion, but for some reason are not among the most qualified. The group of people who are interested, available, *and* most qualified would be determined by the percentage of females among those actually selected from the process, since presumably (as Dr. Haworth believes[12]) Wal-Mart has selected the best, most qualified applicants. The percentage of women selected in the MIT program was 59.8%. Thus, based on Dr. Haworth's assumptions, the most accurate availability figure of women who are interested in MIT positions among those most qualified would be 59.8%.

14. In my February 2003 report I presented an analysis of promotions into MIT positions during

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available", and she had "no information" that affirmative action was being used to select women.

[12] Page 122 line 24 through page 123 line 6 of Haworth deposition.

1997-2002. I determined the percentage women in the pool of those available for promotion to be 59.6%, as shown in Table 23 of my report. My determination of this percentage was based on the percent of women in the historical feeder pools for the MIT positions.[13] The 59.6% availability figure I derived in my promotion analysis is nearly identical to the 59.8% availability figure derived from the January 2003 MIT Program selections, as described in the previous paragraph. Based upon my analysis, I found that there was a shortfall of about 3000 females promoted to MIT positions during 1997-2002. Since the 59.8% and 59.6% availability figures are so close, the results of the recent 2003 MIT Program corroborates the female availability for promotions into MIT positions I used to compute this shortfall in female promotions to MIT positions.

15. Moreover, Dr. Haworth has reported that 40.8%[14] of applicants for MIT positions from Sam's Club employees were women, while only 31.4%[15] of those promoted to MIT positions at Sam's during 1996 through first quarter 2002 were women. At her deposition, she was asked if the MIT bid rate of 40.8%

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[13] In my report, and at my deposition I explained that insufficient information was available at that time to evaluate the fairness of the January 2003 MIT postings.

[14] Page 30 of Dr. Haworth's redlined report. Declaration at 53:21

[15] Page 89 of Dr. Haworth's redlined report. Declaration at 165:6. My computations show only 25.4% of MIT promotions were women during 1997-1st quarter 2002.

was compared to the selections during the period 1996-2002, whether the disparity would be statistically significant.[16] She first answered "I don't know"[17]. When asked again, she said "I don't know, but one would calculate it."[18] Finally, when asked a third time she answered "If you aggregated them all, I think they would be more than two standard deviations."[19] Thus, according to Dr. Haworth's own deposition testimony, there is a statistically significant female shortfall in actual promotions to MIT positions during 1996-2002 at Sam's Club, compared to female availability based on applicants for the MIT program from Sam's in January 2003.

Management Career Selection Incomplete

16. The MCS system is used by Wal-Mart to fill some openings in salary management jobs. Dr. Haworth concludes from her analysis of MCS data that there are no statistically significant selection decisions adverse to women across all the postings for each salaried job. This conclusion is misleading, because the MCS system cannot be considered as an unbiased, fair bidding system as described below, and covers only a small number of salary store management decisions.

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[16] Haworth deposition, page 151 lines 7-11.

[17] Page 151, line 12

[18] Page 151, line 21

[19] Page 152, lines 1-2

17. The MCS system is rarely used to fill management positions below Store Manager. As Dr. Haworth reports (page 35 of her report, Declaration at 66:4-6), the MCS system was used to fill only 2% of Co-Manager positions, and less than 1% of Assistant Manager Positions. At her deposition, Dr. Haworth testified[20] that she could not say whether or not the small number promotions into Co-Manager or Assistant Manager positions found in the MCS data were a representative sample from those interested in these positions. Accordingly, no meaningful analysis of promotions into Co-Manager or Assistant Manager can rely on the MCS system. The only store a salary management position for which the MCS system appears to have been used on any kind of regular basis is the Store Manager job.

18. The MCS appears to be used most of the time for filling Store Manager openings, but still the number of moves found in the MCS is about 400 fewer than the number found in the PeopleSoft data, according to Dr. Haworth's calculations. (Report at 35; Declaration at 66:5). Dr. Haworth gives no explanation why there would 400 Store Manager openings filled outside of the MCS system. In Addition, as explained in my February 2003 report, the MCS system cannot be considered an unbiased bidding system due to the requirement that prior approval is necessary before an employee can bid. Moreover,

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[20] Page 310, lines 11-16

Dr. Haworth fails to point out the fact that women promoted into Store Manager positions are disproportionately assigned to smaller stores than men, and hence earn less money.[21]

D. COMPENSATION

19. In my February 2003 report I presented several analyses of compensation of all hourly and salaried store management employees, based upon the statistical technique known as *linear regression*. Dr. Haworth presented an analysis of compensation for hourly employees, and for salaried store management employees restricted to Store Managers. She did not present any compensation analysis for Co-Managers and Assistant Managers in her report, or any other salaried employees, though she did perform them.[22]

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[21] I examined whether women were disproportionately assigned to smaller stores. Promotions into Store Manager were divided up according to whether the target store was large or small, where 'large' stores were those with size 60,000 square feet or more. For each year, and for Sam's and non-Sam's stores, I determined the shortfall of women promoted into large stores compared to what is expected from their proportion among promotees. The overall Z-value for this analysis is -3.97, indicating a statistically significant pattern where women were moved into smaller stores.

[22] She admitted in her deposition that she had performed such analyses, see page 320, lines 14-18, and page 322 lines 14-18. Her backup materials indicate the results she found showed a pattern adverse to women.

20. Dr. Haworth also used linear regression analysis to do her compensation studies, but used a different model than I did. She claims that her studies "properly model the decision process"[23]. She cites deposition testimony, the Store Manager Survey, and certain statistical tests as the basis for her conclusions.

Compensation for Hourly Employees

21. Dr. Haworth incorrectly decided it is necessary to divide the hourly employees into about 7500[24] separate subunits and do separate regressions for each subunit. Moreover, she improperly includes certain explanatory variables in her regressions that are either tainted, or not considered by Wal-Mart in setting pay rates. Accordingly, her analysis is inaccurate and unreliable. The following paragraphs describe the defects in her analysis in more detail.

22. She ended up with such a large number of separate regressions by first dividing employees by store, then further dividing them by whether they held grocery or non-grocery jobs, then further dividing the non-grocery jobs into the six specialty

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[23] Haworth report, page 104. Declaration at 132:19.

[24] The total number of sub-units for which she attempted regressions is 7691, based on her supplemental results contained on the CD she turned over at her deposition. Also, see page 172 lines 15 through page 173 line 9 of her deposition.

divisions[25] and the remaining non-grocery jobs. In many stores, her analysis separates employees into eight subunits within a store[26]. There is no basis in Wal-Mart policy, or statistical justification for the extreme disaggregation of the data used by Dr. Haworth. The consequence of her disaggregation is to reduce the number of employees analyzed in each regression to a small group, sometimes as low as 20-30 employees.[27] In many cases there are so few employees in a subunit that the regression for this group could not be run.

Overly Disaggregated Analysis, Stores

23. Dr. Haworth ignores established, documented company wide policy controlling much of the compensation process, and contradicting her methodology. She cites Store Manager discretion[28] in setting pay rates as an important reason for her decision to do separate store regressions. In fact, Store Managers are constrained in the amount of discretion they have in setting pay rates. Wal-Mart's company wide Field Associate Compensation Guidelines indicate several

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[25] Haworth deposition, page 196, lines 10-25.

[26] For example, in SuperCenter stores, Dr. Haworth would separate employees into grocery, non-grocery, and 6 specialty division jobs.

[27] Haworth deposition, page 188-191.

[28] See page 41 of her report. Declaration at 92:16-93:2. On page 47, she says, "Because pay rates for hourly employees at Walmart and SC etc. are generally established by Store Mgrs etc."

aspects of salary setting and job assignment which require approval at the District and/or Regional Manager level. The Compensation Guidelines state that "the Store Manager needs to have the flexibility to address ... differences"[29] among employees in setting pay rates. However, these Guidelines list several ways in which the Store Manager is constrained in their discretion:

a. "Exceptions to these guidelines will be reported every pay period in the Payroll Exception Report, which will roll up to the Distinct Manager and Regional Vice President."[30]

b. "The People Group and your Regional People manager will act as consultants to ensure consistency in the program's administration and to provide compensation standards for hiring, evaluating and awarding pay increases."[31]

c. "A facility's pay structure is based on local competitive pay rates of comparable jobs, and established in conjunction with the District Manager, Regional Vice President, and Regional People Manager."[32]

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[29] Field Associate Compensation Guidelines, WMHO000676. The Guidelines are attached as Ex. 2

[30] Field Associate Compensation Guidelines, WMHO000676.

[31] Field Associate Compensation Guidelines, WMHO000676.

[32] Field Associate Compensation Guidelines, WMHO000677.

d. In setting the starting rate for new hires, " ... any increase above 6% of the Starting Rate requires District Manager or Specialty Group Regional Manager approval."[53]

e. " ... all associates' pay levels should be reviewed and any pay inequities caused by the Start Rate adjustments should be identified and discussed with your District Manager."[54]

f. A national pay structure specifies a $0.25 per hour gap between Start Rates in consecutive pay classes (i.e. pay class 1 to 2, pay class 2 to 3, etc.)[55]

24. Moreover, store management employees frequently change stores, districts and even regions.[56] These personnel decisions made by Wal-Mart reflect control exerted above the Store Manager level, further indicating that stores are not isolated from each other. By doing separate regressions for every store

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[53] Field Associate Compensation Guidelines, WMHO000678. I found that during the period May 1999 through April 2000 (the one year period following the effective date of these Guidelines) approximately 90% of the stores had at least one instance where there was a new hire paid at least 6% above the starting rate in that store for the pay class into which the employee was hired. Moreover, I found that approximately 40% of all hires were initially paid at least 6% above the starting rate in that store for the pay class into which the employee was hired.

[54] Field Associate Compensation Guidelines, WMHO000687.

[55] WMHO205186

[56] See Table 16 and 17 of Drogin February 2003 report.

subunit, Dr. Haworth fails to capture the effect of District, Regional, and company wide control over the compensation process.

Overly Disaggregated Analysis, Subunits within Store

25. Dr. Haworth claims each store contains too broad of a group of employees for making meaningful comparisons. So, she divides each store into as many as eight subunits for separate analysis (i.e. grocery, non-grocery, and the six specialty divisions. Her disaggregating of each store into sub-groups is not justified by any written Wal-Mart policy, nor did she conduct any statistical analyses to justify her assertions that the subunits she defines within a store have different "pay structures".[57]

26. Dr. Haworth admitted at her deposition that Wal-Mart guidelines do not mention department as a factor to consider in setting pay rates.[58] Wal-Mart's Field Associate Compensation Guidelines indicate how starting pay rates, and increases thereafter, are to be set for hourly jobs, and make no distinction between department or divisions. Thus, according to company wide Wal-Mart policy expressed in its Field Associate Compensation Guidelines, there is no

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[57] The Chow tests she incorrectly claims justify her disaggregation of employees by store, were never applied to tests for differences between subunits within stores.

[58] Page 81, line 14 through page 82, line 8, and pages 201-203 of Haworth deposition.

separate "pay structure" for grocery, non-grocery, and each of the six specialty divisions.

27. There is a great deal of movement between departments[39] in a store, indicating that Dr. Haworth's departmental subunits in a store do not have isolated decision making structures. Dr. Haworth testified at her deposition that it is ultimately the Store Manager's decision to reassign employees between departments.[40]

28. Dr. Haworth's disaggregating of stores into subunits within the store, and doing separate analysis for each sub-group, makes it impossible to identify important gender patterns that may occur in a store. For example, if men and women are disproportionately assigned to different departments, which are in separate sub-groups in Dr. Haworth's analysis, then the pay rates for these men and women would never be included in the same regression, and therefore never compared.

Store Manager Survey Improper and Unreliable

29. Dr. Haworth relies extensively on the manager survey[41] to justify her method of disaggregating

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[39] Haworth report, page 16, Declaration at 48:5-7.

[40] Haworth deposition, page 95, lines 14-17.

[41] See Haworth report at the top of page 42, and page 45, Declaration at 93:4-99:4, "The above description of the decision-making process makes it clear that there are multiple compensation structures and decision-making processes for hourly

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employees and variable selection in regression model, despite admitting that the methodology of the survey violates accepted scientific standards, and was conducted in a manner contrary to her recommendations. Moreover, she acknowledged that having attorneys conduct the survey is considered to be biased and unreliable by courts and the scientific community. At her deposition she was asked, "Do you consider this survey as designed and as implemented to be a scientifically acceptable survey?"[42] She answered: "I don't know enough about the survey, and I'm also not a survey expert. I don't know enough about the survey and the way it was administered to be able to reach a judgment on whether it's a scientifically sound survey."[43] However, Dr. Haworth and her staff were deeply involved in the design of the survey and made recommendations on how it should be implemented.[44] She knew the survey was conducted by attorneys in this litigation,[45] although she advised the lawyers for Wal-Mart that having the attorneys conduct surveys was not a good idea,[46] "[b]ecause

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employees of Div 1 etc." Also, page 40: (Declaration at 85:20-86:2) " ... we must account for the factors used by decision makers at Wal-Mart to set salary levels and we must account for the different compensation decision-making processes found throughout the company."

[42] Haworth deposition, page 288, lines 9-13.

[43] Haworth deposition, page 288, lines 21-25.

[44] Haworth deposition, pages 267-274.

[45] Haworth deposition, page 251, lines 7-25.

[46] Haworth deposition page 254, lines 3-7.

typically it's difficult for an attorney to collect information in a neutral environment so that they truly get a neutral set of information back."[47]

30. Dr. Haworth testified at her deposition that she was aware that the survey violated important principles in survey design listed in the "Reference Manual on Scientific Evidence"[48], which she admitted is an authoritative treatise on scientific evidence in her deposition[49], and cites in her report.[50]

31. In explaining how she developed her regression models, and determined which variables to include in those models, Dr. Haworth states:

> "Second, we need to gain an understanding of the factors that the decision-makers rely upon when determining the pay rates for hourly employees. With the answers to these questions, the researcher is able to construct a statistical model that reflects the actual decision-making process as closely as possible."[51]

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[47] Haworth deposition, page 254, lines 14-17.

[48] Reference Manual on Scientific Evidence, 2nd ed, West Group, 2000, page 237-238, and Haworth deposition page 291, lines 1-16.

[49] Haworth deposition, page 290, lines 20-21.

[50] Haworth report, page 109, footnote 241. This citation is not included in her Declaration.

[51] Haworth report, page 41, Declaration at 92:12-15.

She claims to rely on the store manager survey "to gain an understanding of the factors that the decision-makers rely upon when determining the pay rates for hourly employees." However, Dr. Haworth fails to point out the most important single factor, cited by more store managers than any other factor as playing a role in determining starting hourly pay. The most frequently cited factor was: "The minimum pay established for the job classification by Wal-Mart's pay guidelines."[82] This same factor was also cited most often as being relied upon by store managers in setting promotional pay increases. Thus, company wide pay guidelines were found to be the most important factor that store managers rely upon in setting pay rates and pay increases. This fact is never pointed out in Dr. Haworth's report[83], and

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[82] Haworth report, Appendix C-7, (appendix C-16 to her Declaration) and Haworth deposition page 276, lines 9-17. The second most frequently cited factor that Store Managers said they took into account in determining starting pay rates was the "Starting rate in the department in the store at the time the offer is made." This factor is 'nonsensical' because there is no starting pay for a department. The Field Compensation Guidelines indicate there is a starting pay rate for each pay class, regardless of the department. Dr. Haworth agreed that there is no starting pay for a department at her deposition (see page 202 line 10 to page 203 line 3, and page 295 line 19 through page 296 line 8).

[83] On pages 42-44 of her report,(Declaration 93-98) Dr. Haworth lists the factors included in the manager survey, but does not give the percentages of managers who said they relied on each factor, and she could not give any rationale for how the factors were ordered on the 3 page list, as stated on page 275 of her deposition. The most important factor, "The minimum pay

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indeed, contradicts her interpretation that all store subunits operate with different pay structures and decision making processes. Although the store manager survey suffers from serious defects as described in the previous paragraphs, Dr. Haworth's misinterpretation of the results of this survey undermine the justification she gives for her highly disaggregated models.

Improperly Excludes Hourly Department Heads

32. Dr. Haworth has inexplicably excluded all employees holding hourly Department Head[34] positions from her compensation regressions for hourly employees. Department Heads are among the highest paid hourly employees at Wal-Mart. Dr. Haworth's exclusion of approximately 60,000 hourly employees from her analysis appears to be an error. She never mentioned this exclusion in her report or at her deposition, she never criticized my compensation analysis for including these hourly employees, and there is no reason Department Heads should be excluded. This apparent error in her analysis was discovered through examination of her backup materials that included her computer programs and the raw data files used as input for those programs.

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established for the job classification by Wal-Mart's pay guidelines" is listed last on page 44 of her report, and in her Declaration at 98.

[34] Department Heads are designated by job code = 101.

33. Dr. Haworth constructed a variable 'mgrsalever', among others, for identifying employees she wished to exclude from her compensation regressions for hourly employees.[58] The programs used to run her hourly regression analyses include a statement which excludes any employee for whom the variable mgrsalever =1. Since Department Heads are identified by job code = 101, and every employee with job code = 101 has the value mgrsalever=1 in her raw data files, it follows that every employee with job code = 101 is excluded by her programs. It appears that her variable mgrsalever was designed to restrict her regressions to employees who "had never been salaried employees during their employment at Wal-Mart" specified at lines 4-5 of page 47 of her report. See Declaration at 101:17-18. For example, there are a small number of employees as of October 2001 (the date Dr. Haworth used for measuring pay rates in her analysis) who were currently in hourly jobs, but who were previously in salary positions such as Store Manager, Co-Manager, or Assistant Manager. Inexplicably, Dr. Haworth sought to exclude such employees, and set the variable mgrsalever =1 for these former salaried employees. Unlike Department Heads, other employees holding hourly supervisor jobs such as Support Manager (1050), CSM (510) and Lead (910) all have mgrsalever =0, and are included in Dr.

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[58] These programs are contained on a CD provided at her April 21, 2003 deposition.

Haworth's regressions of hourly employees (unless excluded for some other reason).

34. If Dr. Haworth intended to include Department Heads in her hourly regressions, but excluded them, then her results are incorrect. On the other hand, if she intended to exclude them, her analysis is not probative. There are an average of about 30 Department Heads per store, and they account for approximately 13% of the hourly employees. As I pointed out in my February report[56], women earned about $1800 less than men during 2001, among full-time Department Heads working over 45 weeks. Accordingly, presenting an analysis of compensation for hourly employees excluding Department Heads without giving any explanation is practically useless. After my rebuttal report was served and my second deposition taken, Dr. Haworth, in her Declaration at 101 n. 134, asserts that she has performed "alternative" regressions that purport to correct this error. I have not been provided any back-up material from which I could assess this assertion.

Arbitrarily Excludes Many Employees from Regressions

35. Aside from Dr. Haworth's exclusion of Department Heads, she also excludes employees from her analysis based upon her use of arbitrary and unexplained restrictions. For example, she has excluded

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[56] Drogin report, Table 10.

employees from her analysis of hourly employee pay rates if they have ever been demoted while working at Wal-Mart, or had ever been salaried employees during their employment at Wal-Mart.

Improperly Includes Tainted Variables

36. Dr. Haworth includes several tainted variables in her compensation analysis that have the effect of masking gender disparities in pay rates. Dr. Haworth has written in a law review article[57] that it is inappropriate to include variables in a model when the values of the variable itself may be influenced by employer discrimination. However, she has included several such variables in her models.

a. The gender distribution among departments is far from being a random distribution.[58] This uneven distribution originates at time of hire[59] as a result of Wal-Marts' uneven gender assignment to initial department. The initial hire separation by gender is re-enforced by the job posting system, where women are significantly less likely to be promoted into the highly male departments, and significantly more likely to be promoted into the highly female departments[60].

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[57] Notre Dame Lawyer, vol 54:633, on page 656. Ex. 3. Also, see the article "Advanced Statistical Techniques – Compensation Analysis", page 8, 2nd paragraph from bottom. This page is designated as WMHO1234022 in this litigation. Ex. 4

[58] For example, see Table 14 on page 21 of my February report.

[59] I analyzed the assignment of new hires to departments, and found that women were disproportionately assigned at hire into the 10 departments with the highest percent female, and found the disparity to be highly significant (Z=125.59). This analysis was conducted on all hires at Wal-Mart, using the department at the time of hire, store, year of hire, starting status (pt or ft).

b. Starting pay rate is another tainted variable Dr. Haworth includes in her analysis. Table 15 on page 23 of my February 2003 report indicates that women are paid less than men at time of hire. That table shows women hired in 1996 were paid between 20 and 40 cents less per hour than men hired in the same job, on the average, for the jobs with the most hires. I have performed a more refined analysis of gender differences in starting pay rate, using Dr. Haworth's data file provided with her backup materials. My analysis shows that initial pay rates for women are less than men's, and this difference is statistically significant.[61]

c. Dr. Haworth includes among her explanatory factors the variable "whether or not someone has ever worked in a grocery division". Again, this variable reflects uneven assignment of males to grocery departments, compared to women.[62]

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[60] See Tables 1a and 1b above.

[61] I compared the starting pay rates of men and women hired into hourly jobs, in the same store, in the same year, in the same starting pay group, and having the same first status (pt/ft), based on Dr. Haworth's raw data file of hourly employees active or on leave as of October 2001. The disparity for this comparison has a Z-value of -71.63, indicating a high degree of statistical significance for the shortfall in female starting pay rates.

d. Dr. Haworth includes the variable "whether someone was promoted in the past year" in her regressions, but gives no explanation or justification for including this variable. In fact, this is another improperly included tainted variable, since the promotion discrimination is an important issue in the case and my February 2003 report presents several results indicating that the promotion decisions at Wal-Mart have significant adverse impact on women.

Variables Included in Regressions Without Justification or Explanation

37. Aside from the tainted variables, there are several other variables that Dr. Haworth included in her regression model for which no explanation or justification is presented. These include:

Whether or not someone has changed stores at any time during their career;

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[62] I compared the percent of men to the percent of women who have ever held a grocery job among those included in Dr. Haworth's raw data file of hourly employees active or on leave as of October 2001. The analysis controls for year of hire, and first store, and results in a Z-value of -71.36, indicating a high degree of statistical significance for the pattern that the percent of women who were "ever grocery" is less than the percent for men, based on Dr. Haworth's raw data.

Whether or not someone was hired as part-time or full-time;

Whether or not someone's job code is one of the Sales Associate job codes[63];

Interaction term between Sales Associate and department;

Whether or not someone ever received a premium for working night shifts;

Whether or not someone had ever held secondary job responsibilities;

First pay group;

Division.

Incorrect Application of Chow Test

38. Dr. Haworth incorrectly applies statistical theory to perform her analysis. She refers to a statistical procedure known as the "Chow Test" to justify her decision to do separate regressions for every subunit of every store.[64] The test is named after its author, Gregory C. Chow. His original article is attached as Ex. 4. In fact, the statistical theory on

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[63] It should be noted that indicators for each Job code are already included as separate variables.

[64] Page 47 of Haworth report, "A statistical test called a 'Chow' test allows us to determine whether there are statistically significant differences between stores with respect to their compensation structures. If the structural differences between stores are statistically significant, then there is also a statistical justification for conducting a separate regression analysis for each store."

which the Chow Test is based does not justify her conclusion that separate regressions must be run for every store sub-component.

a. The statistically significant results from the Chow Test would indicate only that there might be at least one variable that is different in two or more stores. It does not imply that every variable in every store has a different relationship to pay rate. In fact, the method she employed tells her nothing about which stores or which factors might be different.[65] Dr. Haworth's regression implementation is equivalent to assuming that every factor in every store has a different relationship to pay rate. It could be, based on her variables, that only one store is different from other stores.

b. Dr. Haworth did not perform any Chow Tests for studying whether her store sub groupings into each of the specialty divisions are appropriate.[66] At her deposition she claimed to have done Chow tests qualifying candidate to disseminate his views, the CCEA allows wider ranging political debate among a greater variety of voices than if effective political participation were limited to those who could afford to broadcast their views with private funds alone.

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[65] Haworth deposition, page 182, lines 15-22.

[66] At her deposition she could not recall doing any Chow test for testing whether her models differed in any way among specialty departments, and was not certain whether she had done Chow tests, which would have led her to separate grocery and non-grocery. See page 180 lines 25 – page 181 line 4, and page 179 lines 8-19. After her deposition, I was provided with a new disk of data that purported to include grocery/non-grocery chow tests. The date of the output for this analysis indicates that it was done after her deposition.

Most crucially, the public funding provided by the CCEA and the matching provision allow a variety of voices not only to speak, but also to be heard. For self-government, "the point of ultimate interest is ... the minds of the hearers." Meiklejohn, *supra*, at 26. "It is the right of the public to receive suitable access to ... political ... and other ideas ... which is crucial." *Red Lion*, 395 U.S. at 390 (discussing broadcast media). The "right to receive information and ideas ... is fundamental to our free society." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). Speech is protected for "its capacity for informing the public." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978).

The CCEA's matching provision not only makes Arizona's public financing system more inviting to candidates who might otherwise be deterred by the prospect of being drastically outspent, the matching provision itself makes a contribution to the goals undergirding the First Amendment. Vigorous debate among various viewpoints may actually be impeded when one voice is able to drown out others. This point has been recognized with respect to speech by the government itself. *See Warner Cable Communications v. Niceville*, 911 F.2d 634, 638 (11th Cir. 1990) ("the government may not speak so loudly as to make it impossible for other speakers to be heard by their audience"); *accord R.J. Reynolds Tobacco Co. v Shewry*, 423 F.3d 906, 923 (9th Cir. 2005); *AMSAT Cable v. Cablevision Ltd. P'ship*, 6 F.3d 867, 872 (2d Cir. 1993).

In an age in which citizens get most of their information from expensive broadcast media, "a debate in which only one party has the financial resources ... to purchase sustained access to the mass communications media is not a fair test of either an argument's truth or its innate popular appeal." *Banzhaf*, 405 F.2d at 1102. "[T]he public interest in providing access to the marketplace of 'ideas and experiences' would scarcely be served by a system ... heavily weighted in favor of ...those with access to wealth." *Columbia Broad Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 123 (1973). *See also id.* at 196 (Brennan, J., dissenting) ("in light of the current dominance of the electronic media as the most effective means of reaching the public," if only a few individuals can afford to broadcast their messages, this "renders even the concept of 'full and free discussion' practically meaningless").

The CCEA's matching provision makes "a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process." *CBS, Inc. v. Fed'l Communications Comm'n*, 453 U.S. 367, 396 (1981). By furthering the public's interest in being exposed to all sides of public debate, it helps to "ensure that competition among actors in the political arena is truly competition among ideas." *Fed'l Elections Comm'n v. Mass. Citizens for Life*, 479 U.S. 238, 259 (1986), rather than a melee in which "success ... may go to the advocate who can shout loudest or most often." *Banzhaf*, 405 F.2d at 1102.

Petitioners view "the context of competitive electoral politics" as a zero-sum game, "in which one candidate's gain is another's loss." (McComish Petitioners' Merits Brief [McComish Br.] 57.) That description betrays a blinkered perspective that fails to consider "a primary First Amendment policy," *Banzhaf*, 405 F.2d at 1102: the public interest in a debate in which a variety of views may be heard.

B. The Arizona Statute Promotes The Public's Interest In Debate Among Multiple Viewpoints Through the Constitutionally Preferred Means Of "More Speech, Not Less."

Unlike constitutionally problematic efforts to foster increased public exposure to varied viewpoints, Arizona's approach recognizes that, even in service of that essential goal, government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others." *Buckley*, 424 U.S. at 48-49.[2] Far from restricting or constraining any speech, the Arizona statute is crafted with an eye to the principle that "it is our law and our tradition that more speech, not less, is the governing rule." *Citizens United*, 130 S. Ct. at 911.

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[2] *But see* Meiklejohn, *supra*, at 24-26 (comparing free speech in democratic society to discussion at town meeting, whose rules regulate speech to make possible effective discussion, by allowing different views to be heard).

For many decades, when speech of some sort has been deemed problematic, this Court has counseled that "the remedy to be applied is more speech, not enforced silence." *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring). Since Justice Brandeis first proposed this principle in the context of advocacy of violent revolution, it has been applied in striking down restrictions seeking to avert a variety of anticipated harms. *See Brown v. Hartlage*, 456 U.S. 45, 61 (1982) ("In a political campaign, a candidate's factual blunder is unlikely to escape … notice … and correction…. The preferred First Amendment remedy of 'more speech, not enforced silence' thus has special force"); *Rosenbloom v. Metromedia*, 403 U.S. 29, 47 (1971) (plurality opinion) (when liability for defamation might impede vigorous discussion, "the solution lies in the direction of ensuring [citizens'] ability to respond, rather than in stifling public discussion of matters of public concern"). *See also Texas v. Johnson*, 491 U.S. 397, 419 (1989) ("the way to preserve the flag's special role" is not to prohibit flag burning, but "to persuade [flag burners] that they are wrong"). The CCEA promotes wide-ranging debate precisely by funding "more speech," rather than by legislating "enforced silence."

When this Court has struck down limitations on speech as more extensive than necessary, it has often suggested more speech, representing a different point of view, as a less speech-restrictive remedy to the perceived problem. *See 44 Liquormart* *v. Rhode Island*, 517 U.S. 484, 507 (1996) (plurality opinion) (instead of banning price advertising for alcohol, state could achieve "goal of promoting temperance" through "educational campaigns focused on the problems of ... drinking"); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 586 (2001) (Thomas, J., concurring) (instead of limiting tobacco advertising unduly, state "could seek to counteract that message with 'more speech'"). *See also Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 571 (1980) (instead of banning promotional advertising by electric utility, state could "further its policy of conservation" by "for example, requir[ing] that the advertisements include information about the relative efficiency and expense of the offered service"). More speech, rather than enforced silence, has likewise often been held to be the constitutionally preferred remedy for potentially misleading speech. *See Meese v. Keene*, 481 U.S. 465, 481 (1987) ("the best remedy for misleading or inaccurate speech contained within materials [labeled 'political propaganda'] is fair, truthful, and accurate speech"); *Bates v. State Bar*, 433 U.S. 350, 375 (1977) ("the preferred remedy [for potentially misleading speech] is more disclosure, rather than less").

The challenged provision of Arizona's Clean Elections Act accords with this directive. The state faced serious concerns about the potential for political corruption if candidates were deterred from participating in the public financing system for fear of being drowned out by their opponents' spending. It addressed those concerns without restricting any speech, but through the constitutionally preferred remedy of "more speech." The state does not advocate any particular position on any issue, and does not weight the scales for or against the speech of any candidate. Thus, Arizona's remedy is an appropriate application of foundational First Amendment doctrine.

Thirty-five years ago this Court found that a federal public financing system was "a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Buckley*, 424 U.S. at 92-93. Neither the matching funds trigger nor the passage of time has called that conclusion into question.

C. The Statute Enhances Debate Without Compelling Speech.

The matching provision of Arizona's public financing system does not compel speech any more than it suppresses it. To the contrary, in every way it respects the "individual freedom of mind" protected by the First Amendment. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).[3]

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[3] Besides violating the rights of the compelled individual, compelled speech does not further society's interest in open debate. It tends, rather, to inhibit it, both by preventing the speaker from presenting his actual views, and because viewpoints are fairly represented only when presented by "persons who actually believe in them, who defend them in earnest." Mill, *supra*, at 104.

Relying on the principle that compelled dissemination of speech one disfavors amounts to compelled speech, *Pacific Gas & Elect. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1 (1986); *Miami Herald Publ. Co. v. Tornillo*, 418 U.S. 241 (1974), Petitioners argue that being required to report spending and fund-raising data, which will trigger matching funds to publicly financed opponents if certain thresholds are surpassed, is comparable to compelled dissemination of opponents' speech. (*E.g.* McComish Br. 54.) "[T]he financial reporting requirements of Arizona's system literally force [candidates] to press a button on their computer that will trigger the payment of subsidies to the very participating candidates they oppose," thereby compelling them "to help disseminate private political speech, which they abhor." (*Id.* at 24.)

The matching provision cannot plausibly be viewed as compelling dissemination of opponents' speech, even accepting Petitioners' questionable assertions that *Pacific Gas* and *Tornillo* govern scenarios not involving the conscription of private property, and that *Tornillo* applies to scenarios not implicating freedom of the press.[4] Essentially, Petitioners' complaint amounts to no more than that a candidate is required to perform an act (financial reporting) that may, if other conditions obtain (he has spent above the threshold, he has a publicly financed opponent), constitute one link in a causal chain leading to matching funds being disbursed to his opponent.

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[4] The Court explained that *Tornillo* was more specifically about "the principle that the State cannot tell a newspaper what it must print," for fear of "dampen[ing] the vigor and limit[ing] the variety of public debate." *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980).

A causal link of this sort cannot be sufficient to constitute dissemination. If it were, any candidate who agrees to participate in a debate in which his opponent gets equal time is voluntarily disseminating his opponent's speech. By Petitioners' reasoning, California's "civil Gideon" statute, providing publicly funded attorneys to low-income defendants in certain civil suits, Cal. Gov. Code § 68651 (operative July 1, 2011), compels plaintiffs in such cases to disseminate speech they oppose, in that it is plaintiffs' action that causes defense counsel's speech to be funded. Or if the Department of Health shuts down – or gives an unfavorable health rating to – a restaurant on the basis of reports the owner is required to file, and the Department publicizes that fact, then, on Petitioners' analysis, the restaurant owner was compelled to disseminate speech he disfavored. Indeed, there is no end to what could be considered compelled dissemination on Petititioners' reasoning. If a socialist worker in Indonesia taps the rubber that is used to manufacture the tires on trucks used to deliver the Wall Street Journal, the worker could complain that as a condition of employment he is compelled to help disseminate speech he abhors. Petitioners' contention that the Clean Elections Act compels high-spending privately funded candidates to disseminate their opponents' speech is no more plausible.

II. THE ARIZONA LAW DOES NOT CHILL SPEECH.

Petitioners' speculation that debate might somehow be chilled by a funding mechanism that makes it possible for more than one candidate to be heard has no support in observable fact, common sense, or the law.

A. Petitioners' First Amendment Concerns Are Based On An Unrealistic View Of Actual Campaign Behavior.

Petitioners' claims that speech is deterred or postponed by fear of triggering matching funds to an opponent, or that Arizona's public financing scheme discriminates against privately funded candidates, reflect a view divorced from the realities of actual campaign behavior.

1. Candidates Do Not Refrain From Speech to Avoid Triggering Matching Funds.

Petitioners' central complaint that candidates' speech is deterred by the prospect of triggering the release of matching funds is unsupported by evidence, and defies basic principles of campaigning for office. As made clear by the Court of Appeals, 611 F.3d 510, 523-24 (9th Cir. 2010), the record does not support any such claims, even with respect to Petitioners themselves. To the contrary, there is ample evidence that concerns about triggering matching funds played no part in Petitioners' strategizing. *Id.* (*See also* Clean Elections Institute Respondents' Merits Brief [Institute Br.] 6-7).

That evidence accords with what a modicum of familiarity with political campaigning would suggest. A candidate's top priority is almost invariably to get his message out. *See* Joseph Napolitan, *Napolitan's Rules: 112 Lessons Learned From a Career in Politics*, *in* Winning Elections 29 (Ronald Faucheux, ed. 2003). Particularly for candidates who are not already well known to voters, spending heavily is not a choice, but a necessity. Ruth Ann Weaver-Lariscy & Spencer Tinkham, *The Influence of Media Expenditure and Allocation Strategies in Congressional Advertising Campaigns*, 16 J. of Advertising No. 3, at 13 (1987). Moreover, according to generally accepted political campaign strategy, it is crucial for a candidate to get his message out first, so that he, and not his opponents, can frame the issues in the race, and define who the candidates are and what they stand for. *See* Denise Baer, *Contemporary Strategy and Agenda Setting*, *in* Congress and Elections American Style 55 (James Thurber ed. 1995); Joe Garecht, *5 More Secrets for Winning a Political Campaign*, *at* http://www.localvictory.com/strategy/secrets-for-winning-a-political-campaign.html. Consequently, it would be unusual – and likely self-defeating – for a candidate to refrain from spending to get his message out in order to prevent an opponent from getting her message out later.

Privately financed candidates cannot know in advance how much money they will raise. This fact makes it all the more implausible that they might somehow plan to raise the maximum amount possible while remaining just below the fundraising threshold that would trigger matching funding.

Presumably they opted for private financing because they thought doing so would be to their advantage, because they believed either (1) they could raise more funds than the maximum level matched under the CCEA, *see* Ariz. Rev. Stat. § 16-952(E), (2) they would be advantaged by having funds in hand earlier, or (3) they would benefit from a race in which both they and their opponents were able to spend more. It would defeat any of these strategies for privately financed candidates not to maximize their fundraising. And once the funds are in hand, there would be no incentive not to spend them, for raising the money is already enough to trigger the matching funds. § 16-952(B).

In general a candidate would not run for office if she did not believe that her message was superior to that of her opponents, and hence likely more appealing to voters. A candidate who believes this would have no reason to refrain from broadcasting her message in order to prevent her opponent from acquiring the means to broadcast his message to an equal extent.[5]

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[5] Ironically, Petitioners argue that "[a]nyone who takes ideas seriously will be chilled by the prospect of being instrumental in funding the dissemination of ideas one opposes." (McComish Br. 41.) But a candidate who takes ideas seriously is precisely one who would not shrink from presenting his ideas simply because the cost was that his opponent could do the same. He would welcome the opportunity to debate.

2. Delayed Spending Is Neither Factually Nor Legally Likely to Constitute Evidence of a Chilling Effect on Speech.

Even less plausible is Petitioners' argument that the speech of privately financed candidates is chilled because the trigger provision allegedly provides an incentive for candidates to *delay* spending. (McComish Br. 36, 42, 56; Arizona Free Enterprise Club's Freedom Club PAC Petitioners' Merits Brief [AFEC Br.] 16-17, 34.) The only incentive for delay alleged by Petitioners is an attempt to thwart the law. Moreover, it is implausible that the law in fact causes candidates to defer spending, and it would not constitute a chilling effect if it did so.

Petitioners assert that the trigger provision causes candidates to delay political activity until close to the election "so that matching funds arrive too late to be used by the publicly financed candidate." (AFEC Br. 16.) This is a remarkable argument. The only incentive alleged for a privately financed candidate to postpone spending is as an effort to circumvent the public financing system, so that opponents will not receive the funds to which they are entitled under law. It is peculiar to regard such efforts to cheat the system as a burden imposed by the system. Even more remarkably, as Petitioners admit, (McComish Br. 36), such manipulations are illegal under the Clean Elections Act. Ariz. Rev. Stat. § 16-958(C) (prohibiting conspiracies to postpone campaign donations in order to postpone reporting that will trigger matching funds to opponents). Petitioners' argument therefore amounts to a claim that the Clean Elections Act burdens candidates' speech by providing an incentive to defer spending in ways that the Act itself explicitly prohibits. That is not a coherent objection.

In any event, deferring spending to deprive opponents of matching funds would be self-defeating. First, as noted *supra*, *see* sec. II.A.1, it is critical to speak early, in order to define the issues and candidates in a campaign. Second, late spending is unproductive, because many voters will already have voted. In Arizona voting begins 33 days before Election Day,[6] Long Distance Voter, *Early Voting Rules*, *at* http://www.longdistancevoter.org/early_voting_rules#arizona, and many voters avail themselves. For example, of 315,879 total votes cast in Pima County in the 2010 gubernatorial general election, 200,158 ballots were submitted before Election Day. Election Summary Report, Pima County, *at* http://www.pima.gov/elections/results.htm. Consequently, "media needs to be up, and running heavy, when the ballots go out." Gary Nordlinger, *Early Voting: Impact on Campaign Strategies, Training, Budgets*, *in* Winning Elections, *supra*, at 124. Third, late spending is ineffective, because most voters choose their candidates well before Election Day. *Id.* at 122; *see also* Stuart Rothenberg, *Final Stretch Not as Important as You Think*, *available at* http://rothenbergpoliticalreport.com/news/article/final-stretch-not-as-important-as-you-think (2010). In reality, candidates try to spread their media advertising – their greatest expense, Judith Trent & Robert Friedenberg, *Political Campaign Communication* 372 (2008) – over as many weeks as they can afford while achieving a heavy enough media presence to make an impact. Tobe Berkovitz, *Political Media Buying* (1996), *at* http://www.hks.harvard.edu/case/3pt/berkovitz.html.

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[6] Most states now offer early voting. Nat'l Conf. of State Legislatures, *Absentee and Early Voting*, *at* http://www.ncsl.org/default.aspx?tabid=16604.

Even if the matching provision did on occasion affect the timing of a candidate's spending, it would be incorrect to conclude that the state is thereby chilling speech. After all, many decisions concerning when to spend campaign funds are influenced in some way by state action. For example, federal candidates regularly make a big fundraising push shortly before the end of an F.E.C. reporting period, in order to demonstrate momentum. *See* David Leventhal, *January Fund-Raising Mania* , *at* http://www.opensecrets.org/news/2011/01/ceo-1-31-11.html (Jan. 31, 2011). Candidates may avoid advertising on holiday weekends, when voters' attention is likely to be elsewhere; most holidays are scheduled by state action. The state action of allowing early voting influences the scheduling of campaign spending. In fact, Election Day itself is scheduled by the government. By Petitioners' reasoning, the fact that candidates are unlikely to spend heavily too far before Election Day – or for that matter, *after* Election Day – is equally an example of state action chilling political speech. It would be far-fetched to maintain that the scheduling of Election Day (or holidays or a deadline for disclosing funding) exerts a chilling effect on speech. It is equally far-fetched to maintain that the alleged incentive to delay campaign spending provided by the matching provision exerts a chilling effect.

3. Neither Arizona's Public Financing System as a Whole Nor the Triggered Matching Funds Provision Discriminates Against Privately Financed Candidates.

There is equally little merit to Petitioners' complaints that the matching provision discriminates against privately financed candidates.

There is nothing discriminatory in the application of the Arizona statute to multi-candidate races. Petitioners object to the possibility that one candidate's high spending could trigger additional funds to more than one rival candidate, thereby allegedly weighting the scales unfairly against the high spending candidate. But it is plain that additional funding at an equal level all around does not in itself worsen the odds of any given candidate. In fact, candidates often benefit when voters opposed to them are split between more than one candidate. *See, e.g.*, Jon Walker, *NY-23: Dem Owens Catches a Lucky Break – Another Three-Way Race*, *at* http://elections.firedoglake.com/2010/09/23/ny-23-dem-owens-catches-a-lucky-break-another-three-way-race (Sept. 23, 2010). To avert just such a scenario, the national Republican Party refrained from funding the campaign of the Republican nominee in *amicus curiae* Ned Lamont's 2006 Senate race in Connecticut, for fear of splitting the anti-Democratic vote, after Mr. Lamont defeated incumbent Senator Joseph Lieberman in the primary, and Sen. Lieberman sought re-election as an Independent. Anne Kornblut, *G.O.P. Deserts One of Its Own for Lieberman*, N.Y. Times, Aug. 19, 2006, http://www.nytimes.com/2006/08/19/nyregion/19conn.html.

Nor does the Clean Elections regime discriminate against privately financed candidates when it counts independent expenditures against a publicly financed candidate, as well as opponents' spending, for purposes of calculating matching funds. From the perspective of a candidate, as *amici* can attest, independent advertising against the candidate has the same impact as advertising by an opposing candidate. Given the proportion of election expenditures made by entities other than candidates, *see* GAO, *Campaign Finance Reform: Additional Information*, GAO-10-391SP 45 tbl.42, 47 tbl.44 (2010), *at* http://www.gao.gov/new.items/d10391sp.pdf ($2.2 million in independent expenditures reported in 2008 Arizona legislative elections compared to $2.1 million spent by privately financed candidates), candidates would be less likely to participate in a public financing system that did not provide funds to respond to adverse independent expenditures. The difficulty of verifying that nominally independent expenditures are truly independent only strengthens the case for counting them in the matching funds calculation.[7]

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[7] That difficulty is exacerbated by the lack of transparency surrounding the sources of funding for independent expenditures. *See* Lisa Rosenberg, *Impotent FEC Fails to Act on Disclosure Rules*, *at* http://sunlightfoundation.com/blog/taxonomy/term/

Finally, the obvious rejoinder to all of Petitioners' allegations of disadvantages to privately financed candidates is that many candidates continue to opt for private funding. *See id.* at 5 tbl.2 (51.2 % of Arizona legislative candidates chose private funding in 2000-2008). Candidates would not choose private funding unless they expected to benefit from doing so.

In sum, there is no evidence that the matching provision of the CCEA deters speech, discriminates against privately financed candidates, or in any other way infringes expressive rights.

B. The Fear Of Opposing Speech Does Not Constitute A "Chill" On Speech As That Term Is Understood Under The Constitution.

Even in an imaginary world in which the matching funds trigger provision deterred many privately financed candidates from broadcasting their messages as widely as they otherwise would, this would not constitute a "chilling effect" in the constitutional meaning of that phrase. An examination of the contexts in which this Court has found debate to be chilled reveals that it is non-speech retaliation (or threats or the possibility thereof) which give rise to a "chilling effect."

The crucial distinction is between two qualitatively different ways in which one may seek

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Transparency (Jan. 21, 2011) (only 41% of groups making independent expenditures in 2010 federal elections reported funding sources).

to "defeat" speech with which one disagrees: through persuasion or through coercion. One may seek to persuade by countering the speaker's ideas with other ideas, i.e., through the classic remedy of "more speech." Alternatively, one may take the disagreement out of the realm of words and ideas altogether and into the realm of coercion, through crude violence or, for example, through the possibility of "economic reprisal, loss of employment, threat of physical coercion." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). It is the latter sort of response that chills debate, directly or incidentally. By contrast, the threat that speech will be responded to with speech in favor of another viewpoint — the only threat posed by the matching provision — does *not* chill debate. To the contrary, such a response *is* debate.

A survey of recognized chilling effects reveals that they all involve some degree of coercion, through the threat of some sort harm in the material world. The following situations have repeatedly been found to chill speech:[8]

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[8] Other factors may chill speech insofar as they lead to the listed sorts of outcomes. Requirements to identify the author of a leaflet or to disclose membership lists, for example, may chill speech, or association for speech, when they could plausibly expose the author or member to government or community reprisals. *Talley v. California*, 362 U.S. 60, 64-65 (1960); *Patterson*, 357 U.S. at 462.

- Criminal penalties, or threats or the possibility of prosecution.[9] *Virginia v. Black*, 538 U.S. 343, 365 (2003) (plurality opinion); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002).

- Government or private threats, harassment, or reprisals. *Doe v. Reed*, 130 S. Ct. 2811, 2821 (2010) (citing *Buckley*, 424 U.S. at 74); *Hynes v. Oradell*, 425 U.S. 610, 626 (1976) (Brennan, J., concurring).

- Public hostility and threats of violence. *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 557 (1963); *Patterson*, 357 U.S. at 462.

- Loss of employment or professional status or threats thereof. *Sheet Metal Workers' Int'l Ass'n v. Lynn*, 488 U.S. 347, 355 (1989) (regarding statutory free speech rights); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

- Loss of money or forgone earnings. *United States v. Treasury Employees*, 513 U.S. 454, 468-69 (1995); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592 (1983).

- State withholding of benefits. *Baird v. State Bar*, 401 U.S. 1, 7 (1971).

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[9] The doctrine that speech is chilled by laws that are vague, ambiguous, or difficult to understand, *Citizens United*, 130 S.Ct. at 889, 894-96; *NAACP v. Button*, 371 U.S. 415, 432-33, 437-38 (1963), or overbroad, *Virginia v. Hicks*, 539 U.S. 113, 119 (2003), is based on the attendant possibility of prosecution.

- Risk of civil litigation (including risk of liability and the costs and burdens of litigation itself). *Fed'l Elections Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468 (2007); *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 794 (1988).

- Harm to reputation or community standing. *Denver Area Educ. Telecoms. Consortium v. Fed'l Communications Comm'n*, 518 U.S. 727, 754 (1996); *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965).

Unlike the foregoing examples, the "threat" alleged in this case – that opposing viewpoints will be aired in response to one's own – involves no coercion. It is wholly different in kind from anything that has ever been found to chill speech, and is not a threat of any legally cognizable harm.[10] A candidate has the right to shrink from such debate. But his speech is not being *chilled* in the constitutional sense when he does so. His interest in having his speech unanswered is not an interest protected by the First Amendment. *Cf. Red Lion*, 395 U.S. at 387 ("[t]he right of free speech ... does not embrace a right to snuff out the free speech of others").

In sum, Petitioners' argument that § 16-952 chills speech is empirically unsupported – candidate speech is highly unlikely to be deterred. And it is incorrect as a matter of law - if the speech of some candidates were deterred by the prospect of opposing speech, that would not be a constitutionally cognizable chilling effect.

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[10] Indeed, given that the possibility of opposing speech does not threaten any legally cognizable harm to Petioners, there is some doubt whether they even have standing to bring this case. *See Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm").

III. BECAUSE THE CCEA EMPLOYS NON-DISCRIMINATORY MEANS TO ACHIEVE IMPORTANT ENDS, *DAVIS* DOES NOT CONTROL THE OUTCOME OF THIS CASE.

The Arizona trigger provision fundamentally differs from the "Millionaire's Amendment," 2 U.S.C. § 441a-1(a), struck down in *Davis*, 554 U.S. 724, in both its ends and means, making Petitioners' reliance on *Davis* unavailing.

A. The Arizona Statute Calls For A Lower Level Of Scrutiny.

The strict scrutiny applied in *Davis* is inapplicable to this case, because the Arizona statute does not discriminate in any of the ways that made the Millionare's Amendment constitutionally suspect. This Court applied strict scrutiny in *Davis*, because "the activation of a scheme of discriminatory contribution limits ... impose[d] a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech." 128 S.Ct. at 2772. Arizona's law imposes no comparable burden.

The scheme struck down in *Davis* was discriminatory in several significant ways. First, it imposed unequal contribution limits on different privately funded candidates seeking the same office. In this way it was unlike systems, such as Arizona's, in which candidates may voluntarily agree to accept lower contribution limits – or to refrain from accepting contributions at all after qualifying – in exchange for other advantages. *See id.* at 2772 (citing *Buckley*, 424 U.S. at 57 n.65). Second, it discriminated even among high spending candidates in a way that served no legitimate government purpose: one candidate could spend any amount without triggering higher contribution limits for his opponent, as long as he spent funds raised from other contributors, while a self-funding candidate could trigger triple contribution limits for his opponent by spending that same amount. Such discrimination violated the precept that "speech cannot be limited based on a speaker's wealth." *Citizens United*, 130 S.Ct. at 905. Third, it discriminated among members of the public, allowing some to make political contributions three times as great as other were allowed to make, based solely on their political preferences. Such discrimination violated the constitutional demand that "each citizen have an equally effective voice in the election" of office holders. *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

By contrast, the public financing system at issue in this case is not discriminatory in this or any other way. As explained by Respondents, (Institute Br. 32-37), the CCEA does not discriminate according to speaker, content, or viewpoint.[11] Nor, does the CCEA burden speech in any significant way, as explained in section II, *supra*. Therefore, it is not subject to strict scrutiny any more than was the public campaign financing system this Court upheld in *Buckley*, 424 U.S. at 90-108; *see also Regan v. Taxation with Representation*, 461 U.S. 540, 549 (1983) ("We rejected First Amendment ... challenges to [the public financing provision in *Buckley*] without applying strict scrutiny").

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[11] To Respondents' discussion of the statute's viewpoint neutrality, *amici* wish only to add that just as Arizona will provide matching funds equally to "pro-life" and "pro-choice" candidates, (Institute Br. 34), so too will it provide funds equally to candidates who favor public financing

Indeed, given that the Arizona statute does not impose *any* constitutionally recognized burden on speech whatsoever, *see supra*, at IIB, it is not clear that it should be subject even to intermediate scrutiny. The only point at which the *Buckley* Court indicated that any degree of heightened scrutiny of public financing might be in order was when considering an equal protection challenge to the denial of public financing to minor party candidates. 424 U.S. at 93-96. No such equal protection issues arise in the current case.

The CCEA does not impose even incidental burdens on speech like the ones potentially imposed by regulations to which the Court has applied intermediate scrutiny in the context of campaign finance regulation. Those regulations have been of two kinds: contribution limits, *Randall v. Sorrell*, 548 U.S. 230, 246-48 (2006); *Buckley*, 424 U.S. at 25, and disclosure requirements. *Citizens United*, 130 S. Ct. at 914; *Buckley*, 424 U.S. at 64-66. Contribution limits entail a "restriction upon the contributor's

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and those who don't. Candidates opposed to public financing may accept – and have accepted – public campaign funds. (*See* AFEC Br. 13-14.)

ability to engage in free communication," even if "only a marginal" one, *Buckley*, 424 U.S. at 20, and they constrain "one aspect of the contributor's freedom of political association." *Id.* at 24. The Arizona statute imposes no such restriction or constraint. Disclosure requirements "may burden the ability to speak" in some circumstances, such as when disclosing the identity of a speaker may lead to "threats, harassment, or reprisals" against the speaker. *Citizens United*, 130 S. Ct. at 914. The Arizona statute imposes no such potential burden.

It is not clear, therefore, that the Clean Elections Act implicates rights protected by the First Amendment in a way serious enough to warrant *any* form of heightened scrutiny. But two things at least are certain: first, the strict scrutiny exercised in *Davis* is inapplicable; and second, the Act readily withstands intermediate review.

B. The CCEA Serves Important State Interests.

1. The Statute Reduces Corruption and the Appearance of Corruption.

This Court has repeatedly recognized preventing corruption and the appearance thereof as not just important, but *compelling*, state interests in campaign finance regulation. *E.g.*, *Fed'l Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-497 (1985) ("preventing corruption or the appearance of corruption are the only ... compelling government interests thus far identified for restricting campaign finances"); *accord Davis*, 128 S.Ct. at 2773. The Millionaire's

Amendment was found to *disserve* that interest, both because it discouraged use of personal funds, thereby increasing reliance on outside contributors, and because in some cases it raised contribution limits, thereby increasing contributors' potential influence. *Davis*, 128 S.Ct. at 2773. By contrast, the Arizona statute provides candidates an alternative to relying on private contributions. *Cf. Buckley*, 424 U.S. at 96 ("public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest"). The challenged matching provision makes it more attractive for candidates to take advantage of this alternative,[12] by assuring that they will be able to remain competitive even against highly funded opponents.

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[12] Petitioners back-handedly concede this point in objecting that the provision provides *too much* incentive to participate, alleging that one Petitioner "was coerced into running as a publicly financed candidate." (McComish Br. 45.) The claim of coerciveness is far-fetched. In reality, as was found regarding Maine's nearly identical public financing system, the CCEA "provides incentives to candidates to make the public financing route attractive, but the incentives hardly are overwhelming or of an order that can be said to create profound disparities." *Daggett v. Webster*, 74 F. Supp. 2d 53, 57 (D. Me. 1999), *aff'd sub nom. Daggett v. Stearns*, 205 F.3d 445 (1st Cir. 2000).

2. That the Act May Also Serve the Purpose of Enhancing the Variety of Public Debate Does Not Render It Constitutionally Suspect.

Petitioners' argument that the *real* interest served by the Clean Elections Act is to "equalize electoral opportunities, resources, and influences" or "level[] the playing field," (*e.g.* McComish Br. 64), is a misleading distraction.

As the decision below makes clear, it can hardly be denied that the Arizona statute serves the anti-corruption purpose. 611 F.3d at 525-27. If it also serves another interest, that does not detract from the Act's principal purpose or somehow render it constitutionally suspect. When more than one interest is proffered by the state, it is sufficient that one of those interests is weighty enough to meet the requirements of heightened scrutiny, whether intermediate or strict scrutiny is applicable. *See Doe*, 130 S. Ct. at 2819 (because the State's interest in preserving the integrity of the electoral process was "undoubtedly important," there was no need "to address the State's 'informational' interest" in the Public Records Act) (intermediate scrutiny); *Washington State Grange v. Wash. State Republican Party*, 552 U.S. 442, 446 (2008) (after "reject[ing] as illegitimate three of the [state's] asserted interests" for California's blanket primary, proceeding to consider whether "the remaining interests ... were ... compelling") (strict scrutiny).

Moreover, notwithstanding Petitioners' objections to an "illegitimate" government interest at play, (AFEC Br. 60), this Court has never indicated that the public's exposure to more wide-ranging political discourse – or expanded opportunities for political participation – are not worthy purposes. Rather, the Court has held that certain *means* of achieving those goals are illegitimate, in particular the means of "restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others." *Buckley*, 424 U.S. at 48-49.

What Petitioners describe as an interest in equalizing electoral influences could more accurately be described as interest in assuring that a variety of voices is heard, a government interest recognized as important by this Court. *See supra*, at sec. I.A. *See also Turner Broad. Sys. v. Fed. Communications Comm'n*, 512 U.S. 622, 663 (1997) ("assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment").[13]

That interest underlies the First Amendment itself, and could be sufficient on its own to justify § 16-952. But it does not need to be, as the statute serves the important interest of lessening opportunities for – and perceptions of – corruption. If the statute is also motivated in part by an interest in promoting more wide-ranging debate, that in no way undermines its legitimacy.

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[13] *Turner Broadcasting* concerned regulation of broadcast media, a context in which more government regulation may be appropriate than elsewhere. *Buckley*, 424 U.S. at 49. But assuring that a variety of voices is heard about issues of public concern remains an important interest, even if it does not, in non-broadcast contexts, justify measures that limit freedom of expression.

CONCLUSION

Because the Arizona statute addresses the compelling problems of government corruption and the appearance thereof in a way that promotes the values of the First Amendment, without infringing any protected liberties, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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CURIAE
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IN THE

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ARIZONA FREE ENTERPRISE CLUB'S
FREEDOM CLUB PAC, *et al.*,
Petitioners,
v.
KEN BENNETT, *et al.*,
Respondents.

JOHN MCCOMISH, *et al.*,
Petitioners,
v.
KEN BENNETT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* SERVICE EMPLOYEES INTERNATIONAL UNION IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS CURIAE[1]

Amicus Service Employees International Union ("SEIU") is one of the largest unions in North America. It represents 2.2 million workers in service industries throughout the United States and Canada. SEIU's members' voluntary contributions make SEIU's political action committee, the SEIU Committee on Political Education, one of the nation's largest PACs. Directly and through its affiliated local unions, SEIU actively participates in elections at all levels of federal, state, and local government, including in the state of Arizona. Because SEIU's members want to participate in fair and transparent electoral processes, SEIU has a substantial interest in the outcome of this litigation.

SUMMARY OF ARGUMENT

The Court should affirm the decision of the Ninth Circuit. This case involves a challenge to an Arizona law that subsidizes campaign speech for the purpose of reducing the risk of corruption in its electoral process. Petitioners claim that Arizona's manner of calculating this subsidy burdens the speech of those who choose not to accept the subsidy. There is a well-developed First Amendment jurisprudence that makes clear that such subsidies raise different and less substantial First Amendment concerns than government restrictions of speech and should be subject to intermediate judicial scrutiny. Petitioners' failure to acknowledge this difference infects virtually every aspect of their argument.

Specifically, Petitioners make two First Amendment claims that constitute direct assaults on this Court's holding in *Buckley v. Valeo*, 424 U.S. 1 (1976), upholding the federal public financing regime for Presidential elections. In their first Question Presented, they argue that Arizona's public financing law violates a non-participating candidate's free speech rights because it assertedly penalizes candidates who choose to speak with their own funds and effectively forces them to subsidize the speech of their opponents. A substantially similar claim was considered and rejected by the Court in *Buckley*, which held that laws that subsidize speech advance — rather than deter — First Amendment values, and do not force non-participants to subsidize participants.

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, and no counsel or party funded its preparation or submission.

Petitioners' second Question Presented similarly makes a claim that is inconsistent with the holding of *Buckley*. Petitioners argue that because Arizona's public financing regime is relatively more helpful to candidates with relatively less access to the large sums of money it sometimes takes to run a successful political campaign, it runs afoul of the Court's holdings that "equalization" is not a legitimate goal of campaign finance law.

But this claim could be made against any public financing scheme, because it can always be argued that public financing benefits candidates with relatively less access to money and so in that way "equalizes" political campaigns. Notwithstanding this same equalizing effect, the Court in *Buckley* approved Congress' Presidential public financing scheme, while at the same time making clear in contrast that laws whose sole purpose is to "equalize" all candidate's opportunities by restricting speech are unlawful. Nothing about the particular way Arizona's public financing law operates distinguishes it in relevant respects from the public financing law upheld in *Buckley*.

This Court's decision in *Davis v. Federal Election Comm'n*, 554 U.S. 724 (2008), does not support either of Petitioners' claims. There the Court struck down a law which directly and asymmetrically *restricted* self-financing candidates' speech more than others, for the *sole* purpose of leveling the playing field as between rich and poor candidates. Arizona's law shares neither of those characteristics.

Regulations aimed at reducing the risk of corruption of the political process, and the appearance of such risk, advance compelling government interests, and the most comprehensive solution to the problem of quid pro quo corruption is a system of public financing that makes it possible to compete for political office without having to raise contributions at all, acting "to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising." *Buckley*, 424 U.S. at 91.

Arizona's law directly advances these compelling interests and fits comfortably among the laws this Court has upheld against First Amendment challenge. The Court should decline Petitioners' invitation to overrule these precedents and radically reconfigure both campaign finance and First Amendment jurisprudence.

ARGUMENT

SEIU often contributes to candidates up to the maximum amount allowed by law, and it operates a substantial independent expenditure program of behalf of candidates it supports. On Petitioners' way of thinking, SEIU therefore is an entity that is "burdened" and "punished" as a result of Arizona's public financing scheme. We do not share this view. Arizona's law allows us – and everyone else – to spend freely to provide independent support to candidates we endorse. We make such expenditures notwithstanding the Arizona "trigger" mechanism for many reasons, including a belief that our spending will be effective in reaching particular voters, and that our speech will be more persuasive than any additional speech triggered by our activity.

In any event, our experience is that whatever burden we suffer as a result of this and other public financing regimes is greatly outweighed by the fact that public financing enhances our members' and the public's sense that elections are honest and fairly conducted. We would much rather participate in an election that is fair and free of any taint of corruption than in a purely privately-financed election, even though our resources might allow us to play a more prominent role in the absence of public financing.

But Petitioners' and amici's policy preferences regarding public financing are of little legal significance. Whether public financing "appear[s] 'bad,' 'unwise,' or 'unworkable' is [to the Court] irrelevant." *Buckley*, 424 U.S. at 91. The legally significant point is that the voters of Arizona, acting though referendum, choose to subsidize candidates' speech and encourage participation in Arizona's public financing program because they thought it would help address the problem of corruption in their electoral process. As we show in what follows, the First Amendment does not prevent them from implementing this policy judgment.

I. A.R.S. § 16-952 Should Be Subject to Intermediate, Not Strict, Judicial Scrutiny

Both of Petitioners' claims are predicated on their view that Arizona's law restricts their speech and should be scrutinized accordingly. But Arizona's law neither compels Petitioners to speak nor restricts their right to speak. Instead, Arizona provides content neutral subsidies for speech by candidates who voluntarily agree to abide by expenditure limits. These subsidies directly promote First Amendment values and only indirectly implicate Petitioners'

First Amendment interests. As the Court held in *Buckley*, because public funding laws are a state effort "not to abridge, restrict or censor speech but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people," a public financing law "furthers, not abridges, pertinent First Amendment values." 424 U.S. at 93.

While the First Amendment "certainly has application in the subsidy context," governments "may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587-588 (1998). "So long as legislation does not infringe on other constitutionally protected rights, [the legislature] has wide latitude to set spending priorities." *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549 (1983). Congress or a state government may "selectively fund a program to encourage certain activities it believes to be in the public interest" and doing so does not constitute discrimination "on the basis of viewpoint." *Rust v. Sullivan*, 500 U.S. 173, 193 (1991). In addition, a government entity may provide funds to "facilitate a wide range of speech" by private individuals or organizations, *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 231, 233 (2000), provided that the government complies with the "requirement of viewpoint neutrality in the allocation of funding support." *Id.* at 233. In sum, "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity." *Maher v. Roe*, 432 U.S. 464, 475 (1977).

For these reasons, this Court has repeatedly rejected the argument that "strict scrutiny applies whenever Congress subsidizes some speech, but not all speech" as "not the law." *Regan*, 461 U.S. at 548. As long as "governmental provision of subsidies is not aimed at the suppression of dangerous ideas." *id.* at 550 (internal citations omitted), the government has broad powers to encourage actions deemed to be in the public interest.

Thus, strict scrutiny applies only to "laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed," and laws that "compel speakers to utter or distribute speech bearing a particular message." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642, 643 (1994) (citations omitted). "In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Id.* Because Petitioners challenge a speech subsidy, this Court should subject the challenged provision to intermediate, rather than strict scrutiny and determine only whether the challenged provision bears a "substantial relation" to a "sufficiently important" governmental interest. *Citizens United v. FEC*, 130 S. Ct. 876, 914 (2010) (quoting *Buckley*, 424 U.S. at 64, 66).

2. Arizona Law Does Not Compel Petitioners to Subsidize Hostile Speech

Petitioners' contrary claim is that the law should be subject to strict scrutiny and struck down because it "penalizes and deters free speech by forcing privately-funded candidates and their supporters to finance the dissemination of hostile political speech whenever they raise or spend private money ... above a spending limit." First Question Presented. They assert that Arizona's program forces non participating candidates to "subsidize hostile speech," Pets. Br. 41, and its establishment is "the functional equivalent of the compelled speech regime struck down in *Pacific Gas & Elec. Co. v. Public Utilities Comm'n*, 475 U.S. 1 (1986)." Pets. Br. 42.

In *Buckley v. Valeo*, this Court rejected a substantially similar challenge to the federal law providing public financing of Presidential elections, which was claimed to violate the First Amendment because it effectively required people "to finance the dissemination of ideas with which they disagree." 424 U.S. at 91 n.124. The Court observed that

> [l]egislation to enhance these First Amendment values is the rule, not the exception. Our statute books are replete with laws providing financial assistance to the exercise of free speech, such as aid to public broadcasting and other forms of educational media, and preferential postal rates and anti-trust exemptions for newspapers. *Id.* at n.127.

On that reasoning, the Court rejected any presumption that the law was unconstitutional and dismissed First Amendment challenge to the public financing law. That holding controls here.

The distinguishing "facts" that support Petitioners' "compelled speech" claim are a creation of their own rhetoric, and bear no relation to the actual operation of Arizona's law. Petitioners claim that Arizona "conscript[s] [the] labor" of candidates who choose not to participate in public funding, Pets. Br. 55, and that politicians in Arizona are "being required to assist in the rebuttal of their own speech." *Id.* at. 51. Less colorfully, they claim that they are being required to pay for their political opponents' speech. *Id.* at 55.

These factual assertions are false. Petitioners are not having their labor conscripted or their funds used by their opponents. Instead, Arizona is subsidizing the speech of candidates who opt in to its public funding campaign finance regime. Petitioners disapprove of the manner of adjusting the public subsidies that participating candidates receive. But petitioners and other candidates and independent groups do not pay for that increase in their opponents' spending any more than they pay for the initial public spending subsidy. Just like the Presidential public financing at issue in *Buckley*, "the scheme involves no compulsion upon individuals to finance the dissemination of ideas with which they disagree." 424 U.S. at 91 n. 124.

Buckley v. Valeo is one of an unbroken line of cases in which the Court has drawn a distinction between laws that require a person to pay for or associate with speech with which he disagrees, *see e.g. Pacific Gas & Elec. Co.*, 475 U.S. 1, and laws in which the government has chosen to subsidize one speaker and another unsubsidized speaker asserts that choice has burdened his speech rights, *see, e.g.*, *Finley*, 524 U.S. 569; *Rust*, 500 U.S. 173.

Pacific Gas & Elec. Co., on which Petitioners' compelled speech argument principally relies, Pets. Br. 42, itself explicitly distinguishes on two separate grounds PG&E's compelled speech claim from the challenges to the public campaign financing system sustained in *Buckley*. *Id.* at 15. First, the requirement that PG&E disseminate the views of its opponents identified "a favored speaker" and "force[d] the speaker's opponent – not the taxpaying public – to assist in disseminating the speaker's message." *Id.* The Court held that "[t]his kind of favoritism goes well beyond the fundamentally content-neutral subsidies that we sustained in *Buckley* and in *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983)," and therefore "burdens the expression of the disfavored speaker." *Id.* at 14-15.

Second, the Court held that PG&E impermissibly was required "to associate with speech with which [it] may disagree," *id.* at 15, because the speech would have been disseminated in envelopes that PG&E owned and that bore its return address, *id.* at 18. The danger that PG&E would "be required to alter its own message as a consequence of the government's coercive action . . . [arose] from a content-based grant of access to *private* property." *Id.* at 16-17 (emphasis added).

In this case, by contrast, the public financing system is content-neutral and does not require any speaker to finance the speech of his or her opponents: both the initial public campaign funding and any subsequent adjustments are provided by "the taxpaying public." In addition, Arizona's law presents no risk that candidates or groups that make independent expenditures will be forced to associate with speech with which they disagree. Rather, all disbursements of these public funds will be paid to the campaign accounts of the candidates who will use them, and any speech enabled by these funds will bear those candidates' names pursuant to disclosure requirements. No one could possibly think that a publicly-funded candidate's advertisements were being endorsed by his privately-funded opponent.

We are aware of no case in which this Court has applied the compelled speech strict scrutiny standard in circumstances involving the speech effects of government subsidies that neither restrict nor compel private parties' speech. The fact that a non-participating candidate's spending might affect the amount of subsidy provided to a participating candidate raises none of the constitutional infirmities present in compelled speech cases like *PG&E*.

3. Strict Scrutiny Does Not Apply Because Arizona's Public Financing System Does Not Restrict Speech

Just as this is not a "compelled speech" case, neither is it a case challenging a law that directly restricts speech.

No candidate is compelled to participate in Arizona's campaign public financing regime. A candidate who chooses not to participate is free to spend unlimited funds on his campaign, and his independent supporters likewise are not limited in what they may spend on his behalf. The only rules that restrict nonparticipating candidates' activities are the background (and unchallenged) contribution limits and disclosure rules that were in place before Arizona implemented public financing and apply equally to participating candidates.

This case is thus unlike *Davis*. The federal "Millionaires Amendment" struck down in *Davis* penalized candidates who exercised their constitutional right to fund their campaigns with their own money by imposing on such candidates direct and asymmetrical restrictions on their speech rights – self-funded candidates operated under lower contribution limits than candidates who were not able to contribute substantial amounts to their own campaigns. *Davis*, 554 U.S. at 751.

The Court in that case did not strike down that law merely because it imposed "negative consequences on individuals and groups for choosing to exercise their First Amendment rights." Pets. Br. 42. It struck down the law because the "negative consequences" were a direct violation of self-financing candidate's constitutional rights.

Contribution limits are restrictions on speech. Government subsidies are not. While the "millionaire" candidate in *Davis* has a First Amendment right not to have his speech discriminatorily restricted when he exercises his First Amendment right to spend his money, the candidate who chooses to decline public funding has no analogous First Amendment right to stop someone else from receiving a public subsidy that is tailored so that the public funding remains a viable option even in a relatively more expensive political campaign. *Davis* does not control this case.

4. The Arizona Law Furthers Legitimate Governmental Interests

Petitioners' second claim is that Arizona's law is unconstitutional because it furthers an illegitimate purpose – assertedly "to equalize 'influence' and financial resources among competing candidates and interest groups." Second Question Presented. Once again Petitioners' argument is painted with too broad a brush.

Any public financing law could be said to have the effect of benefitting the less well financed candidate relative to the better financed candidate. If that were enough to invalidate a campaign finance law, no public financing law would survive – including the Presidential public funding law affirmed by the Court in *Buckley*. But that is not enough.

It is undisputed that Arizona's law, like all public financing laws, is intended to reduce the risk of corruption of the political process, and the appearance of such risk. It is equally undisputed that these are legitimate — indeed compelling — government interests. *McConnell v. FEC*, 540 U.S. 93, 136 (2003); *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985); *Buckley*, 424 U.S. at 25-30, 38.

Petitioners claim that the law is nevertheless invalid because it *also* has an allegedly illegal "equalizing" effect. In support of their view that speech subsidies that could be said to favor the poor over the rich for that reason violate the First Amendment, Petitioners rely on *Davis*. But that reliance is once again misplaced, for two reasons.

First, as discussed above, *supra* p. 10, *Davis* is a case about a law that restricted speech, with all that implies. This is not.

Second, in *Davis* the asymmetrical contribution limits restricted self-financing candidates' speech *without* serving anticorruption interests. *Davis* took as its starting point the holding in *Buckley* that contribution restrictions were constitutional because they were justified by the compelling state interest in eliminating corruption or its appearance. Distinguishing *Buckley*, the Court in *Davis* then explained that the Millionaire's Amendment could not be justified by that same compelling state interest, since "discouraging use of personal funds disserves the anticorruption interest," and so the state could not rationally further that interest by providing non-self-funded candidates a higher contribution limit than self-funded candidates. 554 U.S. at 741. Instead, in *Davis*, the *sole* asserted government interest was to "level electoral opportunities for candidates of different personal wealth." *Id.* It was one of the principal holdings of *Davis* that this was not a legitimate governmental interest. *Id.*

But Arizona's law, in contrast, addresses corruption and the appearance of corruption. The assertion that, like any public financing law, it *also* could be said to have effect of improving the electoral opportunities of those with more limited access to private funds does not invalidate the law, or distinguish it from the law upheld in *Buckley*.

Petitioners and their *amici* make much of the assertion that the ballot initiative's drafters *intended* that the law have a "leveling" effect in addition to its anti-corruption purpose. But "leveling" by enhancing speech to make campaigns competitive is not unlawful, and even if it were "[i]t is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). *See also, e.g., City of Erie v. Pap's A.M.*, 529 U.S.

277, 291 (2000) (rejecting the argument that a ban on public nudity was "'aimed' at suppressing expression" because "one purpose of the ordinance [was] to combat harmful secondary effects").

The question is not the alleged mixed motive of the legislature, but rather whether "the inevitable effect of a statute on its face . . . abridged constitutional rights." *O'Brien*, 391 U.S. at 384, 385 (citing *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)). A.R.S. § 16-952 does not on its face have the "inevitable effect" of restricting speech. Indeed, as explained in Respondent's brief, p. 16, it has not appeared to deter political expenditures in Arizona even incidentally, and it has not deterred *amicus* SEIU's speech. To the contrary, the fact that roughly two thirds of candidates choose to participate in the system and one third do not suggests that this level of funding and method of adjustment is well-calibrated to ensure that public funding is attractive to candidates without making it irrational for some candidates to opt out, should they so choose.

The voters evidently concluded that such a regime best balanced the State's interest in reigning in campaign fundraising (and its attendant harms) with the interest in establishing a public funding regime that would continue to attract candidates even in races in which spending would be over the amount of the statutory thresholds. If Arizona can implement a public financing law, it can also implement reasonable measures to encourage candidates to participate in public financing, and to make public financing a reasonable choice even when candidates expect a campaign may generate a more-than-normal amount of political spending. These are legitimate state interests that are wholly unrelated to the suppression of speech.

5. The Challenged Trigger Provision Bears a Substantial Relation to The Law's Anti-Corruption Interests

The "trigger" of A.R.S. §16-952 bears a "substantial relation" to the accomplishment of Arizona's interest in reducing corruption and its appearance. *Citizens United*, 130 S. Ct. at 914 (quoting *Buckley*, 424 U.S. at 64). The trigger tailors the level of funding to the financial competitiveness of the race.

Arizona could have chosen to fund each campaign at the level of the cap, eliminating the feature of the law to which Petitioners object. But such a uniformly high funding rate would have resulted in a substantial drain on the state's budget, and would have led to a level of spending the state could reasonably determine was not generally necessary to inform the public and accomplish the law's other important purposes. So instead it determined to set funding at a level that it judged will be adequate in the normal case, and then to provide funding at the higher level (up to the statutory cap) when other spending in the campaign makes the lower amount insufficient to fund a competitive campaign.

The trigger thus furthers the same general anti-corruption purpose as the law of which it is a part. It makes the public financing system effective and efficient, supporting the law's anti-corruption purposes. Indeed, A.R.S. §16-952(C)(3) requires that independent expenditures *in favor* of participating candidates also be counted when determining how much funding other participating candidates will receive. The law in this way ensures that participating candidates have an appropriate funding level even when facing other participating candidates.

This system of tailoring the public subsidy to the financial competitiveness of the relevant races does not undermine its constitutionality; if anything, it strengthens it. If Arizona had instead simply funded all races at the maximum level, its system would have been closely parallel to the federal Presidential funding law the Court upheld in *Buckley*, but participating candidates in some less competitive races would have received substantially more funding than their non-participating opponents, wasting state resources and placing those non-participating candidates at a greater competitive disadvantage.

Calibrating the level of funding to reflect the other financial expenditures in the race also protects candidates' ability to opt out of the public financing system. It does so by limiting the risk that nonparticipants will be substantially outspent by a participating opponent. If Arizona had simply decided to disburse the maximum amount of funds to all participants rather than reserving most of the funds for competitive races, there would be many more cases in which participating candidates substantially outspent nonparticipating candidates.

Candidates are often uncertain regarding their private fundraising abilities. Had they been faced with the prospect of such generously funded participating opponents, many likely would have felt the safer course would be to participate and receive the same subsidy. By instead adopting a more carefully calibrated method for calculating subsidy levels, Arizona voters ensured that viable nonparticipating candidates can safely opt out of the system without fearing they might be massively outspent by participating opponents. Because participants are guaranteed only a modest subsidy initially and receive more only if their opponents have raised substantial additional sums, viable nonparticipating candidates can feel safe in the knowledge that they will rarely be outspent.

Petitioners nevertheless argue that they suffer disadvantages if they opt out of the system because their opponents will have access to public funding at the statutory threshold level and, if they and their independent supporters spend above that amount, their opponents will receive increased public funding up to the maximum set by statute. They complain that knowledge of these aspects of the law will affect their spending decisions, and in particular will influence candidates to spend less than they otherwise might. The public finance law might even persuade a candidate to forgo private financing and to opt into the public financing system. This regulation, Petitioners complain, thus places them "on the horns of a dilemma" as they adjust their speech conduct to the regulatory regime. Pets. Br. 42.

A similar dilemma faces all candidates who are considering whether to accept the benefits and burdens of participating in any public financing system, including the federal Presidential public financing system upheld in *Buckley*. The existence of the public funding option, and the fact that opponents may choose to accept public funds, will influence the choices candidates make. The availability of public funds up to a certain limit discourages candidates from choosing to spend above that limit by forcing them to reject public funds in order to do so.

But *most* regulations put regulated parties "on the horns of a dilemma": They must choose whether to suffer whatever burden the regulation creates or to forgo the behavior that is being regulated. A person wishing to make a political independent expenditure, for example, must evaluate the benefits of making that expenditure against the burdens of complying with substantial disclosure and disclaimer rules. A person wishing to make a political contribution must weigh the benefit he hopes to gain against the cost of having his name made public, and the need to maintain records so that he does not inadvertently violate contribution limits if he makes additional contributions. If the mere fact that regulation of First Amendment conduct puts choices to the regulated party gave rise to strict scrutiny, every campaign finance regulation would be constitutionally suspect. That is not the law and that should not be the law.

The choice to reject public financing in Arizona evidently is a viable one. Many candidates – including some Petitioners – have chosen to opt out of the public system and continue to raise and spend unlimited public funds and to win elections after doing so. Candidates who opt out have to work to raise more funds privately, but they obtain several other advantages. Many candidates expect or hope that they will raise more the maximum funding their participating opponents can receive under A.R.S. § 16-952 and that being able to outspend their participating opponents will help them win. It is not only candidates who expect to raise such large amounts who might decide to opt out, however. Other candidates might predict that a higher level of campaign spending, even if done equally by both campaigns, will redound to their benefit because they believe the strength of their arguments is superior or that their staff will design more effective ads. In addition, even when candidates do not initially predict that a higher level of spending will aid their campaigns, they may opt out because of the value of retaining the ability to initiate a change in the level of the spending in the race if, and only if, they think it will help them capture or retain the lead. Because only nonparticipants may choose whether to exceed the initial spending caps, many might rationally opt out of the system in order to obtain this strategic advantage over nonparticipating opponents. These are not choices that on their face abridge the constitutional rights of non participating candidates.

For all of these reasons, the Arizona "trigger" provisions advance the statute's important anti-corruption purposes and pass constitutional muster.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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February 22, 2011

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AMICUS CURIAE BRIEF

Nos. 10-238, 10-239

In The
Supreme Court of the United States

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ARIZONA FREE ENTERPRISE CLUB'S
FREEDOM CLUB PAC, *et al.*,

Petitioners,

v.

KEN BENNETT, *et al.*,

Respondents.

◆

JOHN McCOMISH, *et al.*,

Petitioners,

v.

KEN BENNETT, *et al.*,

Respondents.

◆

On Writs Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

◆

BRIEF OF *AMICUS CURIAE* UNION FOR REFORM JUDAISM IN SUPPORT OF RESPONDENTS

◆

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STATEMENT OF INTEREST[1]

The Union for Reform Judaism ("URJ") consists of approximately 900 member congregations dedicated to the practice of Reform Judaism in North America. For the past fifty years through its Religious Action Center ("RAC"), the URJ has been, and remains, actively engaged in many of the ethical and moral issues confronting our country. The URJ establishes positions on these crucial questions by resolutions presented to its representative bodies, including its biennial plenary congregational assemblies and its Board of Trustees. Both the URJ itself, and the organization of Rabbis serving the Reform Jewish Movement – the Central Conference of American Rabbis – have passed repeated resolutions supporting campaign finance reform as of central importance to the effective functioning of a democratic nation.

For *amicus* URJ, these resolutions reflect prescient ancient doctrine. The Talmud – a collection of Rabbinic writings that form the basis of Jewish law – warns that "as soon as a man receives a gift from another he becomes so well disposed towards him that he becomes like his own person, and no man sees himself in the wrong." Talmud, Tractate Ketubot, 105b. Even from the days of the Pentateuch, our sages have warned against undue influence which "blind the eyes of the discerning and upset the plea of the just." Deuteronomy, 16:19. As the ancients recognized, any time something of value changes hands, the potential exists for those in position of power to see the world in a tinted hue. Public financing, when voluntarily accepted, provides resources for candidates to make their case to the public in a manner that is free from any opportunity of unintentional distortion. Publicly financed candidates should not be penalized for voluntarily accepting funding that accomplishes this ancillary good, and matching funds ensure the means to remain competitive in a manner that facilitates additional speech rather than restricting the speech of others.

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[1] This brief is filed with the written consent of all parties. The letters of consent are on file with this Court. No counsel for a party authored this brief in whole or in part, and no counsel or party funded its preparation or submission.

◆

SUMMARY OF ARGUMENT

As the Ninth Circuit succinctly summarized:

> This is a challenge to the constitutionality of the "matching funds" provision of Arizona's Citizens Clean Elections Act, Ariz. Rev. Stat § 16-952. The Act establishes a legal framework within which the State of Arizona may provide public financing to candidates for state political offices. A candidate who chooses to participate in the Act's voluntary public financing scheme relinquishes her or his right to raise private campaign contributions. Instead, she or he receives an initial grant of funds from the state to spend on her or his campaign. The challenged provision ensures that if the participating candidate has an

> opponent who is not participating in the public financing system and whose campaign expenditures or contributions exceed a threshold set by the Act, she or he receives additional matching funds from the State.

McComish v. Bennett, 611 F.3d 510, 513.

But the additional matching funds are not unlimited:

> During both elections, matching funds, combined with the initial grant, may not exceed three times the amount of the initial grant. Ariz. Rev. Stat. § 16-952(E). This means that a nonparticipating candidate who is able to raise funds in excess of three times the amount of his or her participating candidate's initial grant gains a potentially unlimited financial advantage in the campaign.

Id. at p. 517. Nevertheless, it is the non-participants who are seeking to invalidate the statute.

The Ninth Circuit rejected the challenge and upheld the statute. As Judge Kleinfeld noted in concurrence, "Because the challenged scheme imposes no contribution or spending limits, it does not restrict speech at all. . . ." *Id.* at p. 528. Judge Kleinfeld went on to explain:

> But the First Amendment does not protect the candidate's interest in winning, just his interest in being heard. There is no First Amendment right to make one's opponent speak less, nor is there a First Amendment

> right to prohibit the government from subsidizing one's opponent, especially when the same subsidy is available to the challenger if the challenger accepts the same terms as his opponent.

Id. at p. 529.

From *Buckley v. Valeo*, 424 U.S. 1 (1976) through *Citizens United v. Federal Election Commission*, ___ U.S. ___, 130 S.Ct. 876 (2010), the consistent core teaching of this Court's campaign finance jurisprudence is "to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Buckley v. Valeo*, 424 U.S. at 14, quoting *Roth v. United States*, 354 U.S. 476, 484 (1957). Thus, where, as here, the campaign finance regime enhances, rather than restricts, debate it not only passes constitutional muster, but indeed furthers the goals and objectives of the First Amendment.

Accordingly, and for the reasons set forth below, *amicus* respectfully requests that the decision of the Ninth Circuit Court of Appeals be affirmed.

ARGUMENT

In sustaining limits on campaign contributions but not on expenditures, the *Buckley* Court established the applicable analytical framework:

The First Amendment affords the broadest protection to such political expression in order "to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484, 77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498 (1957). Although First Amendment protections are not confined to "the exposition of ideas," *Winters v. New York*, 333 U.S. 507, 510, 68 S.Ct. 665, 667, 92 L.Ed. 840 (1948), "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs, . . . of course includ(ing) discussions of candidates. . . ." *Mills v. Alabama*, 384 U.S. 214, 218, 86 S.Ct. 1434, 1437, 16 L.Ed.2d 484 (1966). This no more than reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed.2d 686 (1964). In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 91 S.Ct. 621, 625, 28 L.Ed.2d 35 (1971), "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." 424 U.S. at 14-15.

The very purpose of the First Amendment is to "secure the widest possible dissemination of information from diverse and antagonistic sources." *Id.* at 49-50.

Just last year in *Citizens United, supra*, the Court again re-emphasized the importance of the "open marketplace of ideas protected by the First Amendment." 130 S.Ct. at 906. Speaking for the majority, Justice Kennedy there wrote that "it is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes," *id.* at 899, and again that "it is our law and our tradition that more speech, not less, is the governing rule." *Id.* at 911.

Citizens United overruled *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), adopting the rationale of Justice Kennedy's *Austin* dissent which noted "we confront here society's interest in free and informed discussion on political issues, a discourse vital to the capacity for self government." 494 U.S. 698-699.

The touchstone, then, of this Court's analysis in each campaign finance decision is whether on balance the restriction promotes or inhibits speech. Those schemes that on the whole restrict speech, have been rejected as in *Citizen's United*, while those that do not are upheld. So, for example, this Court has uniformly sustained "disclaimer and disclosure requirements," even though they "may burden the ability to speak but they 'impose no ceiling on campaign-related activities' and 'do not prevent anyone from speaking.'" *Citizens United*, 130 S.Ct. at 914, quoting *Buckley*, 424 U.S. at 64 and *McConnell v. Federal Elections Commission*, 540 U.S. 93, 201 (2003).

Likewise, by memorandum in *Republican National Committee v. Federal Election Commission*, 445 U.S. 955 (1980), this Court affirmed Judge Mansfield's decision on behalf of a three judge District Court, 487 F.Supp. 280 (S.D.N.Y. 1980), sustaining the Presidential Election Campaign Act of 1971 ("PECFA") against constitutional challenge. There, the plaintiffs attacked conditioning eligibility for public campaign funds upon compliance with expenditure limitations. In rejecting that contention, Judge Mansfield, affirmed by this Court without comment, wrote that "The Fund Act merely provides a presidential candidate with an additional funding alternative which he or she would not otherwise have and does not deprive the candidate of other methods of funding which may be thought to provide greater or more effective exercise of rights of communication or association than would public funding." 487 F.Supp. at 285. Judge Mansfield concluded that "as long as the candidate remains free to engage in unlimited private funding and spending instead of limited public funding, the law does not violate the First Amendment rights of the candidate or supporters." *Id.* at 284.

The First Circuit Court of Appeals in *Daggett v. Commission on Governmental Ethics and Election Practices*, 205 F.3d 445 (1st Cir. 2000) applied the rationale of *Republican National Committee*, *supra*, in upholding Maine's campaign finance statute. 205 F.3d at 467. Using a mechanism quite similar to Arizona's statute, Maine provides an initial grant, and then a dollar for dollar match of funds raised by non-participating opponents above the initial grant, up to double of that first grant. Plaintiffs challenged the matching funds scheme, positing, as the Circuit Court characterized it, "a claim of a First Amendment right to outraise and outspend an opponent, a right that they complain is burdened by the matching funds clause." 205 F.3d at 464. Recognizing that the matching funds provision enables response and thereby broadens the marketplace of ideas, the First Circuit soundly rejected that argument in reliance on *Buckley*'s holding that enhancing debate is precisely the object of the First Amendment:

> Moreover, the provision of matching funds does not indirectly burden donors' speech and associational rights. Appellants misconstrue the meaning of the First Amendment's protection of their speech. They have no right to speak free from response – the purpose of the First Amendment is to "'secure the "widest possible dissemination of information from diverse and antagonistic sources."'" *Buckley*, 424 U.S. at 49, 96 S.Ct. 612 (citations omitted); *see Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 14, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) (there exists no right to speak "free from vigorous debate"). The public funding system in no way limits the quantity of speech one can engage in or the amount of money one can spend engaging in

> political speech, nor does it threaten censure or penalty for such expenditures. These facts allow us comfortably to conclude that the provision of matching funds based on independent expenditures does not create a burden on speakers' First Amendment rights.

In language equally applicable to the Arizona statute, the First Circuit further explained why matching funds do not burden the non-participant:

> We cannot say, however, that the matching funds create an exceptional benefit for the participating candidate. Maine's Act does not provide an unlimited release of the expenditure ceiling – it allocates matching funds for the participating candidate of only two times the initial disbursement. Thus, a non-participating candidate retains the ability to outraise and outspend her participating opponent with abandon after that limit is reached. Further, the non-participating candidate holds the key as to how much and at what time the participant receives matching funds.
>
> * * *
>
> Moreover, the participating candidate, not having any way of foreseeing the timing or amounts of any matching funds, is unable to budget, to commit time for radio or television, or to plan, produce, or distribute printed material.

205 F.3d 468-469.

In *North Carolina Right to Life Committee Fund For Independent Political Expenditures v. Leake*, 524 F.3d 427 (4th Cir. 2008), the Fourth Circuit upheld an identical North Carolina matching funds statute, finding that matching funds further First Amendment values as held in *Buckley*, and do not chill or penalize the non-participant.

> Our analysis must begin with the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). The Court made clear in *Buckley* that public financing of political campaigns does not, in itself, violate the First Amendment. 424 U.S. at 57 n. 65, 96 S.Ct. 612. In fact, the Court observed that the Federal Election Campaign Act's (FECA's) public financing scheme "furthers, not abridges, pertinent First Amendment values" because it "facilitate[s] and enlarge[s] public discussion and participation in the electoral process, goals vital to a self-governing people." *Id.* at 92-93, 96 S.Ct. 612.

524 F.3d at 436.

* * *

> The thrust of the plaintiffs' First Amendment argument against the matching funds provision is that it "chill[s] and penalize[s] contributions and independent expenditures made on behalf of [nonparticipating] candidates." Appellants' Br. at 32. The plaintiffs argue that their political speech is chilled because spending in excess of the specified

> trigger results in public funds being disbursed to a participating candidate whom the plaintiffs do not support. Therefore, according to the plaintiffs, they choose to spend less money (and thus engage in less political speech) in order to prevent candidates they oppose from receiving public funds.
>
> * * *
>
> The plaintiffs remain free to raise and spend as much money, and engage in as much political speech, as they desire. They will not be jailed, fined, or censured if they exceed the trigger amounts. The only (arguably) adverse consequence that will occur is the distribution of matching funds to any candidates participating in the public financing system. But this does not impinge on the plaintiffs' First Amendment rights. To the contrary, the distribution of these funds "furthers, not abridges, pertinent First Amendment values" by ensuring that the participating candidate will have an opportunity to engage in responsive speech. *See Buckley*, 424 U.S. at 92-93, 96 S.Ct. 612.

524 F.3d at 437.[2] *See also Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998) (upholding Kentucky's post-trigger matching statute, even though post-trigger

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[2] Thus, contrary to the *amicus* brief for the Center for Competitive Politics (at p. 13), matching funds do not intervene in the debate; they in truth enable and enhance the debate.

public match was double the amount raised by non-participant).

Before *Davis v. Federal Election Committee*, 554 U.S. 724 (2008), the one outlier taking a contrary position on matching funds was *Day v. Holahan*, 34 F.3d 1356 (8th Cir.1994), which found a chilling effect on the speech of the non-participant. But the First Circuit in *Daggett* rejected *Day*, succinctly identifying the flaw in its rationale: "We cannot adopt the logic of *Day*, which equates responsive speech with an impairment to the initial speaker." 205 F.3d at 465. Moreover, the Eighth Circuit's subsequent decision in *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996), ruling constitutional a statute that removes participants' expenditure limits when a non-participant raises private funds in excess of a stated trigger, calls *Day*'s vitality into question. The *Daggett* Court explains:

> The State, as well as amici, assert that *Day* was called into question by the Eighth Circuit's subsequent decision in *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir.1996), which held that a provision waiving the expenditure ceiling for a participating candidate once a non-participating opponent reached a certain threshold did not burden the non-participant's First Amendment rights. *See id.* at 1553. Although *Day* involved independent expenditures while *Rosenstiel* regarded candidate expenditures, the logic of the two cases is somewhat inconsistent. In *Rosenstiel*, the fact that a candidate's expenditure triggered the release of his opponent's spending

> limitation did not burden his First Amendment rights; yet in *Day*, the fact that a non-candidate's spending triggered matching funds burdened the speaker's First Amendment rights. We recognize that there may be a difference between expenditures by a candidate and those by a non-candidate, but nonetheless agree that the continuing vitality of *Day* is open to question.

205 F.3d at 464, n.25.

Accordingly, "until *Davis*, [*supra*], these [matching] schemes were generally considered constitutionally permissible." Note, 122 Harv. L. Rev. 375, 381 (2008). They have also enjoyed wide-spread public support.

Faith communities have long recognized the importance of campaign finance reform. "The issue of campaign financing is far more than a political matter. It goes to the heart of the ethical and moral life of a nation." General Board of Church & Society of the United Methodist Church, Resolution #5071, 2008 BOR. In August, 1999, more than 20 Christian denominations or churches, the Unitarian Universalist Association and the *amicus* Union for Reform Judaism ("URJ") formed Religious Leaders for Campaign Finance Reform, declaring, through Rabbi David Saperstein of the URJ's Religious Action Center that, "campaign finance reform is not an esoteric technical issue of election regulations, but one that goes to the essence of the ethical and moral life of our nation." New York Times, Aug. 21, 1999, p. A9, col. 1. And so in 1984, the *amicus* URJ[3] explicitly endorsed public campaign finance through matching funds. Resolution, Congressional Campaign Finance Reform, Board of Trustees, May, 1984.

Other faith communities reach the same conclusion. In 2008 the Assembly of the United States Presbyterian Church endorsed campaign finance legislation containing matching funds provisions. *Lift Every Voice: Democracy, Voting Rights and Electoral Reform*, Presbyterian Church (U.S.A.), 2008, p. 22. The Church Assembly's Stated Clerk recalled in support the words of Reinhold Niebuhr that "man's (human) capacity for justice makes democracy possible but man's (human) capacity for injustice makes democracy necessary." *Id.* at p. 1.

However, "The more that access to elected officials is linked to wealth, the greater the likelihood that the civil rights of the poor and minorities will be eroded. Without major campaign finance reforms (i.e., clean money reforms that provide public financing of elections), the prospects for future public policies that support social and economic justice are extremely limited." *Campaign Finance Reform*, 2000 Action of Immediate Witness, Universalist Association of Congregations. Consequently, both the Universalist Association and the NAACP have explicitly endorsed campaign finance reforms in all relevant particulars similar to the Arizona matching funds regime and the very similar Maine statute upheld in *Daggett, supra*. *See Campaign Finance Reform*, 2000 Action of Immediate Witness, Universalist Association of Congregations; and Action Alert, Feb. 1, 2010, NAACP-Supported Public Financing of Congressional Campaigns Bill Introduced in the House and Senate.

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[3] Then known as the Union of American Hebrew Congregations.

Even so avid a guardian of First Amendment rights as the American Civil Liberties Union supports voluntary public financing plans provided "they ensure candidates have a true choice as to whether to participate and provide sufficient and equitable funding for all legally qualified candidates to run an effective campaign." Release, April 19, 2010, ACLU Board Addresses Campaign Finance Policy.

Since *Davis, supra*, two Circuits have felt compelled by that decision to hold matching funds statutes unconstitutional. *Green Party of Connecticut v. Garfield*, 616 F.3d 213 (2d Cir. 2010); *Scott v. Roberts*, 612 F.3d 1279 (11th Cir. 2010). With all due respect, these decisions misread *Davis*.

First, *Davis* was not a matching funds case. Rather, there, if a candidate exceeded a limit of personal expenditures on his/her campaign, the ceiling on contributions which his/her opponent could accept tripled, while the non-participant remained subject to the original cap. Because this put the self-funding candidate at a serious disadvantage, the Court held it unconstitutionally burdened his ability to spend his own money. The reading of *Davis* by the *Green Party* and *Scott* Courts:

> oversimplifies and overbroadens the Court's reasoning, and *it ignores the critical constitutional distinction between government restrictions on speech and government subsidies of speech*. While the Court may well set its sights on asymmetrical public funding, *Davis* is hardly the warning shot these commentators think it is. (Emphasis added)

Note, 122 Harv. L. Rev. 375, 381 (2008).

Davis is factually inapposite beyond this distinction. *Davis* treated similarly situated candidates asymmetrically. This important distinction is emphasized by the observation in *Davis* that if the "elevated contribution limits applied across the board, Davis would not have any basis for challenging those limits." 554 U.S. at 737.

Conversely here – as upheld by this Court in *Buckley*, *supra*, and *Republican National Committee*, *supra* – public "opt-in" financing schemes create two different groups of candidates based on the candidates' own choices. Opt-in programs bear limitations which a candidate weighs in making a determination whether to participate. Thus, unlike in *Davis*, the non-participating candidate in Arizona is never similarly situated and has a choice of various options available to all candidates. Indeed, by not opting in, the Arizona privately financed candidate at all times retains the potential to outspend the publicly funded candidate since matching funds are capped.

Neither *Davis*, nor any other decision of this Court undermines this core tenet of public campaign funding jurisprudence: so long as the statute at issue enhances rather than limits the marketplace of political ideas it furthers, and does not run afoul of, the First Amendment. This Court has never struck down a matching public funds program, and nor should it start now. The First Circuit in *Daggett v. Commission on Governmental Ethics and Election Practices*, *supra*, the Fourth Circuit in *North Carolina Right to Life Committee Fund For Independent Political Expenditures v. Leake*, *supra* and the Ninth Circuit in this case have it right: public matching funds in the manner and method of the Arizona statute only enhance and improve the public political debate, for the benefit of us all.

The thrust of Petitioner's contrary argument is that assured publicly funded responsive speech burdens contributions to non-participant candidates. But even if this were true, this Court has never subjected any restraints on contributions to strict scrutiny. *Fed. Election Comm'n v. Colo. Repub. Fed. Campaign Comm.*, 533 U.S. 431 (2001) (observing that ever since *Buckley* the Court has understood that limits on expenditures deserve closer scrutiny than restrictions on contributions); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000) (construing *Buckley* as providing that contribution limitations warrant less compelling justification than expenditure limitations); *Fed. Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending").

Rather, from *Buckley* through *Citizen's United*, this Court has repeatedly and consistently held any slight burden on adverse party contributions because of public funding does not, and should not, outweigh the important public value of the fullest possible open and free political discourse, an objective only furthered by the Arizona statute, and matching funds statutes like it. As the late Judge Skelly Wright recognized 35 years ago,

> Nothing in the First Amendment prevents us, as a political community, from making certain modest but important changes in the kind of process we want for selecting our political leaders. Nothing bars us from choosing to move closer to the kind of community process that lies at the heart of the First Amendment conception – a process wherein ideas and candidates prevail because of their inherent worth, not because prestigious or wealthy people line up in favor, and not because one side puts on the more elaborate show of support.

85 Yale L.J. 1001, 1005 (1976).[4]

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[4] Lest there be any doubt, the Ninth Circuit majority details a long and sordid history of *quid pro quo* corruption in Arizona politics. 611 F.3d at 514-515. This, of itself, is a sufficiently compelling state interest to survive even strict scrutiny. *Buckley*, *supra*; *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39-40 (1st Cir. 1993). *A fortiori* it suffices here.

CONCLUSION

WHEREFORE *amicus* Union for Reform Judaism respectfully requests that the Decision and Order of the Ninth Circuit Court of Appeals be affirmed in all respects.

Dated: February 18, 2011

Respectfully submitted,

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AMICUS
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BRIEF

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◆

JOHN MCCOMISH, et al.,

Petitioners,

v.

KEN BENNETT,

Respondent.

◆

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

◆

BRIEF OF *AMICUS CURIAE* THE WYOMING LIBERTY GROUP IN SUPPORT OF PETITIONERS

◆

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OTHER SOURCES

Federal Communications Commission, *Fairness Doctrine Report*, 102 F.C.C.2d 143 (1985) 7

Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L.REV. 1321 (2000).......................................39

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Seth Mydans, *For Arizonans, the Political Circus Is Back in Town*, N.Y. TIMES, Jan. 16, 1992 at A12, *available at* http://www.nytimes.com/1992/01/16/us/for-arizonans-the-political-circus-is-back-in-town.html........................4

Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L.REV. 808 (1969).........................23

Lewis Carroll and Martin Gardner, THE ANNOTATED ALICE, ALICE'S ADVENTURES IN WONDERLAND 35 (1960)..14

INTEREST OF *AMICUS CURIAE*[1]

The Wyoming Liberty Group believes that the great strength of Wyoming rests in the ambition and entrepreneurialism of ordinary citizens. While limited government is conducive to freedom, unchecked government promotes the suppression of individual liberty. In a state where the people are sovereign, the Group's mission is to provide research and education supportive of the founding principles of free societies. Its mission is to facilitate the practical exercise of liberty in Wyoming through public policy options that are faithful to protecting property rights, individual liberty, privacy, federalism, free markets, and decentralized decision-making. The Wyoming Liberty Group promotes the enhancement of liberty to foster a thriving, vigorous, and prosperous civil society, true to Wyoming's founding vision. The issues presented in this case are of interest to the Wyoming Liberty Group because they involve the fundamental, and threatened, right of citizens to freely participate and share their point of view in the electoral and political process.

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[1] This brief is filed with the written consent of all parties. No counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or their counsel, make a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

1. Arizona's experiment in speech leveling suffers from similar flaws found in other coerced-speech cases, rendering it invalid under any level of scrutiny. The Ninth Circuit's failure to value the import of free speech in public life has undone the chilling effects doctrine.

2. This Court should affirm its chilling effects doctrine, affording bright line adjudication and remedial standards for all speakers nationwide.

3. More than one thousand pages of injuries, expert testimony, and evidence submitted in the Joint Appendix explain why this Court should liberalize its chilling effects doctrine. The Ninth Circuit's manipulation of the chilling effects doctrine should be reversed to establish salient standards protective of representative speech.

4. This Court should announce an easily understood chilling effects doctrine that would afford future speakers streamlined methods of adjudicating free speech challenges.

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ARGUMENT

The speech levelers have returned. Before this Court stands the muting howl of egalitarianism.[1] An intense interest in speech handicapping – the very interest deemed antithetical to the First Amendment by this Court in *Buckley v. Valeo* – finds itself increasingly wed to campaign finance systems around the nation. 424 U.S. 1, 49 (1976) (The "concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"). The Constitution demands a simple divorce, forever severing this Bergeronesque interest from this Court's First Amendment jurisprudence.

I. Nothing Clean About Clean Elections: Only the Anointed May Speak

Arizona's experimentation with the speech leveling effects of the Citizens Clean Elections Act currently stands before this Court for constitutional review. The system that dares not speak its own name – The Arizona Speech Handicapping Project – imposes a carefully designed system to favor speakers who curry favor with the state while silencing those outside the fold. Curiously labeled clean, Arizona's system ensures that real injuries are worked against speakers just because they wish to have nothing to do with the state's "Clean Elections" project.

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[1] *See* A.R.S. § 16-940(A) (declaring the purpose of Arizona's "Clean Elections" to make clean all political discourse and elections "by diminishing the influence of special-interest money").

Born out of a desire to limit the harms of briberies and other illicit dealings like those found arising out of the AZscam controversy, the people of Arizona passed the Citizens' Clean Elections Act by popular initiative in 1998.[3] Like using a sledgehammer to extinguish the nuisance of a cricket's chirp, Arizona's project runs far and wide over protected speech and association in pursuing its goal of political purity. Not content with being overbroad, the system's focus is lopsided due to reliance on speech-inhibiting "matching funds." A.R.S. § 16-952(A)-(C). As such, it does very little to combat real corruption found in *quid pro quo* arrangements of the tried-and-true *Buckley* variety, while doing a great deal to otherwise limit and abridge speech through its matching funds program.

In a move of marketing genius, matching funds are touted as a means to "enable" the "speech of [traditional candidates'] opponents" rendering them, at least superficially, as constitutionally suspect as Quaker Oats. *McComish v. Bennett*, 611 F.3d 510, 524 (2010). All bravos for clever titles aside, when examined in the deeper context of this Court's First Amendment jurisprudence, Arizona's matching fund program establishes content-based speech triggers that work real, if sometimes difficult to detect, injuries against political speakers that must be stricken unless the law is narrowly tailored to serve a compelling governmental interest. *See, e.g.*, *Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002); *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 222 (1989).

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[3] Seth Mydans, *For Arizonans, the Political Circus Is Back in Town*, N.Y. TIMES, Jan. 16, 1992 at A12, *available at* http://www.nytimes.com/1992/01/16/us/for-arizonans-the-political-circus-is-back-in-town.html.

a. Matching Funds and This Court's Coerced Speech Cases

This case would present little controversy if the "Clean Elections" system was just a rising tide that lifted all First Amendment boats. *See Davis v. FEC*, 554 U.S. 724, 737 (2008) (had the Federal Election Campaign Act "simply raised the contribution limits for all candidates, Davis' argument would plainly fail"). Instead, Arizona's project achieves another interest entirely: Speech redistribution. This is accomplished by affording special benefits only to state-favored candidates. *See* A.R.S. § 16-952(A)-(C).

The primary purpose of Arizona's "Clean Elections" system is found in an interest thought traditionally adverse to the First Amendment – "diminishing the influence of special-interest money." A.R.S. § 16-940(A). Stated another way, Arizona's project aims to reduce the influence of some speakers while enhancing the influence of others, namely those favored by the state as "clean" candidates. Independent voices need not apply.

The "Clean Elections" system found in Arizona closely resembles the speech redistributing program before this Court in *Davis*, 554 U.S. 724 (2008). There, this Court struck down an asymmetrical contribution limit scheme because the "vigorous exercise of the right to use personal funds to finance campaign speech produce[d] fundraising advantages for opponents in the competitive context of electoral politics." *Id.* at 739. Unsatisfied with the disastrous speech leveling effects of the Millionaire's Amendment found in *Davis*, Arizona goes where few states have gone before. It delivers actual, rather than hypothetical, cold-hard-cash benefits to one class of candidates: Those favored by the state, the "clean." Chilling.

What this Court noted in *Davis* holds true: Laws that apply uniformly and which respect the bounds of the First Amendment will ordinarily pass scrutiny. But when government enacts uneven, asymmetrical, lopsided burdens that are triggered due to disfavored speech by the state, or which picks winners and losers out of the marketplace of ideas, serious constitutional problems arise. *See, e.g., Pacific Gas & Elec. Co v. Public Util. Comm'n of Cal.*, 475 U.S. 1 (1986) (plurality opinion); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). Arizona enjoys no authority to "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules," but that is precisely what "clean elections" achieves. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992).

It is helpful to examine this Court's trilogy of coerced speech case sets in order to see why Arizona's project is unconstitutional. Pinpointing the unique burdens found in each line of cases illustrates that Arizona's "Clean Elections" system is simply more of what has come before the Court in the past: Unoriginal, state-centered efforts to prop up certain speakers while hushing disfavored speakers.

A first line of coerced speech cases ("Carrying Cases"), represented by *Miami Herald Publishing Co.*, involve regulatory programs where: Government invokes a supposed authority to set (1) speech triggers that demand supplementary (2) coerced support for others' speech, and which include (3) direct cost, space, or physical burdens. *Pacific Gas & Elec. Co.*, 475 U.S. 1; *Wooley v. Maynard*, 430 U.S. 705 (1977); *Miami Herald*, 418 U.S. 241.[4] The result in each

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[4] *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969) is a notable exception to this trend. *Red Lion* is an anomaly in First Amendment jurisprudence and relates to the scarcity of access to public airwaves. Beyond that, the Court noted the precariousness of the doctrine in its opinion by explaining that "if experience with the administration of those doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications." *Id.* at 393. The resulting validity of *Red Lion* is questionable. 1985 Federal Communications Commission, *Fairness Doctrine Report*, 102 F.C.C.2d 143, 158-96 (1985) (where the Federal Communication Commission explains that the Fairness Doctrine inhibits, rather

(Continued on following page)

instance is without much guesswork: Government possesses no ability to adjust our veritable marketplace of ideas through contrived traps, triggers, and talliates. *Miami Herald*, 418 U.S. at 247 ("Government-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate'"). Indeed, this Court reaffirmed in *Riley v. National Fed. of the Blind of North Carolina, Inc.* that "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind." 487 U.S. 781, 797 (1988) (internal quotation marks omitted).

A second line of cases ("Non-Carrying Cases"), as represented by *Davis*, involve: (1) Speech triggers that coerce private individuals to (2) support ideological opponents, but which (3) lack direct cost, space, or physical burdens. 554 U.S. 724 (striking down a system that penalized speakers for the "vigorous exercise of the right to use personal funds to finance campaign speech"); *Day v. Holahan*, 34 F.3d 1356, 1360 (8th Cir. 1994) ("The knowledge that a candidate who one does not want to be elected will have her spending limits increased and will receive a public subsidy equal to half the amount of the independent expenditure, as a direct result of that independent expenditure, chills the free exercise of that protected speech"); *Buckley*, 424 U.S. at 57 n.65

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than promotes, the First Amendment and questions the constitutional validity of *Red Lion Broadcasting*).

(Congress "may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations" though such conditions must be constitutional and non-coercive). In that sense, these cases are one step removed from the first in that they do not demand would-be speakers to directly carry the message of their opponents. Even so, this Court has found it damning enough that speech triggers invoke inhibitions against speech in the first place, rendering them constitutionally void. When government demands that speakers are forced to choose between the "First Amendment right to engage in unfettered political speech" and speech triggers that benefit their ideological opponents, the First Amendment wins. *Davis*, 554 U.S. at 726.

A third line of cases ("Subsidizing Cases"), as represented by *National Endowment for the Arts v. Finley*, include an absence of speech triggers with indirect coerced support for controversial speech, and do not involve cost, space, or physical burdens. 524 U.S. 569 (1998). Because this third class merely creates more speech without disincentivizing others, this Court has upheld these programs. *See, e.g.*, *Finley*, *id.*; *United States v. American Library Ass'n*, 539 U.S. 194 (2003) (plurality opinion) (upholding the requirement of installing Internet content filters before libraries could receive federal subsidies). Thus, where government makes available a speech or speech-enabling subsidy to everyone, this Court has found no cognizable First Amendment harm.

It is important to note that in the Non-Carrying Cases, no direct ownership, physical burden, or cost disincentives were imposed on would-be speakers by the state, yet the programs were equally repugnant under the Constitution. These cases all involve the furtherance of this Court's recognition of the import in protecting the individual freedom of mind. Stated more concretely, government attempts to favor some discussion at the expense of disfavored speech "transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Wooley*, 430 U.S. at 714 (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

The Non-Carrying line of cases proves an observation of import, namely that this Court has taken seriously the need to protect against self-censorship that occurs from the operation of laws that accrue select benefits to some because others exercised their First Amendment rights. This is so because even without "direct government censorship," self-censorship "is no less a burden on speech that is susceptible to constitutional challenge." *Day*, 34 F.3d at 1360; *see also City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757-58 (1988). While government may become more adept at stifling speech through quiet and subtle regimes of self-censorship, a clarification of this Court's chilling effects doctrine would help protect the full scope of the First Amendment from speech handicapping programs nationwide.

Arizona's "Clean Elections" project is a carefully constructed program designed to afford speech benefits to a limited class while ensuring that disfavored speech will be dampened. As discussed more thoroughly in Section III.A, *infra*, Arizona's project works cognizable harms against those independent of the state ("unclean" or "traditional" candidates) just for speaking against those who curry favor with the state. The remaining question is whether Petitioners should be forced to shoulder the burden of compiling lengthy expert opinions, affidavits, and protracted evidentiary support just to speak or whether this Court's chilling effects doctrine suggests an easier and more direct remedy of constitutional injuries of this ilk. *See, e.g., Citizens United v. FEC*, 130 S.Ct. 876, 889 (2010) ("The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day"). The Ninth Circuit's cursory invocation of intermediate scrutiny while imposing daunting evidentiary requirements on would-be speakers must be reversed by this Court.

b. Strict Scrutiny is Warranted for Speech Triggers Like Those Found in Arizona

A keystone principle of First Amendment jurisprudence rests in this simple rule: "government may not regulate [speech or actions] based on hostility – or favoritism – towards the underlying message expressed." *R.A.V.*, 505 U.S. at 386. That principle goes a step further because it is of no particular defense that Arizona's project might not discriminate against particular viewpoints. The First Amendment demands that speech handicapping regimes which inhibit "public discussion of an entire topic" are equally invalid. *Consolidated Edison Co. of New York, Inc. v. Power Service Comm'n of New York*, 447 U.S. 530, 538 (1980). In short, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

Arizona's "Clean Elections" system is a carefully marketed government censorship program of the most odious form. *See Cox v. State of Louisiana*, 379 U.S. 536, 580 (1965) (opinion of Black, J.). Arizona generously supports those candidates deemed "clean" and who wish to incur the financial patronage of the state. A.R.S. § 16-947. State-bankrolled candidates receive a generous dole from the state to fund their primary and general campaigns. A.R.S. § 16-951 (detailing state cash-drops to "clean" candidates). And what remains particularly offensive, beyond the absurd notion of the state funding political actors' campaigns in the first place, is the ratcheting effect of its handicapping "matching" funds – promising nearly a dollar of government subsidized cash to those candidates deemed "clean" by the state when independent voices speak. A.R.S. § 16-952(A)-(C). In this sense, Arizona's project falls by the way of similar programs brought before this Court in the past, all of which, cleverly or not-so-cleverly, push some voices out of the marketplace of ideas in order to favor others. *See, e.g.*, *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65 (1983); *Consolidated Edison Co.*, 447 U.S. at 535-36; *Carey v. Brown*, 447 U.S. 455, 462-63 (1980); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63-65 (1976) (plurality opinion); *Mosley*, 408 U.S. 92, 95-96 (1972).

A review of Arizona's "Clean Elections" law must invoke strict, and in this case, fatal, scrutiny because it inflicts speech burdens based on the identity of disfavored speakers and unpopular speech. In its most basic form, Arizona's project works unconstitutional harms against those who speak against the state – a notion commonly attributed to totalitarian regimes, but never permitted in this Republic. "Clean elections" assures purity of political discourse by silencing speech against state-favored candidates. Purity indeed.

In Arizona, there are three tiers of speakers. First Class speakers are deemed "clean" by the state because they agree to take government money. Curious. Second Class speakers are deemed "unclean" because they wish to maintain a healthy degree of independence from the state and otherwise eschew government funding of their campaign. Curiouser. Those speakers who struggle to maintain an identity separate from the state and who struggle to find private support for their own campaigns are saddled with the burdens of the "Clean Elections" law. There is also a third class of speakers in Arizona damaged by "clean elections," and confined to Steerage: Dissenting citizens. Those few individuals who dare assemble together, like those found in the Arizona Free Enterprise PAC, will face near dollar-for-dollar government subsidies given for every dollar they use to speak out against state-sponsored candidates. Curiouser and curiouser.[5] Unlike "non-participating" candidates, these independent groups cannot avail themselves of any state benefits, damning them to the ninth layer of Arizona's unconstitutional inferno.

As recognized in *Republican Party of Minnesota* and elsewhere, government systems that impose burdens on speech due to the basis of its content must be subject to strict scrutiny. 536 U.S. at 774. Here, where the State of Arizona has saddled unique burdens upon a particular class – individuals and independent candidates who speak against state-favored candidates – strict scrutiny must necessarily apply. To survive this often-fatal review, Arizona must meet the heavy burden that a compelling interest exists to ceivable relation to discrimination. As evidence of Wal-Mart's centralized policies, for example, it noted that Wal-Mart's Home Office "controls the temperature and music in each store throughout the country." Pet. App. 190a. And as evidence of strong corporate culture, it noted that employees "do the Wal-Mart cheer" during shift changes. *Id.* at 188a-189a. Nowhere has anyone explained why air-conditioning policies and morale-boosting exercises should make the difference between a multibillion-dollar nationwide discrimination class action and individual claims by employees with tangible grievances.

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[5] Lewis Carroll and Martin Gardner, THE ANNOTATED ALICE, ALICE'S ADVENTURES IN WONDERLAND 35 (1960).

The Ninth Circuit's reliance on policies and culture with no proven connection to discrimination is inconsistent with *Falcon* and Rule 23(a). Rule 23(a) requires commonality. See Fed. R. Civ. P. 23(a)(2). Without proof that a common policy of distributing discretion was adopted *to effectuate* discrimination, or that discretion was exercised in a discriminatory fashion *because of* central policies and culture, that commonality is absent. That is true even if statistical disparities might suggest that some local decisionmakers exercised their discretion improperly (and thus that a number of persons affected by local decisions might have valid individual claims).

Companywide policies and culture normally are beneficial and implicate none of Title VII's concerns—which is why federal law requires or encourages them in a variety of contexts. See, *e.g.*, U.S.S.G. §§ 8B2.1, 8C2.5(f). Indeed, such policies and culture typically *reduce* the risk of discrimination by increasing consistency and focusing employees on relevant business considerations. But even a policy of leaving "decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct." *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988). Likewise, "a decision by a company to give managers the discretion to make employment decisions, and the subsequent exercise of that discretion by some managers in a discriminatory manner, is not tantamount to a decision by a company to pursue a systematic, companywide policy of intentional discrimination." *Sperling* v. *Hoffmann-La Roche, Inc.*, 924 F. Supp. 1346, 1363 (D.N.J. 1996). Rather, subjectivity in employment decisions "cuts *against* any inference for class action commonality" because subjective assessments necessarily vary with the person making them. *Stastny*, 628 F.2d at 279 (emphasis added); see also *Love* v. *Johanns*, 439 F.3d 723, 730-731 (D.C. Cir. 2006) (rejecting the view that "'a common policy of discrimination exists when significantly subjective decision-making operates on a national basis with discriminatory results'" (alterations omitted)).

The most the Ninth Circuit could claim here was that Wal-Mart's policies, "in part through their subjectivity, provide[d] a *potential conduit* for discrimination." Pet. App. 53a (emphasis added). Wal-Mart's "strong corporate culture," it opined, "*may include* gender stereotyping," and its personnel policies are "*vulnerable* to gender bias." *Id.* at 54a-55a. (emphasis added). But that sort of speculation about what might be and what could be is precisely what *Falcon* forbids. Rule 23(a) conditions class certification on the *existence* of specified criteria, including commonality. See p. 21, *supra*. Speculation that a common issue *might* exist is no substitute for a finding, supported by adequate evidence, that a common issue *does* exist. As Judge Kleinfeld noted: "'Vulnerability' to sex discrimination is not sex discrimination." *Dukes* v. *Wal-Mart, Inc.*, 509 F.3d 1168, 1194 (9th Cir. 2007) (Kleinfeld, J., dissenting). Absent "significant proof" of an actual companywide policy or culture of discrimination that gave rise to the alleged instances of discrimination, the Ninth Circuit lacked any basis for concluding that Rule 23(a)'s requirements were met. And, as *Falcon* made clear, "actual, not presumed, conformance with Rule 23(a) remains * * * indispensable." 457 U.S. at 160.

C. The Ninth Circuit's Reliance on Social Framework Analysis Is Inconsistent with *Falcon*

Much of the Ninth Circuit's flawed reasoning stems from its reliance on plaintiffs' sociology expert, Dr. William Bielby. See Pet. App. 54a-60a. Dr. Bielby asserted that Wal-Mart's policies and culture were "vulnerable to gender bias" based on a "social framework" analysis. See *ibid.* The Ninth Circuit's reliance on that analysis strays unacceptably from *Falcon* and Rule 23(a).

Social framework analysis "denote[s] the use of general conclusions from social science research to help determine specific factual issues in a case." John Monahan *et al.*, *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* 94 Va. L. Rev. 1715, 1726 (2008). Under such an analysis, "the expert uses her judgment rather than traditional empirical methods to link social science propositions to a particular case." Greg Mitchell *et al.*, *Beyond Context: Social Facts as Case-Specific Evidence*, 60 Emory L.J. (forthcoming 2011) (manuscript at 3), *available at* http://ssrn.com/abstract=1564724. "[T]he expert does not reach the conclusion that a specific decision was made with discriminatory intent; that judgment is for the fact finder." Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 Fordham L. Rev. 37, 45 (2009). Rather, the expert "offer[s] his or her knowledge of the social science research and identif[ies] the characteristics of policies challenged in the particular workplace that research has linked with higher likelihood of bias and stereotype." *Ibid.*

Reliance on such social framework analysis as a basis for class certification has been roundly criticized—and rightly so. "'Issues of causality in the social sciences have a long and rich methodological tradition.'" Gregory Mitchell, *Good Causes and Bad Science*, 63 Vand. L. Rev. En Banc 133, 138-139 (2010). But social framework analysis dispenses with those traditional and accepted methods of proving causation. Instead, it relies on the existence of a common policy that is merely "vulnerable" to discrimination and invites the jury to *assume* that the vulnerability of that common policy caused all the individual instances of alleged discrimination. It thus "improperly treat[s] findings drawn from aggregate data as if they revealed constant effects across individuals and settings." Monahan *et al.*, *Contextual Evidence*, *supra*, at 1735. It "ignore[s] the potential confounding and moderating variables that were statistically or experimentally controlled in the research settings but that could not be controlled in the specific case where the behavior in question occurred." *Id.* at 1735-1736. And it improperly permits experts to "make unreliable descriptive claims that are used to establish commonality, such as claims about * * * the uniformity of actual or likely bias across disparate locations that the experts have not systematically studied in any detail." Mitchell, *supra*, at 142.

As the authors of the authoritative casebook on law and social science make clear: "No field of social science of which we are aware permits its experts to speculate that a general finding, derived from group averages or ecological correlations, applies to each member of the group or applies to one specific group member but not to another." Monahan *et al.*, *Contextual Evidence*, *supra*, at 1734; see also John Monahan & Laurens Walker, *Social Science in Law* 597-605 (7th ed. 2010); John Monahan *et al.*, *The Limits of Social Framework Evidence*, 8 Law, Probability & Risk 307, 316 n.50 (2009). Social framework analysis, however, rests on precisely that flawed methodology.

Ironically, moreover, social framework analysis suffers from the same subjectivity it assails as a conduit for discrimination. Rather than apply scientifically reliable methods, a social framework expert relies on "subjective judgments and interpretations of case-specific data to decide which general principles apply and which do not, to determine which causal hypotheses should be rejected and which should be accepted, and to decide how much weight to give conflicting pieces of possibly unrepresentative evidence within a record as assembled by the parties in the context of litigation." Monahan *et al.*, *Contextual Evidence*, *supra*, at 1740. "One of the ironies of these cases is that the experts use subjective judgment to indict the subjective judgment of managers." Mitchell, *supra*, at 141 n.19.

Dr. Bielby's testimony in this case exemplifies all those defects. Dr. Bielby did not "conduct an audit study (in which persons of different sexes with matching qualifications pose as applicants for the same job), a controlled experiment into the effects of stereotyping on managerial decisions at Wal-Mart, or an objective observational study of conditions at Wal-Mart." Monahan *et al.*, *Contextual Evidence*, *supra*, at 1747 (footnote omitted); see also Mitchell *et al.*, *supra*, at 3 (Dr. Bielby "conducted no observational, statistical or experimental tests to determine that any particular employment practice of Wal-Mart actually contributed to any sex disparities in pay"); Mitchell, *supra*, at 138 (outlining standard scientific procedures Dr. Bielby failed to follow); Monahan *et al.*, *Limits of Social Framework Evidence*, *supra*, at 313. Rather, Dr. Bielby "simply reviewed discovery materials and judged Wal-Mart's practices to contain features that social science studies suggest *can be* associated with intergroup bias." Mitchell *et al.*, *supra*, at 3 (emphasis added).

From that review, Dr. Bielby "opined that Wal-Mart had a strong and uniform corporate culture that influenced how personnel decisions were made and that Wal-Mart's personnel and accountability systems were unduly subjective and discretionary." Mitchell, *supra*, at 136. "Given that the deposition testimony and exhibits that he relied on were the product of questioning and selection by advocates for the plaintiffs, and given that he reviewed the record using an entirely subjective analytical method after knowing the plaintiffs' statistical evidence of disparities, it is not surprising that Dr. Bielby reached conclusions supporting the plaintiffs' class claims." *Id.* at 137 (footnote omitted). "Plaintiffs at the class certification stage need experts willing to say that there are common organizational practices exposing the class members to a common risk, and that is what Dr. Bielby and the other social framework experts have been providing without a reliable basis for doing so." *Id.* at 142; see also Monahan *et al.*, *Contextual Evidence*, *supra*, at 1748 (Dr. Bielby "reli[ed] on methodologically inadequate subjective judgments").

The district court acknowledged that "Dr. Bielby's opinions have a built-in degree of conjecture." Pet. App. 195a. And it recognized that he "cannot definitively state how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart." *Ibid.* Indeed, while Dr. Bielby criticized Wal-Mart's policies as "vulnerable" to gender bias, he "conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking." *Dukes* v. *Wal-Mart, Inc.*, 222 F.R.D. 189, 192 (N.D. Cal. 2004). The district court nonetheless certified the class, dismissing the shortcomings of Dr. Bielby's testimony on the ground that "this is the nature of this particular field of science." Pet. App. 195a.

The appeal of Dr. Bielby's approach to class-action plaintiffs is obvious. To achieve class certification, the theory posits only the *possibility* of discrimination seeping through "vulnerable" companywide policies. It thereby leaves *proof* of any actual companywide policy of discrimination to a merits trial that—because of the hydraulic pressure to settle that class certification produces—will never occur. See pp. 31-32, *infra*. Plaintiffs, however, are not entitled to class treatment simply because it is *possible* that the alleged discrimination stems from a common policy that *might* allow discrimination to occur. They must adduce the "significant proof" of a "general policy of discrimination" that *Falcon* and Rule 23(a) require. Absent "significant proof" that a common discriminatory policy is to blame, there is simply no sufficiently common issue to justify combining otherwise disparate claims of discrimination into a nationwide class action.

D. The Ninth Circuit's Decision Distorts Organizational Decisionmaking and Threatens Corporate Diversity Initiatives

The Ninth Circuit's decision is not only wrong as a matter of law. It is also bad policy. By rejecting *Falcon*'s significant proof standard, the decision distorts how firms make basic organizational decisions necessary to manage a successful enterprise.

To compete in today's global marketplace, corporations must strike a careful balance among centralized policies, local discretion, and corporate culture. See pp. 8-12, *supra*. Those decisions are driven by business realities—like the need to react quickly to the marketplace while also ensuring a consistent product—that have nothing to do with discrimination. Those sensitive and difficult organizational decisions can often mean the difference between a thriving business that employs thousands of workers to serve millions of customers and a corporate train wreck.

By relying on those commonplace organizational tools as grounds for class certification, the decision below distorts corporate structural decisionmaking. As this Court has recognized, class certification is usually the entire game in class-action litigation. "Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978).[8] "Many corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere." *Blair* v. *Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999). The potential for "an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low." *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996). Certification thus imposes substantial costs "[i]rrespective of the merits." *Newton*, 259 F.3d at 167. Even luminaries such as Judge Friendly have described such settlements as "blackmail." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). It was in part that very concern—that "[a]n order granting certification * * * may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability"—that led to Rule 23's amendment in 1998 to permit interlocutory appeals of certification orders. See Fed. R. Civ. P. 23(f) & advisory committee note; *Blair*, 181 F.3d at 834.

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[8] See also *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 26 (1st Cir. 2008) (certification imposes "'irresistible pressure to settle'"); *Newton* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 192 (3d Cir. 2001) ("hydraulic pressure on defendants to settle"); *Regents of Univ. of Cal.* v. *Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 379 (5th Cir. 2007) ("the backbreaking decision that places 'insurmountable pressure' on a defendant to settle"); Richard A. Nagareda, *Aggregation and Its Discontents*, 106 Colum. L. Rev. 1872, 1875 (2006); Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1285-1286 & n.129 (2002); George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. Legal Stud. 521, 522, 554 (1997). Even proponents of social framework analysis acknowledge that, "after a class is certified, the pressure on the employer to settle the dispute * * * is substantial." Hart & Secunda, *supra*, at 50. Thus, "as a practical matter, class certification operates as a kind of victory on the merits." *Ibid.*

By attaching potentially case-dispositive consequences to a corporation's decisions to adopt centralized policies, delegate implementation authority, and foster a strong corporate culture—even when those decisions have nothing to do with discrimination—the Ninth Circuit's opinion skews organizational decisionmaking. Having "company-wide policies" or a "strong corporate culture," even ones wholly unconnected to discrimination, may now mean the difference between a multibillion-dollar, *must-settle* nationwide class action and individual discrimination claims resolved *on their merits* in traditional proceedings. High-level managers seeking to structure their businesses for success now must make those decisions with an artificial thumb on the scale to avoid the specter of a potentially ruinous class certification order.

The consequences are all the more troubling because it is not even clear what corporations can do to avoid them. The Ninth Circuit faulted Wal-Mart for its "company-wide corporate practices and policies" while, in the same breath, criticizing those policies for leaving "excessive subjectivity" in the hands of local decisionmakers. Pet. App. 51a. The court thus faulted Wal-Mart for being both *too centralized* and *too decentralized* at the same time. Corporate managers making basic organizational decisions should not be forced into an impossible Catch-22 situation where virtually any organizational structure they might adopt becomes grounds for class certification.

The Ninth Circuit's decision threatens those same negative consequences for corporate diversity and antidiscrimination initiatives as well. As explained above, see pp. 12-17, *supra*, most large firms in the United States today have made strong, public commitments to eradicating discrimination and promoting diversity. To implement those initiatives, however, corporations must often rely on the same organizational tools they use in managing any other aspect of their business—centralized policies, local implementation, and corporate culture.

The Ninth Circuit's reasoning threatens to render even those important initiatives sufficient evidence of "commonality" to justify class treatment of otherwise unrelated discrimination claims. If a company's air-conditioning policy can be cited against it as evidence of commonality, as Wal-Mart's was here, there is no reason its diversity and antidiscrimination policies could not be as well. The Ninth Circuit's decision thus threatens to impede even corporate efforts to promote inclusiveness and equality of opportunity. That perverse result is yet another reason to reaffirm *Falcon* and reject the Ninth Circuit's contrary approach.

A decision that a discrimination suit should not proceed as a nationwide class action does not leave genuine victims of discrimination without a remedy. Even in the best-managed companies, there may be isolated instances where rogue managers make improper decisions. And in large firms, those instances may add up. But the law provides ample means of redress for those individual claims. Indeed, those remedies are even more expansive now than when this Court decided *Falcon*. In 1991, Congress amended Title VII to provide for compensatory and punitive damages, not just backpay or equitable relief. See Civil Rights Act of 1991, Pub. L. No. 102-166, §102, 105 Stat. 1071, 1072-1073 (codified at 42 U.S.C. §1981a(a)(1), (b)). Even before that amendment, prevailing plaintiffs could recover their attorney's fees. See 42 U.S.C. §2000e-5(k). Those remedies ensure the vindication of meritorious individual claims without recourse to class actions. There is accordingly no reason to expand the class-action mechanism beyond its traditional bounds by converting ordinary corporate organizational decisions with no proven connection to discrimination into a basis for class certification.

The Ninth Circuit's holding is impossible to reconcile with *Falcon*'s mandate that "actual, not presumed, conformance with Rule 23(a) remains * * * indispensable" and that, in cases like this, that standard requires "[s]ignificant proof" of a "general policy of discrimination." 457 U.S. at 159 n.15, 160. The Ninth Circuit's erroneous decision threatens companies' ability to manage their workforces and impedes the private-sector diversity initiatives that play an increasingly important role in corporate America's efforts to ensure opportunity for all.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted.

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JANUARY 2011

APPENDIX

APPENDIX A

LIST OF *AMICI CURIAE*

Altria Group, Inc., is the parent company of Philip Morris USA, U.S. Smokeless Tobacco Company, John Middleton, Ste. Michelle Wine Estates, and Philip Morris Capital Corporation. The Altria Group of companies has about 10,000 employees throughout the United States. Its award-winning diversity programs seek to provide an inclusive work environment where different perspectives are encouraged and valued. See Altria, *Diversity & Inclusion*, http://www.altria.com/en/cms/About_Altria/Our_People/Diversity_Inclusion/default.aspx?src=top_nav.

Bank of America Corporation is one of the world's largest financial institutions, serving individual consumers, small- and middle-market businesses, and large corporations with a full range of banking, investing, asset management, and other financial products and services. With approximately 284,000 employees, the company has been broadly acclaimed for its diversity initiatives. It promotes a philosophy of inclusion that draws on the strength of every associate to build an atmosphere of personal and professional growth. See Bank of America, *Diversity and Inclusion*, http://careers.bankofamerica.com/learnmore/diversity.asp.

CIGNA Corporation provides healthcare and related benefits, the majority of which are offered through the workplace. Its products and services include healthcare, disability, life, and accident insurance. The company has approximately 30,000 employees, and its diversity policies seek to educate employees about the important role diversity plays in creating a winning environment across the enterprise. CIGNA has received awards and recognition for its diversity programs from such organizations as the National Committee for Quality Assurance and the

Human Rights Campaign Foundation. See CIGNA, *Diversity: It's Who We Are*, http://careers.cigna.com/CIGNAPage.aspx?page=23.

Del Monte Foods Company is one of the country's largest and best-known producers, distributors, and marketers of premium quality, branded pet products and food products. Del Monte has a powerful portfolio of brands, and its products are found in eight out of ten U.S. households. The company employs about 15,000 individuals. It is committed to promoting and preserving a workplace environment rich in diversity—one in which individual differences are not simply tolerated or accepted, but truly appreciated. The company's commitment to diversity is respected in the industry for delivering results. See Del Monte Foods, *Workplace Diversity*, http://www.delmonte.com/careers/default.aspx?page=ca_workplacediversity.

Dole Food Company, Inc., is the world's largest producer and marketer of fresh fruit and vegetables. It does business in more than 90 countries and employs approximately 39,100 full-time employees and 36,500 part-time employees worldwide. The company practices nondiscriminatory policies and is an equal opportunity employer. See Dole, *Employees*, http://dolecsr.com/Principles/Employees/tabid/407/Default.aspx.

Dollar General Corporation is the Nation's largest small-box discount retailer. The company employs approximately 80,000 employees in 35 states. In keeping with its mission of "Serving Others," Dollar General has implemented policies designed not only to ensure compliance with antidiscrimination laws but also to foster a diverse and inclusive work environment. See Dollar General, *Diversity at Dollar General*, http://www.dollargeneral.com/Careers/Pages/Diversity.aspx.

DuPont Company is a science-based products and services company. Founded in 1802, DuPont puts science to work by creating sustainable solutions essential to a better, safer, healthier life for people everywhere. Operating in more than 90 countries, DuPont has more than 58,000 employees. DuPont's commitment to diversity is embodied in its vision to be a "great global company through people." That vision of inclusiveness seeks to overcome any and all cultural and structural barriers that dampen motivation, stifle creativity, and deter full participation at all levels of the company. DuPont has been recognized for its commitment to the advancement of women and minorities by several organizations. Its continuing goal is to ensure that all employees have the opportunity to grow personally and professionally during their careers with DuPont. See DuPont, *Diversity and Inclusion*, http://www2.dupont.com/Diversity_and_Inclusion/en_US/index.html.

FedEx provides customers and businesses worldwide with a broad portfolio of transportation, e-commerce, and business services. Consistently ranked among the world's most admired and trusted employers, FedEx inspires its more than 285,000 team members to remain focused on safety, ethical and professional standards, and the needs of customers and communities. FedEx embraces diversity as essential to its continued success in today's ever-changing global marketplace. The company has been honored with the Champion of Diversity Award from the New York Urban League; was ranked as one of the top 40 companies for diversity by *Black Enterprise* magazine; was recognized as one of the top 50 employers by *Minority Engineer* magazine; and was both honored as one of the "Elite Eight," and ranked as a great place for women to work, by *Pink* magazine. At FedEx, diversity is a priority from management to the frontline. See FedEx, *Diversity*, http://about.fedex.designcdt.com/corporate_responsibility/diversity/culture.

General Electric Company is a global infrastructure, finance, and media company. It employs 300,000 people in more than 100 countries. The company implemented its first companywide equal employment opportunity policy in the 1930s and has a long history of fair employment practices, ensuring a level playing field for all. GE has been named in numerous "top employer" lists for its employment programs and practices. See GE, *Our People*, http://www.ge.com/company/culture/people.html.

Hewlett-Packard Company is the world's largest technology company. It creates technology solutions for consumers and business with a portfolio that spans printing, personal computing, software, services, and information technology infrastructure. It has approximately 304,000 employees worldwide. The company's diversity policy recognizes that creating a diverse, inclusive work environment is a process of continuous renewal. See HP, *The Diversity Value Chain*, http://www8.hp.com/us/en/hp-information/about-hp/diversity/value.html.

Kimberly-Clark Corporation provides family care, personal care, and other products to 1.3 billion consumers each day in more than 150 countries. Its well-known brands include Kleenex, Scott, and Huggies. The company has nearly 56,000 employees worldwide. Kimberly-Clark focuses on developing employee programs that retain and recruit engaged and skilled talent reflective of its customers, consumers, and communities. It believes that promoting a culture that values and capitalizes on individual and collective talents, opinions, perspectives, and ideas makes it a more innovative company. See Kimberly-Clark, *Diversity at Kimberly-Clark*, http://www.kimberly-clark.com/aboutus/diversity.aspx.

McKesson Corporation is dedicated to delivering the vital medicines, supplies, and information technologies that enable the healthcare industry to provide patients better, safer care. The company has over 32,000 employees across the Nation and around the world. McKesson is committed to fostering a workplace environment that respects the many ways we are different from one another, and supports and acknowledges the diverse world in which we live and work. See McKesson, *Diversity and Inclusion*, http://www.mckesson.com/en_us/McKesson.com/About%2BUs/Corporate%2BCitizenship/Diversity%2Band%2BInclusion.html.

Microsoft Corporation is a worldwide leader in software, services, and solutions that help people and businesses realize their full potential. Founded in 1975, it has approximately 88,000 employees worldwide. Microsoft strongly believes that a diverse workforce brings greater perspective, knowledge, and experience, and makes the company an employer of choice for talent from around the world. Being able to attract, develop, and retain this talent enables Microsoft to be more innovative in the products it develops, the way it solves problems, and the way it serves the needs of an increasingly global and diverse customer base. See Microsoft, *Global Diversity and Inclusion*, http://www.microsoft.com/diversity.

NYSE Euronext is a leading global operator of financial markets and provider of innovative trading technologies. The company's exchanges in Europe and the United States, which include the New York Stock Exchange, trade equities, futures, options, fixed-income, and other products. With more than 3,000 employees, NYSE Euronext encourages the highest levels of ethics, performance, respect, and excellence throughout its organization. At NYSE Euronext, diversity means enabling people of all ages, races, genders and sexual orientations, as well as people with disabilities and different cultures, religions, and styles, to work together effectively to meet company objectives and maximize their potential. The company's U.S. Diversity Council is recognized by the Association of Diversity Councils as one of the Nation's top-performing diversity organizations. See NYSE Euronext, *Corporate Responsibility Report 2009*, http://www.nyse.com/pdfs/NYX_Corporate_Responsibility_Report.pdf.

PepsiCo, Inc., is a world leader in convenient snacks, foods, and beverages. It is home to hundreds of brands, including Pepsi-Cola, Frito-Lay, Gatorade, Tropicana, and Quaker. PepsiCo has over 285,000 employees. It approaches diversity and inclusion as fundamental business priorities and has received dozens of awards for its efforts. See PepsiCo, *Diversity & Inclusion*, http://www.pepsico.com/Purpose/Talent-Sustainability/Diversity-and-Inclusion.html.

Tyson Foods, Inc., founded in 1935, is one of the world's largest processors and marketers of chicken, beef, and pork. The company has approximately 117,000 team members employed at more than 400 facilities and offices around the world. Inclusion and valuing diversity are cornerstones that have supported the growth of its business throughout its history, especially in the past few decades. See Tyson, *2009 Sustainability Report* 18, 28

29, http://www.tyson.com/Corporate/PressRoom/docs/2009SustainabilityReport_English.pdf.

UnitedHealth Group Incorporated is a diversified health and well-being company dedicated to helping people live healthier lives and making healthcare work better. With approximately 80,000 employees, UnitedHealth Group serves more than 75 million people worldwide through a broad spectrum of health benefit programs and health services. UnitedHealth Group embraces and encourages a culture of diversity and inclusion and knows that valuing diversity makes good business sense and helps to ensure the company's future success. The company is a member of the Select 50 Diversity Employers of Choice and has received numerous other awards and distinctions. See UnitedHealth Group, *Diversity & Inclusion*, http://diversity.unitedhealthgroup.com/.

United Parcel Service, Inc., is the world's largest package delivery company and a global leader in logistics, offering a broad range of solutions including the transportation of packages and freight, the facilitation of international trade, and the deployment of advanced technology to more efficiently manage the world of business. It has approximately 408,000 employees and serves more than 220 countries and territories worldwide. UPS has a longstanding commitment to diversity and believes that people do their best when their talents are encouraged to flourish in an environment that embraces diversity. The company has received awards and recognition for its diversity efforts from many organizations, including Hispanic Business magazine and the Women's Business Enterprise National Council. See UPS, *Diversity in Business*, http://www.responsibility.ups.com/Diversity.

Walgreen Co. operates the Nation's largest drugstore chain, Walgreens, with 244,000 employees. Diversity and inclusion at Walgreens are more than business initiatives; they are a way of life. The company's business groups are devoted to sustaining a culture of diversity and inclusion. Walgreens earned a 100 rating in the Human Rights Campaign Foundation's Human Equality Index and has been recognized as a "Best Diversity Company" by *Diversity/Careers* magazine. See Walgreens, *Diversity Fuels Future Growth*, http://www.walgreens.com/topic/sr/sr_reflecting_diversity.jsp.

The Williams Companies, Inc., is an integrated natural gas company. It produces, gathers, processes, and transports clean-burning natural gas to heat homes and power electric generation across the country, and employs approximately 5,000 people. The company's diversity mission is to foster an environment that attracts a high-performing, diverse workforce where individuals are respected and valued for their contributions and have the opportunity to achieve their maximum potential. See Williams, *2008 Corporate Responsibility Report* 26-28, http://www.williams.com/corporate_responsibility/docs/CSR_2008.pdf.

AMICUS
CURIAE
BRIEF

31

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IN THE

Supreme Court of the United States

WAL-MART STORES, INC.,

Petitioner,

v.

BETTY DUKES, *ET AL.*,

Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENTS

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Cases

Amchem, Inc. v. Windsor, 521 U.S. 591 (1997) 7, 9, 16

Bain Peanut Co. v. Pinson, 282 U.S. 499 (1931) 1

Bell v. Farmers Insurance Exchange, 9 Cal. Rptr. 3d 544 (Cal. App. 1 Dist. 2004) 10

Brinkerhoff v. Rockwell International Corp., 83 F.R.D. 478 (N.D. Tex. 1979) 11

Califano v. Yamasaki, 442 U.S. 682 (1979) 8

Carnegie v. Household International, Inc., 376 F.3d 656 (7th Cir. 2004) 9

Coleman v. Estes Express Lines, Inc., 627 F.3d 1096 (9th Cir. 2010) 8

Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867 (1984) 6

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) 9

Ervin v. OS Restaurant Services, Inc., --- F.3d ---, 2011 WL 135708 (7th Cir. Jan. 18, 2011) 8

General Telephone Company of Southwest v. Falcon, 457 U.S. 147 (1982) .... *passim*

Gentry v. Superior Court, 165 P.3d 556 (Cal. 2007) 10

Haynes v. Shoney's, Inc., 1993 WL 19915 (N.D. Fla. Jan. 25, 1993) 14

IBP, Inc. v. Alvarez, 546 U.S. 21 (2005) 14

In re Pet Food Products Liability Litigation, 629 F.3d 333 (3rd Cir. 2010) 8

Koon v. United States, 518 U.S. 81 (1996) 8

Mace v. Van Ru Credit Corp., 109 F.3d 338 (7th Cir. 1997) 9

Maldonado v. Ochsner Clinic Foundation, 493 F.3d 521 (5th Cir. 2007) 9

Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288 (1960) 11

Mohawk Industries, Inc. v. Carpenter, 130 S. Ct. 599 (2009) 16

N.L.R.B. v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978) 11

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 8

Schnuerle v. Insight Communications Company, L.P., --- S.W.3d---, 2010 WL 5129850 (Ky. Dec. 16, 2010) 10

Scott v. Aetna Services, Inc., 210 F.R.D. 261 (D. Ct. 2002) 10

Simon v. Philip Morris Inc., 200 F.R.D. 21 (E.D.N.Y. 2001) 18

Smellie v. Mount Sinai Hospital, 2004 WL 2725124 (S.D.N.Y. Nov. 29, 2004) 11

Velez v. Novartis Pharmaceuticals Corp., 2010 WL 4877852 (S.D.N.Y. Nov. 30, 2010) 13

Other Authorities

AggData, *Complete List of Fortune 500/1000 Companies 1955-2010* (Aug. 2010), http://www.aggdata.com/business/fortune_500 12

Blumberg, Phillip I., *The Corporate Entity In An Era Of Multinational Corporations*, 15 Del. J. Corp. L. 283 (1990) 11

Current Dollar and "Real" Gross Domestic Product, U.S. Bureau of Economic Analysis, http://www.bea.gov/national/xls/gdplev.xls...... 12

Economic Census, United States Census Bureau, http://www.census.gov/history/www/programs/economic/economic_census.htm 12

Empirical Research Panel Part II, *Overview of Satisfaction or Dissatisfaction With the Current System and Suggestions For Change Raised By The Data* (2010), http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/51AF4213BF9DE4798525773100 65B7D5/$File/Empirical%20Research%20Panel%2C%20Executive%20Summary.pdf?OpenElement.................... 18

Federal Judicial Center, *2003–2004 District Court Case-Weighting Study, New 2004 District Court Case Weights* (2005) 15

Fortune Global 500: *Novarits*, CNN Money, http://money.cnn.com/magazines/fortune/global500/2007/snapshots/6799.html 13

Gensler, Steven S., *Judicial Case Management: Caught in the Cross-Fire* (2010), http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/9F4D94E0D4B13E92852577130004A5AE3/$File/Steven%20S.%20Gensler%2C%20Caught%20in%20the%20Cross-Fire.pdf?OpenElement 17

Lawyers for Civil Justice, *et al.*, *Litigation Cost Survey of Major Companies*, For Presentation to *Committee on Rules of Practice and Procedure Judicial Conference of the United States* (May 2010), http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/33A2682A2D4EF700852577190060E4B5/$File/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf?OpenElement 15

Lawyers for Civil Justice, *et al.*, *Reshaping the Rules of Civil Procedure for the 21st Century: The Need for Clear, Concise, and Meaningful Amendments to Key Rules of Civil Procedure* (May 2010), http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/888E977DFE7B173A8525771B007B6EB5/$File/Reshaping%20the%20Rules%20for%20the%2021st%20Century.pdf?OpenElement 17

Lee III, Emery G. & Willging, Thomas E. , *Litigation Costs in Civil Cases:*

Multivariate Analysis, Report to the Judicial Conference Advisory Committee on Civil Rules (Federal Judicial Center Mar. 2010), http://www.fjc.gov/public/pdf.nsf/lookup/costciv1.pdf/$file/costciv1.pdf 14

Lee, III, Emery G. & Willging, Thomas E., *National Case-Based Civil Rules Survey, Preliminary Report to the Federal Judicial Conference Advisory Committee on Civil Rules* (Federal Judicial Center Oct. 2009), http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf 14

Levit, Nancy, *Megacases, Diversity, And The Elusive Goal Of Workplace Reform*, 49 B.C. L. Rev. 367 (2008) 14

McIntyre, Douglas A., *America's Biggest Companies, Then and Now (1955 to 2010)*, Wall St. 24/7, Sept. 21, 2010, http://247wallst.com/2010/09/21/americas-biggest-companies-then-and-now-1955-to-2010/#ixzz1DO6pBlz 13

Nagareda, Richard, *1938 All Over Again? Pre-Trial As Trial In Complex Litigation* (May 2010), http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/ED61ECFA8257D3198525770E004D2B11/$File/Richard%20Nagareda%2C%201938%20All%20Over%20Again.pdf?OpenElement 16

Pop Culture: 1800, United States Census Bureau, http://www.census.gov/history/www/throug h_the_decades/fast_facts/1800_fast_facts.htm 11

Pop Culture: 2000, United States Census Bureau, http://www.census.gov/history/www/through_the_decades/fast_facts/2000_new.html 12

Report of the Advisory Committee on Civil Rules to the Chief Justice of the United States (2010) 16

Statistics about Business Size (including Small Business), United States Census Bureau, http://www.census.gov/epcd/www/smallbus.html 12, 13

The Pew Research Center for the People & The Press, *Wal-Mart a Good Place to Shop But Some Critics Too* (Dec. 2005), http://people-press.org/report/265/wal-mart-a-good-place-to-shop-but-some-critics-too. 13

Third Circuit Task Force Report, *Selection of Class Counsel*, 208 F.R.D. 340 (2002) 9

U.S. and World Population Clock, United States Census Bureau (Feb. 25, 2011, 11:00 am), http://www.census.gov/main/www/popclock.html 13

Rules

Fed. R. Civ. Proc. 1 1

Fed. R. Civ. Proc. 23 .... *passim*

INTEREST OF *AMICUS CURIAE*[1]

The American Association for Justice ("AAJ") respectfully submits this brief as *amicus curiae*. AAJ is a voluntary national bar association whose members represent plaintiffs in civil actions. AAJ has participated as *amicus curiae* before this Court in dozens of cases of importance to AAJ members and to the public. AAJ members routinely represent large numbers of persons in federal courts, including in class actions in general and in civil rights class actions in particular. AAJ members have an abiding interest in the interpretation of the Federal Rules of Civil Procedure and participate in the rulemaking processes of the Judicial Conference.

INTRODUCTION AND SUMMARY OF ARGUMENT

Like government in general, the Federal Rules of Civil Procedure, and in particular Rule 23, need "a little play in the joints"[2] if they are to meet the needs of modern litigation. That flexibility is built into the rules, with Rule 1 admonishing that they be construed to provide "just, speedy, and inexpensive" adjudications, and is reflected in the deference trial courts traditionally have been accorded in administering class actions. This court should assure that trial judges have the breathing room they need to make the system work.

---

[1] Letters of consent from the parties have been filed with the Clerk of Court. Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored any part of this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

[2] "We must remember that the machinery of government would not work if it were not allowed a little play in its joints." *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501 (1931) (Holmes, J., for the court).

No issue of Wal-Mart's liability is before the court. Wal-Mart conflates questions of whether it is liable with questions about how it is appropriate to adjudicate whether it is liable. This Court was clear in *General Telephone Co. of Southwest v. Falcon* that those inquiries are distinct. They must remain so.

The questions presented deal with how to adjudicate whether Wal-Mart is liable. The question certified for class adjudication is whether Wal-Mart's behavior—not the behavior of particular agents in particular locations—violates substantive law. Wal-Mart repeatedly refers to its size and de-centralized decisionmaking as reasons why *none* of plaintiffs' allegations can be adjudicated in one proceeding. But as big as Wal-Mart is, it is one entity, responsible for the actions of its collective parts. The allegations before the court are not, as Wal-Mart apparently wishes they were, that the fingers and toes of a juridical person misbehaved; they are that the juridical person, itself, misbehaved. Establishing, on a classwide basis, whether Wal-Mart acted in one discriminatory manner is a speedier, less expensive, and more just way to adjudicate the issue than determining that question in 500,000 individual adjudications, which would be cost-prohibitive and effectively exculpatory. If the civil justice system is to perform its constitutional role of providing quiescence by resolving disputes peaceably, the size and complexity of a juridical person cannot preclude adjudicating claims that it behaved badly.

Rule 23 traditionally has been interpreted to afford trial courts great flexibility in deciding whether and how to adjudicate claims on a classwide basis. That kind of flexibility recently has been endorsed by bench, bar, and the academy as a key factor in successful administration of the rules in general. The Advisory Committee on Civil Rules last year undertook a major retrospective on the rules. One clear lesson is that informed judges need great discretion to administer cases like this one. This Court should be slow to interfere, at this preliminary stage of adjudication, with the considered rulings of a trial judge charged with overseeing this litigation. The class certification here is a reasoned response to a knotty problem of providing justice to both a large entity assertedly guilty of misconduct and the large number of persons who make the assertion.

ARGUMENT

I. THE QUESTION OF WHETHER WAL-MART EMPLOYS A SINGLE SET OF CORPORATE WIDE DISCRIMINATORY POLICIES IS APPROPRIATELY ADJUDICATED ON A CLASSWIDE BASIS

The lower courts endorsed determining, on a classwide basis, "whether Wal-Mart's female employees nationwide were subjected to a *single set of corporate policies* (not merely a number of independent discriminatory acts)" that discriminated against them. Pet. App. 78a (emphasis in original). That question is singularly appropriate for class adjudication, resolving a dispute about whether one entity employs one policy that affects all employees in a prohibited manner.

Wal-Mart colorfully asserts that evidence supporting this determination does not bridge the "*Falcon* gap," noting that this court's decision in *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982) held:

> that a plaintiff can potentially bridge the gap between individual and representative claims, and secure authorization to proceed on behalf of absent persons, by adducing "[s]ignificant proof that an employer operated under a general policy of discrimination" that was implemented through "entirely subjective decisionmaking processes" in a manner that affected all class members. *Falcon*, 457 U.S. at 159 n.15.

Pet'r's Br. 19. That is not quite an accurate description of either the particular statement or the overall rationale in *Falcon*. Material elided from the statement is telling. The complete language is:

> Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class *of both applicants and employees* if the discrimination manifested itself in hiring and promotion practices in the same general fashion, *such as* through entirely subjective decisionmaking processes.

Falcon, 457 U.S. at 159 n.15 (emphases added).

The elided language illustrates two key points. First, subjective decisionmaking is merely an example of one way a "general policy" of discrimination can be manifested, not a limitation on how it might be manifested. It certainly is not the evidentiary requirement Wal-Mart attempts to make it. Second, the Court is addressing primarily substantive law, and not standards under Rule 23. The elided language makes clear that the statement addresses the question on which certiorari was granted: "whether the class action was properly maintained on behalf of both employees who were denied promotion and applicants who were denied employment." *Id.* at 155. The sentence to which the footnote is appended reads: "We find nothing *in the statute* to indicate that Congress intended to authorize such a wholesale expansion of class-action litigation." *Id.* at 159 (emphasis added). *Falcon* finds, as a matter of substantive law, that the claim of an employee denied promotion is different from the claim of a person denied employment. That is the *Falcon* "gap":

> Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims.

Id. at 157.

The Court holds that, for purposes of Rule 23, the claim of denied promotion is not typical of the claim of denied employment *unless* "the discrimination manifested itself in hiring and promotion practices in the same general fashion." *Id.* at 159 n.15. *See Cooper v. Fed. Res. Bank of Richmond*, 467 U.S. 867, 877 (1984) ("Falcon thus holds that the existence of a valid individual claim does not necessarily warrant the conclusion that the individual plaintiff may successfully maintain a class action.")

The court's "significant proof" statement was speculation about what might be required to establish how present employees might show that their claims were typical of, and had commonality with, persons denied employment. That issue is not present in this case, as persons denied employment are not part of the class certified here.[3] The Court made clear that "significant proof" is not a generally applicable evidentiary requirement for class certification: "Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Falcon*, at 160. The court made no specific evidentiary demand of the lower courts. Reversal was based on a methodological failure, not an evidentiary one, the district court's "failure to evaluate carefully the legitimacy of the named plaintiff's *plea* that he is a proper class representative under Rule 23(a)." *Id.* at 148 (emphasis added), and its failure to provide "rigorous *analysis*, that the prerequisites of Rule 23(a) have been satisfied." *Id.* at 161 (emphasis added). The Court in *Falcon* noted that factual and legal issues related to the merits often are enmeshed with those related to class certification, but it did not collapse Rule 23 into a determination on the merits. With its acknowledgement of the "flexibility" trial courts necessarily are accorded in certifying classes and its refusal to judge those certifications "by hindsight," after trial evidence had been taken, it made clear that it was prescribing no particular requirement regarding evidentiary production in class certification. *Id.* at 160. *See Amchem, Inc. v. Windsor*, 521 U.S. 591, 619 & 621-22 (1997) (Permitting a certifying court to look beyond the pleadings to the parties' stipulated settlement for the limited purpose of explaining why requirements of Rule 23 were not satisfied but imposing no evidentiary requirement and precluding a court from conflating a certification decision with determinations of merits).

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[3] The Ninth Circuit remanded for consideration of whether former employees at the time the complaint was filed could be certified in a 23b(3) class. Pet. App. 118a

II. THE RULES VEST TRIAL JUDGES WITH THE DISCRETION NECESSARY TO ADJUDICATE CLASS CLAIMS INVOLVING LARGE ENTITIES AND EXERCISE OF THAT DISCRETION SHOULD BE REVIEWED DEFERENTIALLY

The *Falcon* court, along with many courts before and since, acknowledged that flexibility in administering class actions is a virtue and that trial courts deserve deference in their exercise of it.[4] *See Califano v. Yamasaki*, 442 U.S. 682, 703 (1979) ("[M]ost issues arising under Rule 23 . . . [are] committed in the first instance to the discretion of the district court"); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979) (district courts have "broad power and discretion . . . with respect to matters involving the certification" of class actions).[5] Deference flows in part from recognition of the essentially factual nature of the certification inquiry and in part from recognition of the inherent power of the trial court to manage its caseload. *Maldonado v. Ochsner Clinic*

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[4] The questions presented make no direct reference to an appropriate standard of review. Wal-Mart alludes to one cryptically, in a footnote citing one case that does not quite bear the weight Wal-Mart places on it. Pet'r's Br. 18, n 2, citing *Koon v. United States*, 518 U.S. 81, 100 (1996). *Koon* does recite that error of law is per se an abuse of discretion, but it illustrates that point with an example of a court considering, in exercising discretion, an unpermitted factor; evidence outside the record of the case would be an example. This case is much more appropriately viewed, from the appellate level, as deferential oversight of the exercise by a trial judge of matters committed primarily to that judge, the court having noted in *Koon* that "[t]he abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions." *Id.*

[5] Recent circuit court opinions continue to endorse this kind of discretion. *See, e.g., Ervin v. OS Rest. Servs., Inc.*, --- F.3d ---, 2011 WL 135708 (7th Cir. Jan. 18, 2011) ("We review class-certification decisions deferentially, in recognition of the fact that Rule 23 gives the district courts 'broad discretion to determine whether certification of a class-action lawsuit is appropriate.'"); *In re Pet Food Prod. Liab. Litig.*, 629 F.3d 333, 343 (3rd Cir. 2010) (endorsing discretion on certifying subclasses); *Coleman v. Estes Express Lines, Inc.*, 627 F.3d 1096, 1100 (9th Cir. 2010) (permitting interlocutory appeal of class certification order under CAFA within discretion of district court) (noting accord with First and Tenth Circuits)

Found., 493 F.3d 521, 523 (5th Cir. 2007). This case, involving the nation's largest employer, illustrates the wisdom of those positions. In the modern era, class adjudication is often the only practical means of adjusting disputes between gargantuan organizations and groups of persons harmed in the same way by them. Economic reality dictates that certain litigation "proceed as a class action or not at all." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974).[6] That statement applies more widely today than it did when made in 1974.[7] And it is true not

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[6] *See also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("'The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.'") (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)); *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.").

[7] *See, e.g.*, Third Circuit Task Force Report, *Selection of Class Counsel*, 208 F.R.D. 340 (2002):

> What was thought to be true in 1966 appears to be true today: namely, that the interests of justice are well served by class actions that vindicate rights that might otherwise go unprotected and that spare courts the burden of handling numerous lawsuits, some small and some not so small, arising from a common set of facts. Over the last 35 years, the American legal system has handled a variety of class actions involving an enormous array of claims. In many situations, the class action has been successful in identifying public harms, discovering a substantial percentage of likely victims, making

only of cases, like *Eisen*, involving small individual recoveries. Individual employment claims are complex, and ones of the magnitude asserted here often are not viable if asserted individually. *See, e.g., Gentry v. Superior Court*, 165 P.3d 556, 564 (Cal. 2007) (finding that ban on class action for individual wage claims averaging $5,000-7,000 was effectively exculpatory as amounts involved were insufficient to support bringing individual claims); *Bell v. Farmers Ins. Exch.*, 9 Cal. Rptr. 3d 544, 570 (Cal. App. 1 Dist. 2004) (rejecting assertion that individual claims as high as $37,000 rendered individualized claims viable and precluded certification of class of overtime claimants); *Scott v. Aetna Serv., Inc.*, 210 F.R.D. 261, 268 (D. Ct. 2002) ("the cost of individual litigation is prohibitive, notwithstanding the high salaries of the Systems Engineers or the sizable potential damages awards."). And a class action can dissipate legitimate fear of reprisal. "[C]urrent employees—whether rank and file, supervisory, or managerial—over whom the employer, by virtue of the employment relationship, may exercise intense leverage" can be inhibited from acting individually: "Not only can the employer fire the employee, but job assignments can be switched, hours can be adjusted, wage and salary increases held up, and other more subtle forms of influence

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> the party responsible for the harm rectify much of the damage caused, and distributing damages among the injured parties.

Id. at 342, *Schnuerle v. Insight Commc'ns Co., L.P.*, --- S.W.3d --- , 2010 WL 5129850, at *5 (Ky. Dec. 16, 2010) (When cost of litigation makes individual litigation against a company impractical, "the lack of an economically viable means to bring the company into court would effectively exculpate the company from liability, allowing it to reap unjustly a substantial economic windfall.").

exerted." *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 240 (1978); *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) ("[I]t needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions."). *See also Smellie v. Mount Sinai Hosp.*, 2004 WL 2725124, *4 (S.D.N.Y. Nov. 29, 2004) (recognizing reprisal as significant in class certification); *Brinkerhoff v. Rockwell Int'l Corp.*, 83 F.R.D. 478, 482 (N.D. Tex. 1979) (denying precertification discovery of names of individual class members in employment gender discrimination case because of fears of retaliation and manipulation).

Neither the size of modern organizations nor the number of facilities they operate should affect whether the existence of discriminatory corporate-wide policies can be adjudicated collectively. Modern business organizations are ubiquitous, large, and growing larger. As of 1801, "there were only 317 corporations in the entire country," Phillip I. Blumberg, *The Corporate Entity In An Era Of Multinational Corporations*, 15 Del. J. Corp. L. 283, 300 (1990) (footnote omitted), one for every 17,000 persons.[8] "These were almost entirely in banking, insurance, and public service areas; only a handful were manufacturing corporations. This condition began to change with the growth of the textile industry following the introduction of the power loom, the embargo laws against manufactured imports, and the War of 1812." *Id.* In response to this growth Congress ordered the Census Bureau to begin recording the economic activity of business enterprises.[9] As of the last economic census in 2002, there were 5,885,784 "employing firms" in America (business organizations that employed persons other than the owner),[10] or one for about every 50 persons.[11]

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[8] U S population in 1800 Census was 5,308,483. *Pop Culture: 1800*, United States Census Bureau, http //www.census.gov/history/www/through_the_decades/fast_facts/1800_fast_facts htm (last visited Feb 25, 2011).

Business organizations have grown not only in number and ubiquity, but in size, stunningly so in the last half century. In 1955, the revenues of the 500 largest American corporations equaled 33 percent of gross domestic product (GDP); fifty years later, they equaled 74 percent of GDP.[12] Today one employer—Wal-Mart—employs more people than the top ten Fortune 500 companies, combined, employed in 1955. Douglas A. McIntyre, *America's Biggest Companies, Then and Now (1955 to 2010)*, Wall St.

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[9] *Economic Census*, United States Census Bureau, http://www.census.gov/history/www/programs/economic/economic_census.html (last visited Feb. 25, 2011).

[10] *Statistics about Business Size (including Small Business)*, United States Census Bureau, http://www.census.gov/epcd/www/smallbus.html (last visited Feb. 25, 2011).

[11] U.S. population in 2000 Census was 281,421,906. *Pop Culture: 2000*, United States Census Bureau, http://www.census.gov/history/www/through_the_decades/fast_facts/2000_new.html (last visited Feb. 25, 2011).

[12] Calculating gross revenues from AggData, *Complete List of Fortune 500/1000 Companies 1955-2010* (Aug. 2010), http://www.aggdata.com/business/fortune_500, adjusting to real dollars and deriving real-dollar GDP from *Current Dollar and "Real" Gross Domestic Product*, U.S. Bureau of Economic Analysis, http://www.bea.gov/national/xls/gdplev.xls (last visited Feb. 25, 2011).

24/7, Sept. 21, 2010, , http://247wallst.com/2010/09/21/americas-biggest-companies-then-and-now-1955-to-2010/#ixzz1DO6pBIz. Large employers are now a norm. Today, 3,500 firms employ 2,500 or more persons.[13] Those very large employers have, like Wal-Mart, many places where they do business. The eight hundred ninety firms that each employ more than 10,000 persons operate almost 600,000 facilities, or 660 facilities per firm. *Id.*

The certified class in this case is comprised of approximately 500,000 women. Pet. App. 6a, n.3; 112a. That is 0.3 percent of the 130 million people who shop at Wal-Mart regularly[14] and is less than 25 percent of Wal-Mart's workforce. Courts routinely have administered class actions involving similar percentages of the workforces of single entities. *See, e.g., Velez v. Novartis Pharm. Corp.*, 2010 WL 4877852 (S.D.N.Y. Nov. 30, 2010) (class of 6,000 women out of U.S. workforce of 20,000 (100,000 total employees, *Fortune Global 500: Novarits*, CNN Money, http://money.cnn.com/magazines/fortune/global500/2007/snapshots/6799.html (last visited Feb. 25, 2011), 20 percent of employees in U.S., *Novartis in the US—The Big Picture*, Novartis, http://www.us.novartis.com/downloads/careers/Novartis-in-the-US-brochure.pdf (last visited Feb. 25, 2011)); *IBP, Inc. v. Alvarez*, 546 U.S. 21, 30 (2005) (involving virtually all of approximately 1,000 employees); Nancy Levit, *Megacases, Diversity, And The Elusive Goal Of Workplace Reform*, 49 B.C. L. Rev. 367, 387-405 (2008) (describing several large employment class actions, including *Haynes v. Shoney's, Inc.*, 1993 WL 19915, (N.D. Fla. Jan. 25, 1993), covering "200,000 current and former employees and job applicants in twenty-three states," Levit, at 388; *Butler v. Home Depot, Inc.*, 1996 WL 421436, at *1-2 (N.D. Cal. Jan. 25, 1996) (order certifying class action), involving "over 17,000 current and former employees and 200,000 unsuccessful applicants in ten western states," Levit, at 394).

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[13] *Statistics about Business Size, supra* note 10.

[14] A 2005 Pew Research Poll found that 84 percent of Americans have shopped at Wal-Mart and that 42 percent of them do regularly. The Pew Research Center for the People & The Press, *Wal-Mart a Good Place to Shop But Some Critics Too* (Dec. 2005), http://people-press.org/report/265/wal-mart-a-good-place-to-shop-but-some-critics-too. The current population of the United States is approximately 310 million. *U.S. and World Population Clock*, United States Census Bureau (Feb. 25, 2011, 11:00 am), http://www.census.gov/main/www/popclock.html.

The alternative to litigating the issues certified here for class adjudication is individual litigation. Even at the modest average costs the Federal Judicial Center found extant in federal civil litigation[15] the parties' costs of the alternative are

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[15] Costs in federal civil cases are, in general, quite low, $15,000, on average, including attorneys' fees, for plaintiffs, and $20,000 for defendants. In a relatively small number of cases, costs are disproportionately high. Emery G. Lee, III & Thomas E. Willging, *National Case-Based Civil Rules Survey, Preliminary Report to the Federal Judicial Conference Advisory Committee on Civil Rules* (Federal Judicial Center, Oct. 2009), at 2, http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf. Cases with disproportionately high costs tend to be clashes of corporate titans, particularly intellectual property disputes. Emery G. Lee III & Thomas E. Willging, *Litigation Costs in Civil Cases: Multivariate Analysis, Report to the Judicial Conference Advisory Committee on Civil Rules* (Federal Judicial Center Mar. 2010) at 8, http://www.fjc.gov/public/pdf.nsf/lookup/costciv1.pdf/$file/costciv1.pdf.

$17.5 *billion*. Wal-Mart's proportional share of that $17.5 billion would be $10 billion, which is on the order of a thousand times greater than the amount Wal-Mart could be expected to pay to litigate this action. A recent survey of litigation costs of Fortune 200 companies—Wal-Mart is one—found that mean litigation expenditures for "major cases" —this would be one—were under $2 million for the period 2004-2008.[16] That is a substantial reduction in transactions costs, and case law makes clear that the costs of individual adjudication effectively would bar individual actions and potentially exculpate Wal-Mart from conduct condemned by civil rights statutes at the core of our identity as a nation.

Administering this kind of case requires flexibility traditionally granted by appellate courts and recently strongly endorsed by bench, bar, and

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These cases require disproportionate commitments of judicial resources. Federal Judicial Center, *2003-2004 District Court Case-Weighting Study*, at 5, tbl. 1 (New 2004 District Court Case Weights (2005)), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/CaseWts0.pdf/$file/CaseWts0.pdf.

[16] Lawyers for Civil Justice, *et al.*, *Litigation Cost Survey of Major Companies*, For Presentation to *Committee on Rules of Practice and Procedure Judicial Conference of the United States*, p. 14, Fig. (2010), http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/33A2682A2D4EF700852577190060E4B5/$File/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf?OpenElement. The survey was done on behalf of Lawyers for Civil Justice, the Civil Justice Reform Group, and the U.S. Chamber Institute for Legal Reform and was conducted by the Searle Center at Northwestern University. The survey did not attempt to identify kinds of cases that were defined as "major" (involving costs greater than $250,000), but Federal Judicial data suggest that most of those cases are inter-corporate disputes. Lee & Willging, *Litigation Costs in Civil Cases*, *supra*, note 15.

the academy. In May of 2010 the Advisory Committee on Civil Rules gathered judges, academics, and practitioners for a conference[17] "designed as a disciplined identification of litigation problems and exploration of the most promising opportunities to improve federal civil litigation." Report of the Advisory Committee on Civil Rules to the Chief Justice of the United States, 1 (2010), *available at* http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/9286E143BF0D465185257 7BB004D4450/$File/Report%20to%20the%20Chief%20Justice.pdf?OpenElement. The conference was the kind of "extensive deliberative process" the committee typically employs and that this court has endorsed, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997), drawing "on the collective experience of bench and bar" to facilitate "the adoption of measured, practical solutions." *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 609 (2009). The carefully designed conference had only one panel specifically dealing with Rule 23 and entertained only one paper on the topic.[18] Defense interests, well-represented at the conference, made no suggestions for amending Rule 23.[19] In reporting to the Chief Justice, the Committee made no mention of any need to deal directly with Rule 23, or particularly with class certification requirements under Rule 23. It did discuss extensively how to deal with issues that arise in administering large cases, in general, and found a strong consensus that close judicial management was a key to assuring that such cases could be litigated efficiently. Report to Chief Justice, at 4.[20] The panel examining empirical data relating to administration of the civil justice system concluded that "procedure should be tailored to the needs of each case early in the pretrial process, through a combination of attorney cooperation, judicial management, and case-type specific rules and protocols."[21] Notably absent from the implementation steps the Advisory Committee will take are any efforts specific to Rule 23 in general or to class certification in particular. Report to the Chief Justice, at 12.

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[17] 2010 Civil Litigation Conference, Duke Univ. School of Law, May 10-11, 2010 [hereinafter "Civil Lit. Conf."].

[18] Agenda, Civil Lit. Conf., http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/h_Toc/CC9D423FE4AFF65D852576510053D407/?OpenDocument; Richard Nagareda, *1938 All Over Again? Pre-Trial As Trial In Complex Litigation*, for Civil Lit. Conf., at 17-18, 22-24, 28 (May 2010), http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/ED61ECFA8257D31985257 70E004D2B11/$File/Richard%20Nagareda%2C%201938%20All%20Over%20Again.pdf?OpenElement.

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[19] *See* Lawyers for Civil Justice, *et al.*, *Reshaping the Rules of Civil Procedure for the 21st Century: The Need for Clear, Concise, and Meaningful Amendments to Key Rules of Civil Procedure*, for Civil Lit. Conf. (May 2010), http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/888E977DFE7B173A8525771B007B6EB5/$File/Reshaping%20the%20Rules%20for%20the%2021st%20Century.pdf?OpenElement.

[20] Commitment to case management is not new. *See generally* Steven S. Gensler, *Judicial Case Management: Caught in the Cross-Fire*, for Civil Lit. Conf. (2010), http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/9F4D94E0D4B13E928525771300 4A5AE3/$File/Steven%20S.%20Gensler%2C%20Caught%20in%20the%20Cross-Fire.pdf?OpenElement, especially p. 7, noting that "the Judicial Conference endorsed early case management as provided in Rule 16, saying '[t]he federal judiciary is committed to, and believes in, sound case management to reduce unnecessary cost and delay in civil litigation.'" (quoting the Judicial Conference of the United States, *Long Range Plan of the Federal Courts* 70 (1995) (Recommendation #38)).

Close judicial management—what judges, courts, and scholars want—requires play in the joints. "[W]hile an action is pending in the trial court, it is a living, developing and changing entity," and too close oversight from an appellate court distant from those realities hinders the trial court's ability to manage the case in a fair manner. *Simon v. Philip Morris Inc.*, 200 F.R.D. 21, 48-49 (E.D.N.Y. 2001) (Weinstein, J.). "Merely demonstrating that the district judge's class certification decision is questionable is insufficient procedurally, as such decisions require the application of broad and flexible legal standards to unique sets of facts that do not fit squarely within prior precedent." *Id.* at 42. This Court should assure that trial judges have it.

CONCLUSION

Class certification should be AFFIRMED.

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[21] Empirical Research Panel Part II, *Overview of Satisfaction or Dissatisfaction With the Current System and Suggestions For Change Raised By The Data*, for Civil Lit. Conf. (2010), http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/51AF4213BF9DE479852577310065B7D5/$File/Empirical%20Research%20Panel%2C%20Executive%20Summary.pdf?OpenElement.

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AMICUS
CURIAE
BRIEF

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No. 10-277

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IN THE

Supreme Court of the United States

◆

WAL-MART STORES, INC.,
Petitioner,

—v.—

BETTY DUKES, *ET AL.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND NATIONAL WOMEN'S LAW CENTER, *ET AL.*, IN SUPPORT OF RESPONDENTS

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Other Authorities

Alison A. Reuter, Comment, *Subtle but Pervasive: Discrimination Against Mothers and Pregnant Women in the Workplace*, 33 Fordham Urb. L.J. 1369, 1400 (2006)....................17

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Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination*, 40 Harv. C.R.-C.L. L. Rev. 481, 482 (2005)....................12

Barbara F. Reskin & Debra B. McBrier, *Why Not Ascription? Organizations' Employment of Male and Female Managers*, 65 Am. Soc. Rev. 210, 214 (2000)....................13

Cheryl Travis et al., *Tracking the Gender Pay Gap: A Case Study*, 33 Psychol. Women Q. 410, 410-11 (2009) 8

Deborah Thompson Eisenberg, *Shattering the Equal Pay Act's Glass Ceiling*, 63 SMU L. Rev. 17, 29 (2010) 7, 26, 30

Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. Rev. 859, 891 (2008) 26, 29, 31, 32

Deborah L. Brake, *Retaliation*, 90 Minn. L. Rev. 18, 25-28 (2005) 29, 31

Diana Burgess & Eugene Borgida, *Who Women Are, Who Women Should Be: Descriptive and Prescriptive Gender Stereotyping in Sex Discrimination*, 5 Psychol. Pub. Pol'y & L. 665 (1999) 20

H.R. Rep. No. 110-237 (2007) 27

Heather Boushey, *The New Breadwinners*, in The Shriver Report: A Woman's Nation Changes Everything 36 (Boushey & O'Leary eds. 2009), *available at* http://www.americanprogress.org/issues/2009/10/womans_nation.html 17

Institute for Women's Policy Research, *Press Release: Pay Secrecy and Paycheck Fairness* (November 2010), *available at* http://myopenworkplace.com/wp-content/uploads/2010/11/PressRelease_PaySecrecy_16Nov2010.pdf 27

Joan C. Williams & Stephanie Bornstein, *Caregivers in the Courtroom: The Growing Trend of Family Responsibility Discrimination*, 41 U. S. F. L. Rev. 171 (2006) 19

Joan C. Williams & Stephanie Bornstein, *The Evolution of 'FReD': Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 Hastings L.J. 1311 (2008).. 19

Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination and Defang the "Cluelessness" Defense*, 7 Emp. Rts. & Emp. Pol'y J. 401 (2003).. 19, 21

Joan Williams, *Toward A Reconstructive Feminism: Reconstructing the Relationship of Market Work and Family Work*, 19 N. Ill. U. L. Rev. 89 (1998) 18

Jonah Gelbach et al., *Passive Discrimination: When Does It Make Sense to Pay Too Little?*, 76 U. Chicago L. Rev. 797 (2009)............................ 29

Julie Chi-hye Suk, *Antidiscrimination Law in the Administrative State*, 2006 U. Ill. L. Rev. 405 (2006).. 13

Laura Beth Nielsen et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination in the Post Civil Rights United States*, 7 J. Empirical Legal Stud. 175 (2010) . 33

Leonard Bierman & Rafael Gely, *"Love, Sex and Politics? Sure. Salary? No Way": Workplace Social Norms and the Law*, 25 Berkeley J. Emp. & Labor L. 167 (2004) 27, 28

Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161 (1995) 12

Lindsay R. B. Dickerson, *Your Wife Should Handle It: The Implicit Messages of the Family and Medical Leave Act*, 25 B.C. Third World L.J. 429 (2005) 17

Nancy M. Carter & Christine Silva, Catalyst, *Pipeline's Broken Promise* (February 2010), *available at* http://www.catalyst.org/file/340/pipeline%27s_broken_promise_final_021710.pdf 9

Rafael Gely & Leonard Bierman, *Pay Secrecy/Confidentiality Rules and the National Labor Relations Act*, 6 U. Pa. J. Lab & Emp. L. 121 (2003) 27, 32

Rosemary Hunter, *A Feminist Response to the Gender Gap in Compensation Symposium*, 82 Geo. L. J. 147, 151-52 (1993) 22

Susan T. Fiske et al., *Social Science Research on Trial: Use of Sex Stereotyping Research in* Price Waterhouse v. Hopkins, 46 Am. Psychologist 1049 (1991) 14

Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458 (2001) 13

Tristin K. Green & Alexandra Kalev, *Discrimination-Reducing Measures at the Relational Level*, 59 Hastings L.J. 1435 (2008) 14, 22

U.S. Census Bureau, *Current Population Survey, Annual Social and Economic Supplement*, tbl. PINC-05, parts 55 & 109, *available at* http://www.census.gov/hhes/www/cpstables/032010/perinc/toc.htm 7

U.S. Census Bureau, *Historical Income Tables – People*, tbl. P-40, *available at* http://www.census.gov/hhes/www/income/data/historical/index.html 7

U.S. Government Accountability Office, *Women in Management: Analysis of Female Managers' Representation, Characteristics, and Pay* 6 (2010), *available at* http://www.gao.gov/new.items/d10892r.pdf 8

Vicki Schultz, Life's Work, 100 Colum. L. Rev. 1881 (2000) 19

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INTEREST OF *AMICI*

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Northern California is one of its regional affiliates. The ACLU, through its Women's Rights Project, frequently litigates cases, including class actions, concerning sex discrimination in the workplace, and has appeared before this Court in numerous cases involving women's equality, both as direct counsel and as *amicus curiae*.

The National Women's Law Center (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights in all aspects of their lives. Since 1972, NWLC has worked to secure equal opportunity for women in the workplace, which includes the right to equal pay and promotions. NWLC has prepared or participated in the preparation of numerous *amicus* briefs in employment discrimination cases before this Court.

The ACLU and the NWLC are joined in filing this brief by 32 organizations that share a longstanding commitment to civil rights and equality in the workplace. The individual organizations are described in the Appendix to this brief.[1]

INTRODUCTION AND SUMMARY

In support of their motion for class certification, plaintiffs presented evidence demonstrating statistically significant disparities in pay and promotions between men and women at Wal-Mart. Plaintiffs also presented evidence that Wal-Mart relies on subjective criteria to decide on pay and promotions, that those decisions are made by managers exercising largely unchecked discretion, and that managers invested with that authority have engaged in sex stereotyping at Wal-Mart stores across the nation. Together, this evidence raised the question whether Wal-Mart's policies and practices operate to discriminate against women in a manner common to the class. In addition, Wal-Mart's policies and practices prohibit employees from discussing their pay, which further entrenches gender-based disparities by making discrimination exceedingly difficult for individual women to discover or challenge. Under these circumstances, class certification is not only an appropriate mechanism for addressing plaintiffs' claims of employment discrimination – fully contemplated by the class action rules and consistent with Congress' intent in enacting Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (*codified as amended at* 42 U.S.C. § 2000e *et seq.*) – it is an indispensable one.

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[1] The parties have lodged blanket consents to the filing of *amicus* briefs in this case. Pursuant to Rule 37.6, counsel for *amici* attests that none of the parties authored this brief in whole or in part and no one other than *amici* or their counsel contributed money or services to the preparation or submission of this brief.

This Court has recognized that "'broad-scale action against patterns or practices of discrimination'" is "essential" to achieving the purposes of Title VII. *EEOC v. Shell Oil Co.*, 466 U.S. 54, 69 & n.22 (1984) (quoting H.R. Rep. No. 92-238, at 8, 14 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2144, 2149), because employment discrimination is a "'complex and pervasive' problem that [can] be extirpated only with thoroughgoing remedies," *id.* Federal Rule of Civil Procedure 23 advances these purposes by allowing plaintiffs to aggregate claims and collectively challenge far-reaching discriminatory practices that otherwise might go unaddressed. *See infra* Part III. Moreover, Congress has recognized that burdensome limitations on Title VII suits, such as Wal-Mart seeks here, may "ignore[] the reality of . . . discrimination" and may be "at odds with the robust application of the civil rights laws that Congress intended." Lilly Ledbetter Fair Pay Act of 2009, Pub. L. 111-2, 123 Stat. 5, § 2(2), *codified at* 42 U.S.C. § 2005-e note (2009).

Amici agree that the class of female employees at Wal-Mart was properly certified under Rules 23(a) and (b)(2) for the reasons set forth in the Brief for Respondents and do not repeat those arguments here. Rather, this brief highlights three aspects of sex discrimination that plaintiffs' evidence indicates were present at Wal-Mart and that underscore why class treatment of their pay and promotion claims is both appropriate and important.

First, the district court found that evidence presented by plaintiffs in support of class certification demonstrates statistically significant disparities in pay and promotions throughout Wal-Mart that "support an inference of company-wide discrimination" sufficient to satisfy the commonality requirement of Rule 23(a). *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 188 (N.D. Cal. 2004), *reprinted at* App. 162a, 281a. Class actions are a traditional and necessary means of addressing such broad-based discrimination claims under Title VII. That is true both in this case and more broadly. Significant disparities persist nationwide between men's and women's wages and their representation in management positions, even when controlled for factors such as experience, employee preference, and occupation type, suggesting that ongoing discrimination is one of the culprits.

Second, evidence presented by plaintiffs indicates that outmoded sex stereotypes influence employment decisions at Wal-Mart and that women are treated as less valued employees than men, regardless of their actual performance. Declarants attested that women were repeatedly told that they should be paid less because they are not breadwinners, that they cannot be effective managers due to their family obligations, and that certain more desirable jobs are "men's work" and off-limits to women. Social science research confirms that such stereotypes can become the basis for employment decisions where an employer delegates unchecked discretion over pay-setting and promotion decisions to local managers utilizing subjective criteria. As a matter of well-established law, subjective decisionmaking practices may be challenged through class actions when the totality of the evidence raises an inference that such practices have resulted in broad-based discrimination. Indeed, class actions are critical in these circumstances to address ongoing sex stereotyping in the workplace that would otherwise go unremedied.

Third, plaintiffs presented evidence indicating that individual women at Wal-Mart face significant barriers in challenging discrimination, including evidence showing that Wal-Mart does not allow its employees to discuss their pay and threatens those who raise questions about pay and promotion decisions. As in many workplaces, these policies and practices make it difficult for women employees even to know when they are being paid less than similarly situated male employees. Retaliation for complaining about discrimination is all too common. The class action mechanism enables women at Wal-Mart and other victims of discrimination to overcome these obstacles, thereby furthering Title VII's purpose of achieving a workplace free from discrimination.

Accordingly, and for the reasons set forth below, the district court's class certification order should be affirmed.

ARGUMENT

I. SEX DISCRIMINATION IN THE WORKPLACE, AS PLAINTIFFS ALLEGE HERE, REMAINS A SERIOUS NATIONAL PROBLEM THAT IS APPROPRIATELY ADDRESSED BY CLASS ACTIONS.

Plaintiffs presented evidence of pay and promotion disparities at Wal-Mart. They alleged company-wide discrimination and presented statistical evidence that overall, women were paid less and received fewer promotions than men, even though women on average had more seniority and higher performance ratings than their male peers. Company-wide discrimination has long been subject to challenge on a class or collective basis where, as here, the evidence raises the inference that "discrimination was the company's standard operating procedure" – not "isolated or 'accidental' or sporadic." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977). Such challenges remain necessary to address persistent gender discrimination, both in this case and in the workplace generally.

A. Because cases brought by and on behalf of a class of workers present a more complete picture of the employer's conduct than individual suits, and enable company-wide reforms, they have long played an essential role in promoting Title VII's goal of eradicating discrimination in the workplace. *See, e.g., Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976) (class action); *Teamsters*, 431 U.S. 324 (government pattern or practice case). Unfortunately, that goal has yet to be achieved with respect to women's equal pay and equal access to management positions. When Congress enacted Title VII in 1964, women working full time were paid approximately 59 percent of what men were paid, on average. U.S. Census Bureau, *Historical Income Tables – People*, tbl. P-40, *available at* http://www.census.gov/hhes/www/income/data/historical/index.html (last visited Feb. 21, 2011). At that time, one third of employers in one study openly maintained "'a double standard pay scale for men and women.'" Deborah Thompson Eisenberg, *Shattering the Equal Pay Act's Glass Ceiling*, 63 SMU L. Rev. 17, 29 (2010) (*quoting* 109 Cong. Rec. 9199 (1963) (statement of Rep. Green) (debating passage of the Equal Pay Act)).

Although great strides have been made, the wage gap persists: even today, women working full time are paid only 77 percent of the salaries paid to men, on average. U.S. Census Bureau, *Current Population Survey, Annual Social and Economic Supplement*, tbl. PINC-05, parts 55 & 109, *available at* http://www.census.gov/hhes/www/cpstables/032010/perinc/toc.htm (last visited Feb. 23, 2011) (calculations based on 2009 annual median earnings for all male and female full-time workers). Women also continue to lag behind men in management. In 2007, 49 percent of non-managers were women, but women made up only

40 percent of managers. U.S. Government Accountability Office, *Women in Management: Analysis of Female Managers' Representation, Characteristics, and Pay* 6 (2010), *available at* http://www.gao.gov/new.items/d10892r.pdf (last visited Feb. 23, 2011).

B. Such large disparities in pay and promotions cannot be dismissed as the result of women's "employment choices" in career and family matters. *See, e.g.*, Br. *Amicus Curiae* of Pacific Legal Foundation in Support of Petitioner at 26. Authoritative studies conclude that, even after controlling for factors believed to influence pay – including workers' qualifications, personal preferences, job responsibilities, occupation type, and industry – an unexplained earnings gap between men and women remains. *See* Cheryl Travis et al., *Tracking the Gender Pay Gap: A Case Study*, 33 Psychol. Women Q. 410, 410-11 (2009) (citing studies). This gap can be fairly attributed to discrimination.

The wage gap emerges as soon as students graduate from post-secondary and graduate school programs and increases over time. In the medical profession, for example, gender disparities between earnings for new female physicians and their male counterparts have increased in the past decade and remain unexplained, even after controlling for medical specialty, hours, and practice type. Anthony T. LoSasso et al., *The $16,819 Pay Gap for Newly Trained Physicians: The Unexplained Trend of Men Earning More Than Women,* 30 Health Affairs 193, 193 (2011). Similarly, women with

MBAs are paid less than men in their first post-MBA job and experience less salary growth thereafter. Nancy M. Carter & Christine Silva, Catalyst, *Pipeline's Broken Promise* (February 2010), *available at* http://www.catalyst.org/file/340/pipeline%27s_broken_promise_final_021710.pdf (last visited Feb. 21, 2011) (reporting a wage gap of $4,600 in post-MBA jobs after controlling for factors including prior experience, time since MBA, job level, region, industry, parenthood, and different aspirations). Restricting the availability of class actions will constrain courts' ability to address the type of broad-based discrimination that contributes to disparities in pay and promotion and that is alleged in this case.

C. After evaluating competing expert testimony submitted in connection with plaintiffs' class certification motion, the district court found that the statistical disparities in Wal-Mart's workforce "support an inference of company-wide discrimination in both pay and promotions" sufficient to satisfy Rule 23(a)'s requirement of commonality. App. 281a. Plaintiffs presented evidence that women working at Wal-Mart made 5% to 15% less than similarly situated men, even after accounting for factors such as seniority, turnover, and performance. J.A. 518a. Overall, women were paid $5,000 less than men, even though women on average had higher performance ratings in hourly jobs and more years of employment. J.A. 516-517a. The record also reflects statistically significant shortfalls in promotions of women to in-store management positions. App. 176a; App. 212a; J.A. 479a. And women had to wait significantly longer for promotions than their male counterparts. App. 198a; App. 214a; J.A. 484a.

The statistical evidence proffered by plaintiffs of significant pay and promotion disparities, along with the anecdotal and other evidence they submitted, *see infra* Part II, supports their claim that women working at Wal-Mart faced the kind of broad-based employer discrimination that this Court has long recognized may be challenged by, or on behalf of, classes of employees under Title VII. *See, e.g.*, *Franks*, 424 U.S. 747; *Teamsters*, 431 U.S. 324. Gender discrimination in the workplace resulting in significant pay and promotion disparities remains a systemic problem that continues to demand company-wide responses.

II. SEX STEREOTYPES AND SUBJECTIVE DECISIONMAKING PRACTICES OF THE KIND ALLEGED HERE RAISE QUESTIONS COMMON TO THE CLASS AND UNDERSCORE PERSISTENT BARRIERS TO GENDER EQUALITY.

Certification of the class in this case is consistent with well-established legal principles recognizing that subjective decisionmaking processes that lead to discriminatory results can be challenged on a class-wide basis, and that the question of whether an employer's practices served to discriminate company-wide against a group of employees can be established through a combination of statistical and anecdotal evidence.

This Court, in *Watson v. Forth Worth Bank & Trust*, 487 U.S. 977, 990-91 (1988), recognized the danger that subjective decisionmaking processes may invite reliance on discriminatory stereotypes. The unfortunate persistence of sex stereotypes in the workplace, *see Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 730 (2003) (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)), underscores the continued importance of class challenges to subjective practices in accomplishing Title VII's goals.

Plaintiffs have alleged that Wal-Mart's company-wide, unchecked subjective decisionmaking regarding pay and promotions led to statistically significant gender disparities by permitting managers to discriminate in making these decisions. Plaintiffs proffered, among other evidence, anecdotes of sex stereotyping that shed light on how Wal-Mart's common practice of subjective decisionmaking may have operated to discriminate against women: managers believed that women are not breadwinners, so they deserved to earn less; women are and should be family caretakers, whose family responsibilities prevent them from assuming greater management responsibility at work; and women can and should only perform certain kinds of work, and should therefore be clustered into certain jobs, with their promotion opportunities correspondingly limited. These anecdotes illustrate how Wal-Mart's subjective practices invited managers to translate the discriminatory stereotype that women have less value in the workplace than men into concrete employment decisions.

A. Research Establishes That Unchecked Subjective Decisionmaking Can Result In Discrimination.

1. This Court has long held that subjective decisionmaking that leads to discriminatory results may be challenged under Title VII as a company-wide practice. *See Watson*, 487 U.S. at 990-91; *see also Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 301-02 (1977) (pattern or practice challenge to school district's "relatively unstructured procedures" that vested "virtually unlimited discretion" in "each school principal"). As the Court observed in *Watson*, leaving personnel "decisions to the unchecked discretion of lower level supervisors" can contribute to inequality by allowing managers to make these decisions based, not on objective criteria, but on "subconscious stereotypes and prejudices." 487 U.S. at 990. Social science research confirms that observation.

Stereotypes operate as cognitive shortcuts that shape how information is perceived, processed, and retained. *See* Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination*, 40 Harv. C.R.-C.L. L. Rev. 481, 482 (2005); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161, 1188-89, 1202-04 (1995). They "influence how incoming information is interpreted, the causes to which events are attributed, and how events are encoded into, retained in, and retrieved from memory. In other words, stereotypes cause discrimination by biasing how we process information about other people." *Id.* at 1199.

Limited oversight of managers' decisions can allow decisions influenced by biases and stereotypes to stand without meaningful assessment or correction. *See* Barbara F. Reskin & Debra B. McBrier, *Why Not Ascription? Organizations' Employment of Male and Female Managers*, 65 Am. Soc. Rev. 210, 214 (2000) (stating that informal personnel practices "invite cronyism, subjectivity, sex stereotyping, and bias" and "when organizations allow individuals latitude in selecting managers, supervisors may consciously or unconsciously take workers' sex into account"). Unguided discretion in personnel decisions thus often yields decisions that, in the aggregate, result in significant gender disparities in pay rates and supervisory power. *See* Tristin K. Green & Alexandra Kalev, *Discrimination-Reducing Measures at the Relational Level*, 59 Hastings L.J. 1435, 1444 (2008); *see also* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458, 460-63 (2001) (discussing how unstructured decisionmaking can exacerbate workplace bias). Using informal recruiting and employee referrals to fill positions can further exacerbate existing sex disparities, because managers select people they feel comfortable with and who share their characteristics. *See* J.A. 539a; Green & Kalev, *supra*, at 1444; Julie Chi-hye Suk, *Antidiscrimination Law in the Administrative State*, 2006 U. Ill. L. Rev. 405, 418 (2006).

Subjective decisionmaking does not inevitably produce discriminatory results. Employers can counter reliance on stereotyping by adopting certain safeguards. "[R]esearch show[s] that formalized personnel systems can reduce reliance on stereotypes and favoritism." Green & Kalev, *supra*, at 1444; Susan T. Fiske et al., *Social Science Research on Trial: Use of Sex Stereotyping Research in* Price Waterhouse v. Hopkins, 46 Am. Psychologist 1049, 1051 (1991). Such systems include routinely posting opportunities for advancement, holding decisionmakers accountable for the criteria they use to make personnel decisions, monitoring and analyzing pervasive disparities, and monitoring employees' perceptions of discriminatory barriers to advancement. *See, e.g.*, Green & Kalev, *supra*, at 1443-44 (describing safeguards implemented in consent decrees). An employer's choice with respect to its personnel systems thus may foster or minimize discriminatory, stereotype-influenced decisionmaking.

2. The record evidence indicates that Wal-Mart utilizes employment practices that social scientists have found to facilitate reliance on stereotypes, including delegation of largely unchecked discretion to managers in pay and promotion decisions and reliance on informal, internal recruiting. As the district court found, Wal-Mart's "Home Office" establishes the minimum starting wage for hourly employees, but grants store managers discretion to depart from these rates. App. 176-77a. Store managers may depart from centrally established rates within a two-dollar per hour range, and are authorized to

exceed that, with approval from a higher level of management, for rates more than 6% above the centrally established minimum. *Id.* Higher-level managers exercise unguided discretion to set specific pay rates for lower-level managers within broad ranges set by the Home Office. *Id.*

Wal-Mart rarely, if ever, posted job vacancies during the class period, and "the parties agree that subjectivity is a primary feature of promotion decisions for in-store employees." App. 180a. Promotions are granted to employees meeting centrally established minimum criteria on the basis of a subjective "tap on the shoulder" process. App. 181a; *accord* J.A. 578-80a (employee could never find written information about the Management Training Program and promotions were made before positions were posted). One woman attested that workers must be part of the "informal network versus the formal network" to be successful because Wal-Mart is "a very cli[que]-oriented environment" in which women were referred to as "girls" and "Janie Qs." J.A. 304a. Another woman reported that her manager "ran the store like a boys' club," in which male managers regularly socialized with male hourly workers, leaving her to run the store. J.A. 927a. Another was told by a senior vice president that she would not advance because she did not "hunt, fish, or do other typically-male activities" with the "boys" in the company and was not "a part of the boys club." J.A. 741a; *accord* J.A. 595a (woman employee was told that promotion was based on "whom you knew, not what you knew").

B. Evidence Of Gender Stereotyping At Wal-Mart Sheds Light On How Subjective Decisionmaking Operated To Discriminate Against Women.

Evidence presented by plaintiffs through numerous declarations that are part of the class certification record in this case illustrates the stereotyping that supervisors at Wal-Mart engaged in, which devalued women and their role in the workforce. Kathleen MacDonald testified that her male department manager told her, "God made Adam first, and so women would always be second to men" and would "never make as much money as men." J.A. 1037a. One manager said that the role of female assistant managers was to give women associates someone to discuss their periods with. J.A. 849a. And the record is replete with instances in which women workers are referred to as "girls," J.A. 840a, J.A. 304a, "housewives," J.A. 1188a, and with degrading language, J.A. 917-18a ("squatter" "someone who squats to pee"). These declarations, which reflect the stereotype that women have less value in the workplace than men, bring the statistical evidence of gender-based disparities "convincingly to life." *See Teamsters*, 431 U.S. at 339 & n. 20. Plaintiffs submitted evidence that this stereotype was expressed in various ways at Wal-Mart.[2]

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[2] *Amici* focus here on the evidence illustrating the ways in which this stereotype operated at Wal-Mart stores. Plaintiffs also submitted evidence indicating that managers at the highest levels held such discriminatory views, that sex stereotypes were evident at company-wide functions,

1. As a general matter, it is well recognized that both women and men are subject to the stereotype that men are breadwinners for their families, while women earn "extra" money. *See, e.g.*, Alison A. Reuter, Comment, *Subtle but Pervasive: Discrimination Against Mothers and Pregnant Women in the Workplace*, 33 Fordham Urb. L.J. 1369, 1400 (2006); Lindsay R. B. Dickerson, *Your Wife Should Handle It: The Implicit Messages of the Family and Medical Leave Act*, 25 B.C. Third World L.J. 429, 442 (2005) (book review) (discussing widely held assumption that "secondary source of income exists" for women who work). The stereotype that women do not need to work is rooted in the increasingly untrue assumption that women are not breadwinners supporting their families. *See* Heather Boushey, *The New Breadwinners*, in The Shriver Report: A Woman's Nation Changes Everything 36 (Boushey & O'Leary eds. 2009), *available at* http://www.americanprogress.org/issues/2009/10/womans_nation.html (last visited Feb. 25, 2011) (reporting that, in 2008, about 4 out of 10 mothers were breadwinners, compared with about 1 in 10 in 1967). This assumption underlies the view that men are entitled to higher pay and to managerial, career-track jobs, while women do not "need" managerial jobs or equal pay, because they do not support families on their salaries. *See*

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and that Wal-Mart had a uniform corporate culture that reinforced these stereotypes. Br. for Respondents at 15-21. *Amici* do not repeat that discussion here.

Joan Williams, *Toward A Reconstructive Feminism: Reconstructing the Relationship of Market Work and Family Work*, 19 N. Ill. U. L. Rev. 89, 113-16 (1998) (explaining the tradition of underpaying women "on the grounds that they are just working for 'pin money,'" while men are viewed as breadwinners).

Record evidence suggests that this stereotype was held by Wal-Mart managers in stores around the country who explained apparent pay disparities between men and women by saying that, for example, men make more because they "are working as the heads of their households, while women are just working for the sake of working." J.A. 1313-14a; *accord* J.A. 1188a (retail is for housewives who just need to earn extra money). Similarly, managers expressed the view that male workers are entitled to more pay because they support their families. *E.g.*, J.A. 1256a (men are paid more because they have families to support); J.A. 1001a (man was given a raise because he had a family to support); J.A. 1114-15a (District Director of Operations explained gender pay disparity, discovered accidentally when male employee left his W-2 in an office, by saying that male employee "supports his wife and his two kids"); J.A. 1037a (men would be paid more because they were the heads of household). As for promotions, a District Manager told one woman that he had selected a male employee for promotion instead of her because the male employee "deserved the position" as the "head of his household," while an unmarried woman, "did not 'need' the position." J.A. 709a.

2. "Family responsibility discrimination," or caretaker discrimination, is similarly rooted in outmoded notions that women are not valuable workers. It occurs when employers deny opportunities to women, particularly pregnant women and mothers, based on the assumption that they are caretakers first and workers second and that they therefore will not be able to perform in demanding supervisory positions. A great deal of "discrimination that mothers experience in the workplace stems from stereotypes and negative assumptions about mothers' competence and commitment to the job that have nothing to do with their actual behavior." Joan C. Williams & Stephanie Bornstein, *The Evolution of 'FReD': Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 Hastings L.J. 1311, 1326 (2008). Where women are believed to be unwilling to travel, commute, or work irregular hours because of perceived caregiving commitments, they are deprived of equal opportunities for management positions, especially where there is no formal way to assess their interest in such positions. *See* Joan C. Williams & Stephanie Bornstein, *Caregivers in the Courtroom: The Growing Trend of Family Responsibility Discrimination*, 41 U. S. F. L. Rev. 171, 177-78 (2006); Vicki Schultz, Life's Work, 100 Colum. L. Rev. 1881, 1894-96 (2000). Related to this is the belief that women *should* stay home and raise a family, rather than pursue a career. *See* Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination and Defang the "Cluelessness" Defense*, 7 Emp. Rts. & Emp. Pol'y

J. 401, 406 (2003) (discussing *Bailey v. Scott-Gallaher, Inc.*, 480 S.E.2d 502, 503 (Va. 1997) (employer fired a woman after she gave birth because her "place was at home with her child")); *see generally* Diana Burgess & Eugene Borgida, *Who Women Are, Who Women Should Be: Descriptive and Prescriptive Gender Stereotyping in Sex Discrimination*, 5 Psychol. Pub. Pol'y & L. 665 (1999).

The record contains numerous examples of Wal-Mart managers openly espousing the belief that women should stay home and raise a family. Julie Donovan was told by a senior vice president that she "should raise a family and stay in the kitchen," rather than advance her career; when she complained to her supervisor, she was told to "shrug it off." J.A. 741a; *accord* J.A. 1175a (manager told woman she should resign and "find a husband to settle down with and have children to relieve [her] work-related stress"; reporting this to superior made no difference); J.A. 337a (women "should be home barefoot and pregnant"). Melissa Howard – the only female store manager in her district – was asked by a supervisor to resign from her management position because a woman should not be running a Wal-Mart store and she "needed to be home raising [her] daughter." J.A. 931a; *accord* J.A. 1031-32a (woman who expressed interest in an overnight supervisor position was told by a manager that she could not have the job because she had children); J.A. 845a (store manager said all women should be "at home with a bun in the oven").

Women were assumed not to be able or willing to relocate – one of the company's criteria for being promoted – because of their families, App. 181a, even when that was not the case. Geanette Bell was told by her Store Manager that she would not "want to be in the Management Training Program," despite her inquiries, because she would "not want" to relocate her children. J.A. 641-43a. Another woman was told that a man in her store with less experience was asked to enter the Management Training Program because "he's a man, he doesn't have a family." J.A. 973a. A third was told that the one-year anniversary of her son's death "would not be a good time" for her to enter management training. J.A. 651-52a. And a fourth was told that it would be better to wait until after her pregnancy to enroll in a management training course. J.A. 1108-09a.

3. The stereotype that women are not competent at "male work" also underlies assumptions that women are less valuable workers. This stereotype posits that men are more competent at traditionally male work, including jobs involving physical labor and managerial skills. Williams, *The Social Psychology of Stereotyping, supra*, at 407, 412 & n.18 (summarizing findings of empirical social psychologists).

By contrast, "women's work" refers to labor traditionally performed by women for no pay in their own homes, or for low pay with few benefits in other peoples' homes. The "occupations . . . in which women work tend to be low paid," in part because "the skills women perform in those jobs have been undervalued" and "are hardly seen as skills at all. Women doing work that resembles domestic work are doing what comes 'naturally.'" Rosemary Hunter, *A Feminist Response to the Gender Gap in Compensation Symposium*, 82 Geo. L. J. 147, 151-52 (1993). Paradigmatic examples include cleaning and caretaking. In the retail sector, this stereotype can appear in the belief that women are suited only to certain jobs, such as cashier, and to certain departments, such as ladies' clothing, limiting opportunities for advancement. Within departments or stores, it can determine the tasks assigned to workers. *Cf.* Green & Kalev, *supra,* at 1448 (noting that, even within the same occupations, women are more likely than their male counterparts to "hold the least valued jobs").

Record evidence suggests that such stereotypes contributed to gender segregation within Wal-Mart and limited women's opportunities. One woman reported that a Store Manager explained that he always assigned women Assistant Managers to Softlines "because that's what women know." J.A. 689-90a; *accord* J.A. 637-38a (female employee stuck in Cosmetics while men were repeatedly promoted to departments she had expressed interest in, such as Paper Goods and Chemicals). Within departments, women were "required to clean and stock," while "the boys working alongside" them were not. J.A. 674a; J.A. 1188a (store manager specified that a woman should be hired to clean employee lounge and restrooms).

Declarants stated that their expressed interests in rotating through traditionally male domains were dismissed by managers who said that women should not or could not obtain positions in those departments. When Sheila Hall asked to work in hardware, her manager responded by saying, "you're a girl, why do you want to be in Hardware?"; a male co-worker told her that hardware was a "man's job" that women should not do. J.A. 839-41a. Sales associate Alix McKenna, when passed over for a promotion in Sporting Goods for a man with less seniority, was told "You don't want to work with guns." J.A. 1073a. Others were told that women could not do certain jobs at Wal-Mart. *See* J.A. 1128-29a (manager "needed a man in the job" in Sporting Goods); J.A. 949a (management position in Electronics required heavy lifting and was a "man's job"), J.A. 1110a (lifting furniture as manager of Domestics was a man's job), J.A. 754a (retail is tough, not for women); J.A. 604-05a (told she needed experience unloading trucks, a man was hired who had no such experience); J.A. 656a (supervisors rarely allowed women to unload trucks). Dannette Brown Ballou was actively discouraged by her managers from working in the hardware, automotive, sporting goods, meat, produce, receiving and unloading, and Tire and Lube departments, with comments such as the produce department "needed men because of the lifting of heavy boxes of fruit and women could not do the work" or "what do you know about sporting goods?" J.A. 669-70a.

Segregation in stereotypically "women's" departments at Wal-Mart was pervasive: women were more than 90% of sales associates in infant-toddlers, domestic goods, health and beauty aids, jewelry, hosiery, and ladies sportswear, and they were 30% or fewer of those employed in sporting goods, hardware, meat, maintenance, produce, or security departments. J.A. 486-487a

As illustrated above, plaintiffs presented substantial anecdotal evidence of sex stereotyping at Wal-Mart. The statistical evidence, *see supra*, Part I.C, found by the district court to "support an inference of company-wide discrimination in both pay and promotions" for purposes of commonality, App. 281a, suggests that Wal-Mart managers acted in accord with the discriminatory stereotypes class members personally encountered. *See Teamsters*, 431 U.S. at 339 n.20 (looking to similar evidence in collective action challenging discrimination). Together, this evidence fairly raises the question, common to the class, whether Wal-Mart's subjective decisionmaking practices allowed managers throughout the company to translate the discriminatory view that women are not of equal value in the workplace into concrete personnel decisions, rendering class certification appropriate in this case.

III. SYSTEMIC BARRIERS TO INDIVIDUAL ACTIONS REINFORCE THE APPROPRIATENESS OF A CLASS ACTION TO CHALLENGE THE KIND OF DISCRIMINATION ALLEGED IN THIS CASE.

Major obstacles frequently prevent individual women from going to court to challenge discrimination in pay and promotions. The evidence submitted by plaintiffs about Wal-Mart provides a textbook example of how such obstacles operate. For example, evidence was presented of subjective decisionmaking, a pay secrecy policy, and job segregation, all of which operated to make it difficult for a female employee to know whether a similarly situated male employee was being treated differently. The class action mechanism of Rule 23 allows individual women employees to overcome these and other barriers by joining together and presenting systemic evidence of discrimination.

A. Individual Employees Face Difficulties In Learning About Pay Discrimination.

The record indicates that pay practices utilized by Wal-Mart ensured that employees knew little about their peers' salaries and were not well positioned to draw conclusions about disparities.

1. Plaintiffs submitted evidence that subjective, discretionary pay decisions were common practice at Wal-Mart. *See supra* Part II.A.2. In the absence of "an established

compensation system," employees frequently remain in the dark about the decisionmaking process, and "records of the reasons underlying pay decisions rarely exist." Eisenberg, *supra*, at 50. Information about wages and any rationale for disparities between employees' wages lies directly, and often exclusively, with the employer. If an employee learns of pay disparities at all, it is likely through "information suggestive of discrimination that trickles in piecemeal, in anecdotal fashion, through the sharing of experiences with colleagues." Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. Rev. 859, 891 (2008).

2. Plaintiffs also presented evidence that Wal-Mart maintains a pay secrecy policy, which operated to deter discussions of pay. J.A. 1054a (female assistant manager learned a newly hired male assistant manager made $6,000 more than she was paid, but "had always been told [she] would be fired for discussing salary issues so [she] never discussed this pay difference with anyone for fear that [she] might lose [her] job"); *accord* J.A. 1036-37a ("[I]t is against Wal-Mart policy to discuss pay."). Women employees reported learning of pay differences only through word-of-mouth or by sheer accident. *See, e.g.*, J.A. 1073-74a (female employee learned, when a male employee confided in her, that he had received a more generous raise, although both had received identical promotions and had worked in the same departments); J.A. 1036-37a (female employee realized that she received a lower rate of pay because "many male associates [at her store]

brag[ged] about their pay"); J.A. 1114a (female assistant manager discovered that a less-experienced male assistant manager's salary was $10,000 more than hers when someone found his misplaced W2 and gave it to her).

These practices can limit employees' ability to uncover discrimination. Employees frequently have little or no information about their co-workers' wages and salaries. Employer pay scales are often confidential and, in many workplaces, explicit rules and workplace social norms forbid disclosure of pay. *See* H.R. Rep. No. 110-237, at 7 (2007) (House Report on the Lilly Ledbetter Fair Pay Act of 2007); Leonard Bierman & Rafael Gely, *"Love, Sex and Politics? Sure. Salary? No Way": Workplace Social Norms and the Law*, 25 Berkeley J. Emp. & Labor L. 167, 168, 171 (2004). One third of private sector employers have rules prohibiting employees from discussing pay with their co-workers. *Id.* at 168; Rafael Gely & Leonard Bierman, *Pay Secrecy/Confidentiality Rules and the National Labor Relations Act*, 6 U. Pa. J. Lab & Emp. L. 121, 125 (2003) (reporting results of online survey). In a recent survey of private and public sector employees, 50 percent of respondents, and 61 percent of private sector employees, reported that discussing pay was prohibited or discouraged in their workplace. Only 27 percent of those surveyed reported that pay information was public. Institute for Women's Policy Research, *Press Release: Pay Secrecy and Paycheck Fairness* (November 2010), *available at* http://myopenworkplace.com/wp-content/uploads/2010/11/PressRelease_PaySecrecy_16Nov2010.pdf (last visited Feb. 23, 2011). And labor cases confirm that many employers maintain formal or informal policies prohibiting discussions of compensation.[3]

Even when discussion of pay is not explicitly prohibited by an employer, an informal "code of silence" surrounding pay in many workplaces poses a substantial practical barrier to gaining information about coworkers' compensation. Bierman & Gely, *supra*, at 175. The difficulty in learning about coworkers' pay rates is heightened for new employees, who typically lack the knowledge of workplace culture and the informal connections with coworkers that allow some workers ultimately to penetrate the code of silence regarding compensation.

Without access to data for pay practices across an organization, it is difficult for individuals to recognize or confirm discrimination. Social psychology research explains that, as a result, "people are more likely to hypothesize nondiscriminatory reasons for individual disparities and less likely to perceive discrimination." Brake & Grossman, *supra*, at 891-92. This is a manifestation of a well-documented "minimization bias," in which targets of discrimination resist perceiving and acknowledging it as such. *See* Deborah L. Brake, *Retaliation*, 90 Minn. L. Rev. 18, 25-28 (2005); Jonah Gelbach et al., *Passive Discrimination: When Does It Make Sense to Pay Too Little?*, 76 U. Chicago L. Rev. 797, 841 & n.173 (2009).

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[3] Examples of such policies include rules explicitly prohibiting discussions of wages, *e.g.*, *NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 66 (2d Cir. 1992); *Jeanette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976), a broad confidentiality policy that could be construed to cover discussions of wages, *Cintas Corp. v. NLRB*, 482 F.3d 463, 465-66 (D.C. Cir. 2007), manager statements that employees could not discuss wages, *NLRB v. Main Street Terrace Care Ctr.*, 218 F.3d 531, 534 (6th Cir. 2000), *Wilson Trophy Co. v. NLRB*, 989 F.2d 1502, 1511 (8th Cir. 1993), and a prohibition against opening paychecks on the work site, *id. at* 1510.

Relatedly, unless an employer actually cuts an employee's pay, the decision to grant her a particular salary is seldom experienced as adverse, unlike a firing or a refusal to hire an employee. Pay discrimination often occurs not because a female employee is denied a raise, but because male employees receive larger raises. "Having received a pay increase, the female employee is unlikely to discern at once that she has experienced an adverse employment decision." *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 650 (2007) (Ginsburg, J., dissenting), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5, codified at 42 U.S.C. § 2000e-5. When an employee does not recognize a pay decision as adverse, she is less vigilant for indicators of discrimination. For example, she is unlikely to seek an explanation from the employer, evaluate it for pretext, or make particular note of any comments suggestive of stereotyping or bias. This further obscures individuals' ability to identify and challenge pay discrimination.

Pay discrimination cases confirm the significant barriers employees face in gathering the information that suggests discrimination. For example, Lilly Ledbetter learned that her male counterparts earned higher salaries via an anonymous letter. *See* Eisenberg, *supra*, at 64 n. 331; *see also Ledbetter*, 550 U.S. at 649-650 (Ginsburg, J., dissenting) (describing barriers to discovering "[c]ompensation disparities"); *Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781, 785 (7th Cir. 2007) (plaintiff learned of disparities only when she "accidentally left her pay stub in plain view, and some of her colleagues began laughing and making negative remarks about her pay"); *Goodwin v. General Motors Corp.*, 275 F.3d 1005, 1008-09 (10th Cir. 2002) (plaintiff learned of a pay disparity when a printout listing her own and co-workers' salaries mysteriously appeared on her desk); *McMillan v. Mass. Soc'y for the Prevention of Cruelty to Animals*, 140 F.3d 288, 296 (1st Cir. 1998) (plaintiff discovered a pay disparity when her salary and the salaries of other department heads were published in a newspaper).

3. Plaintiffs also submitted evidence of workplace segregation, whereby women were concentrated in departments stereotypically viewed as "women's work" and excluded from those departments viewed as "men's work." *See supra* Part II.B.3. Workplace segregation exacerbates the problem of inadequate information, because women concentrated in one part of an employer's workforce tend to compare their treatment and pay only with the treatment and pay of other women with whom they work.

See Brake & Grossman, *supra*, at 892-93 (describing the "generalized tendency" of employees to use same-gender comparisons to evaluate the fairness of their pay, leading women to expect lower pay and men to expect high pay, and emphasizing that tendency means the very fact of widespread discrimination against women can make it less likely that women will perceive discrimination).

B. The Fear Of Retaliation Leads Employees To Remain Silent About Discrimination Of Which They Are Aware.

Plaintiffs presented evidence that women complaining of discrimination at Wal-Mart faced the prospect of retaliation, despite Wal-Mart's "Open Door" policy that purported to allow employees to share concerns without repercussions. One woman who worked at Wal-Mart for twenty-five years reported that a representative from the company's Home Office told her and other female employees who made complaints of sex and race discrimination, "Don't bother using your quarter to call us. I can fire you, without taking any steps, for using the open door." J.A. 973-74a; *accord* J.A. 693a ("I realized that the Open Door policy at Wal-Mart was a façade and resulted only in retaliation.").

As this Court recognized in *Crawford v. Metro. Gov't of Nashville & Davidson County*, the "[f]ear of retaliation is the leading reason" why many victims of pay and other discrimination "stay silent." __ U.S. __, 129 S. Ct. 846, 852 (2009) (quoting Brake, *supra*, at 20). This fear is well-founded. People who challenge discrimination against them are often branded as hypersensitive troublemakers. *See* Brake & Grossman, *supra*, at 904 n. 236. This problem is especially serious for employees who wield little power in their workplace, such as low-wage female workers. *See* Brake, *supra*, at 36.

Those experiencing discrimination are especially apt to remain silent where an employer has a policy discouraging or prohibiting discussion of wages. Because such policies may lead employees to fear retaliation if they complain of discrimination based on wage disclosures, they can have a "chilling effect" on employees, *NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 67 (2d Cir. 1992), or be "coercive," *NLRB v. Main Street Terrace Care Center*, 218 F.3d 531, 538 (6th Cir. 2000), and in certain circumstances have been deemed an "unfair labor practice" under the National Labor Relations Act, *see, e.g.*, Gely & Berman, *supra*, at 126-128 (discussing cases).

Employer retaliation sends a chilling message to others in the workplace and suppresses future challenges to discrimination by other individuals. *See, e.g.*, *Thompson v. N. Am. Stainless, LP*, __ U.S. __, 131 S. Ct. 863, 868 (2011) (asserting that fear of retaliation operates to "dissuade[] [employees] from engaging in protected activity"). Low-wage workers are particularly vulnerable to the threat of retaliation, both because they are more likely to live paycheck-to-paycheck and thus less able to absorb the impact of a job loss, and because, to the extent they work in low-skilled jobs, their employer may perceive them as easily replaceable.

C. The Small Stakes Of Many Claims Hinder Individual Challenges To Employer Discrimination.

For low-wage workers in particular, while the stakes in discrimination cases are high to the individual, they are low in absolute terms. For example, the average claim for an hourly Wal-Mart worker is estimated to be approximately $1,100. J.A. 475a. This can make it prohibitively difficult to find legal representation for these claims, particularly against large employers who have vast legal resources at their disposal. Individuals who proceed *pro se* are nearly "three times more likely to have their cases dismissed [than those with counsel], are less likely to gain early settlement, and are twice as likely to lose on summary judgment." Laura Beth Nielsen et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination in the Post Civil Rights United States*, 7 J. Empirical Legal Stud. 175, 188 (2010). Moreover, the relatively small dollar amounts of many discrimination claims can lead individuals to determine that the costs of challenging discrimination, in the form of social stigma and possible employer retaliation, simply are not worth the potential benefits of proceeding.

D. Class Actions Are Intended To Overcome These Obstacles To Redressing Discrimination.

In the absence of class actions, the barriers women at Wal-Mart and elsewhere face in bringing discrimination claims would threaten to undermine Title VII's reliance on private attorneys general to challenge discrimination and achieve the purposes of the statute. Thus, employees seeking to vindicate their Title VII rights have routinely done so on a class basis. *See, e.g., Lewis v. City of Chicago*, __ U.S. __, 130 S. Ct. 2191 (2010); *Int'l Union, United Auto., Aerospace & Ag. Imp. Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187 (1991); *Watson*, 487 U.S. 977; *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). This Court has likewise recognized the importance of class actions in removing structural barriers to litigation in other contexts. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980).

Class actions remove obstacles to systemic discriminatory practices in the following ways:

Collection of pay information. When employees obtain information about their pay and the pay of some comparator coworkers sufficient to initiate a class action, the class mechanism subjects discriminatory pay practices and organization-wide pay data to judicial scrutiny. This is so regardless of whether each employee has been able to gather sufficient information to determine whether she has suffered pay discrimination or whether the individuals had reason to suspect at the time that the decisions were discriminatory.

Protection against retaliation. A particular virtue of class actions for challenging discrimination is that the class nature of the proceeding substantially reduces the likelihood of retaliation and the social costs of coming forward with complaints of discrimination. *See, e.g.*, *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1999) (approving the district court's presumption that class members still working for the employer might be unwilling to sue individually for fear of retaliation); *Simmons v. City of Kansas City*, 129 F.R.D. 178, 180 (D. Kan. 1989) (certifying class of police officers challenging discrimination in part to minimize the likelihood of retaliation against individual class members). Class membership gives those individuals who want to speak out against discrimination support and protection, as they are less likely to be individually targeted when they are one of many challenging an employer's practice.

Aggregation of small claims. Class actions make it economically possible for individuals and attorneys to pursue claims for relatively small amounts of backpay that would otherwise go unremedied. *Amchem Prods., Inc.*, 521 U.S. at 617 (noting that the "'policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights'") (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)); *Phillips Petroleum Co.*, 472 U.S. at 809 ("Class actions . . . permit the plaintiffs to pool claims which would be uneconomical to litigate individually"); *Deposit Guar. Nat'l Bank*, 445 U.S. at 339 ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class action device."). This aggregation of claims conserves judicial resources, allowing a pay practice affecting many individuals to be tested in a single proceeding, rather than numerous proceedings, and avoiding inconsistent results.

The obstacles to individual enforcement actions present in the workplace generally and illustrated by the evidence plaintiffs proffered regarding Wal-Mart, threaten to make Title VII's goal of ending employment discrimination merely aspirational. The class action device provides a vehicle for overcoming these obstacles and promotes "the robust application of the civil rights laws that Congress intended." Lilly Ledbetter Fair Pay Act of 2009, 123 Stat. 5, §2(2).

CONCLUSION

For the reasons set forth above, the class certification order should be affirmed.

Respectfully Submitted,

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APPENDIX

INDIVIDUAL STATEMENTS OF INTEREST OF AMICI CURIAE

9to5, National Association of Working Women is a national membership-based organization of low-wage women working to achieve economic justice and end discrimination. 9to5's members and constituents are directly affected by disparities in pay compared to their male co-workers, sex discrimination including failure to promote and advancement decisions based on gender stereotypes, the long-term negative effects on their and their families' economic well-being of these pay disparities and discrimination, and the difficulties of seeking and achieving redress for all these issues. Our toll-free Job Survival Helpline fields thousands of phone calls annually from women facing these and related problems in the workplace. The issues of this case are directly related to 9to5's work to end workplace discrimination and our work to promote policies that aid women in their efforts to achieve economic security. The outcome of this case will directly affect our members' and constituents' rights in the workplace and their long-term economic well-being and that of their families.

A Better Balance: The Work & Family Legal Center is a legal advocacy organization dedicated to promoting fairness in the workplace and helping workers across the economic spectrum care for their families without risking their economic security. In particular, A Better Balance is dedicated to advancing laws and policies which seek to strengthen our national and state equal pay and other anti-discrimination laws. As is well-documented in the Walmart case, unfair pay is borne not only of sex discrimination but also maternal bias—this type of bias is one of the most overt forms of discrimination against women in the workplace, often holding them back at work and endangering their long-term economic security. As long as policymakers fail to address these issues, litigation is one of the only remaining avenues to address them and must be pursued.

For 130 years, the *American Association of University Women (AAUW)*, an organization of over 100,000 members and donors, has been a catalyst for the advancement of women and their transformations of American society. In more than 1,000 branches across the country, AAUW members work to break through barriers for women and girls. AAUW plays a major role in mobilizing advocates nationwide on AAUW's priority issues, and chief among them is economic security for all women. Therefore, AAUW supports efforts to ensure pay equity, fairness in compensation, equitable access and advancement in employment, as well as vigorous enforcement of employment antidiscrimination statutes.

The *California Women's Law Center (CWLC)* is a private, nonprofit public interest law center specializing in the civil rights of women and girls. Established in 1989, the California Women's Law Center works in the following priority areas: Gender Discrimination, Women's Health, Reproductive Justice and Violence Against Women. Since its inception, CWLC has placed a strong emphasis on eradicating sex discrimination in employment. CWLC has authored numerous amicus briefs, articles, and legal education materials on this issue. The *Dukes v. Wal-Mart* case raises questions within the expertise and concern of the California Women's Law Center. Therefore, the California Women's Law Center has the requisite interest and expertise to join in the amicus brief in this case.

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The *Coalition of Labor Union Women (CLUW)* is America's only national membership organization for all union women based in Washington, DC with chapters throughout the country. Founded in 1974 it is leading the effort to empower women in the workplace, advance women in their unions, encourage political and legislative involvement, organize women workers into unions and promote policies that support women and working families. From its inception CLUW has advocated to strengthen the role and impact of women in every aspect of their lives. CLUW focuses on public policy issues such as equality in employment and educational opportunities, affirmative action, pay equity, national health care, labor law reform, family and medical leave, reproductive freedom, and increased participation of women in unions and in politics. Through its 46 chapters throughout the United States, CLUW members work to end discriminatory laws and policies and practices adversely affecting women through a broad range of educational, political and advocacy activities. CLUW has frequently participated as amicus curiae in numerous legal cases involving issues of gender discrimination. CLUW has provided educational and training programs for many years to educate and inform workers, union leaders and employers about issues of gender equality in the workplace.

The *D.C. Employment Justice Center (EJC)* is a non-profit organization whose mission is to secure, protect, and promote workplace justice in the D.C. metropolitan area. EJC provides legal assistance on employment law matters to the working poor and supports a local workers' rights movement, bringing together low-wage workers and advocates for the poor. Established on Labor Day of 2000, EJC advises and counsels well over 1000 workers each year on their rights in the workplace. In 2010, more than 40% of the workers served by EJC were women, and a significant number of those claims involved violations of the women's rights through sex-based discrimination in the workplace. It is critically important that all women be afforded a meaningful opportunity to protect their civil rights.

The *Feminist Majority Foundation (FMF)*, a 501(c)(3) non-profit organization founded in 1987, is dedicated to the pursuit of women's equality, utilizing research and action to empower women economically, socially and politically. FMF advocates for full enforcement of Title VII and other laws prohibiting discrimination and advancing workplace equality for women, including in pay and promotions.

Hadassah, the Women's Zionist Organization of America, Inc., is the largest women's and the largest Jewish membership organization in the United States, with nearly 300,000 members. While traditionally known for its role in funding health care and other initiatives in Israel, Hadassah also has had a longstanding commitment to the protection of women's rights in the United States. In particular, Hadassah recognizes the need to eliminate wage discrimination and has been a long-time supporter of measures to achieve economic equality and security for women. The availability of class actions to assert claims of discrimination against women in the workplace is necessary to combat such discrimination and bring about real economic equity for women.

Legal Momentum (formerly NOW Legal Defense and Education Fund) has worked to advance women's rights for forty years by using the power of the law and creating innovative public policy. Assuring women's equality in the workplace is central to Legal Momentum's mission. Legal Momentum has litigated cases to secure full enforcement of laws prohibiting sex discrimination, harassment, and retaliation, including *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and has participated as *amicus curiae* on leading cases in this area, including *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), *Northern Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).

Legal Voice is a regional non-profit public interest organization that works to advance the rights of all women in Washington, Alaska, Montana, Idaho and Oregon, through litigation, legislation, education and the provision of legal information and referral services. Since its founding in 1978 (as the Northwest Women's Law Center), Legal Voice has been dedicated to protecting and ensuring women's legal rights, including the right to equality in the workplace. Toward that end, Legal Voice has participated as counsel and as *amicus curiae* in cases involving workplace gender discrimination throughout the Northwest and the country. Legal Voice serves as a regional expert advocating for robust interpretation and enforcement of anti-discrimination laws protecting women.

The *National Association of Commissions for Women (NACW)* is a non-partisan organization committed to equality and justice for women by increasing the effectiveness of member commissions and serving as their national voice. The NACW has passed several resolutions over the years in support of pay equity for women.

Established in 1955, the *National Association of Social Workers (NASW)* is the largest association of professional social workers in the world with 145,000 members and 56 chapters throughout the United States and internationally. With the purpose of developing and disseminating standards of social work practice while strengthening and unifying the social work profession as a whole, NASW provides continuing education, enforces the NASW Code of Ethics, conducts research, publishes books and studies, promulgates professional criteria, and develops policy statements on issues of importance to the social work profession.

NASW recognizes that discrimination and prejudice directed against any group are not only damaging to the social, emotional, and economic well-being of the affected group's members, but also to society in general.

NASW has long been committed to working toward the elimination of all forms of discrimination against women. The NASW Code of Ethics directs social workers to "engage in social and political action that seeks to ensure that all people have equal access to the resources, employment, services, and opportunities they require to meet their basic human needs and to develop fully" . . . and to "act to prevent and eliminate domination of, exploitation of, and discrimination against any person, group, or class on the basis of . . . sex." NASW policies support "legislative and administrative strategies that address pay equity and comparable worth initiatives for increasing women's wages....breaking the "glass ceiling," the "Lucite ceiling" for women of color, and the "maternal wall" that affects mothers in the paid labor force..." and "ending sexual harassment and occupational segregation, which clusters women in low-paying, "pink-collar" occupations." NATIONAL ASSOCIATION OF SOCIAL WORKERS, Women's Issues, SOCIAL WORK SPEAKS, 367, 370 (8th ed., 2009).

Accordingly, given NASW's policies and the work of its members, NASW has expertise that will assist the Court in reaching a proper resolution of the questions presented in this case.

The *National Association of Women Lawyers (NAWL)*, founded in 1899, is the oldest women's bar association in the country. NAWL is a national, voluntary organization with members in all fifty states, devoted to the interests of women lawyers, as well as all women. Through its members, committees and the Women Lawyers Journal, it provides a collective voice in the bar, courts, Congress and the workplace. NAWL stands committed to ensuring equality in the workplace. NAWL joins as an *amicus* only to the extent that this brief addresses the general use of the class action vehicle to advance claims of discrimination against women.

The *National Campaign to Restore Civil Rights (the Campaign)* is a non-partisan movement of more than one hundred civil rights and social justice organizations and individuals working to ensure that our courts protect and preserve equal justice, fairness, and opportunity. The Campaign is interested in *Dukes v. Wal-Mart*, because this case directly implicates the Campaign's mission to preserve equal justice and defend against the erosion of civil rights protections. Since the beginning of the Civil Rights Movement, class action lawsuits have been an effective and powerful tool for protecting rights and enforcing civil rights laws. From *Brown v. Board of Education* through the instant case, class action lawsuits have been used to promote civil rights and equal justice. A decision in Wal-Mart's favor will have harmful effects on civil rights and social justice advocates' ability to use litigation to prevent discrimination and promote equality. These effects will be far-reaching and impact many of the Campaign's partner organizations, including racial justice, immigrants', and disability rights organizations, and advocates working on housing, the environment, access to health care, education, employment, and the rights of the aging, women's rights, and the rights of people who are LGBTQ. The Campaign is interested in protecting access to the courts.

The *National Committee on Pay Equity (NCPE)*, founded in 1979, is a coalition of women's and civil rights organizations; labor unions; religious, professional, legal, and educational associations, commissions on women, state and local pay equity coalitions and individuals working to eliminate sex- and race-based wage discrimination and to achieve pay equity. NCPE supports efforts to ensure pay equity, fairness in compensation, equitable access, and advancement in employment, as well as vigorous enforcement of employment antidiscrimination statutes.

The *National Council of Jewish Women (NCJW)* is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Principles and Resolutions state that "equal rights and equal opportunities for women must be guaranteed" and "discrimination on the basis of race, gender, national origin, ethnicity, religion, age, disability, marital status, sexual orientation or gender identity must be eliminated" and the organization endorses and resolves to work for "employment laws, policies, and practices that provide equal pay for work of comparable worth and equal opportunities for advancement." Consistent with our Principles and Resolutions, NCJW joins this brief.

The *National Education Association (NEA)* is a nationwide employee organization with more than 3.2 million members, the vast majority of whom are employed by public school districts, colleges and universities. NEA is strongly opposed to employment discrimination, especially discrimination against women in the workplace, and firmly supports the vigorous enforcement of Title VII.

The *National Employment Law Project (NELP)* is a non-profit organization that advocates on behalf of low income and unemployed workers. NELP believes that work should be a ladder of economic opportunity and a sure path to middle-class financial security. NELP has a long-standing commitment to the enforcement of the nation's civil rights laws, and the use of all tools necessary to vindicate the individual and collective rights of workers, such as women, who are in legally protected classes.

The *National Organization for Women Foundation (NOW)* is a 501(c)(3) organization devoted to furthering women's rights through education and litigation. Created in 1986, NOW Foundation is affiliated with the National Organization for Women, the largest feminist grassroots organization in the United States, with hundreds of thousands of supporters and contributing members in hundreds of chapters in all 50 states and the District of Columbia. Since its inception, NOW Foundation's goals have included eliminating all forms of sex discrimination in the workplace.

Since 1966, the *National Organization for Women Foundation (NOW) NYC* has worked to advance the women and girls of New York through public education, grassroots organizing, lobbying, action, and advocacy. Since our inception, NOW-NYC has worked to create a culture where America's most valuable untapped resource- women- can succeed in all realms. NOW-NYC aims to end violence against women, advance women in the workplace, promote reproductive freedom and transform images of women in the media. Our sister organization, The Service Fund of NOW-NYC provides unemployment discrimination clinics.

The *Older Women's League (OWL)* is a non-profit, non-partisan organization that accomplishes its work through research, education, and advocacy activities conducted through its chapter network. Now in its 30th year, OWL provides a strong and effective voice for the more than 70 million women age 40 and over in America. OWL has long advocated for equality and economic security, and believes that all persons should be free from all forms of discrimination in the workplace, including in pay and promotions.

People for the American Way Foundation (PWAWF) is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1981 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, PFAWF now has hundreds of thousands of members nationwide. PFAWF has been actively involved in efforts to combat discrimination and promote equal rights, including efforts to protect the rights of women, issues which are directly involved in this case.

Pick Up the Pace is a San Francisco-based non-profit organization whose mission is to identify and eliminate barriers to women's advancement in the workplace, emphasizing the role of law in combating glass ceiling discrimination, cognitive bias, gender stereotyping and work/family conflict. Established in 2005, the organization seeks to raise awareness of cutting edge gender bias issues through public education and legal advocacy as amicus curiae before state and federal courts, including the United States Supreme Court in *Thompson v. North American Stainless*, *Burlington Northern & Santa Fe Railway Co. v. Sheila White*, *BCI Coca-Cola Bottling Co. v. EEOC*, *Ledbetter v. Goodyear Tire & Rubber Company, Inc.* and *AT&T v. Hulteen*.

The *Sargent Shriver National Center on Poverty Law (Shriver Center)* champions social justice through fair laws and policies so that people can move out of poverty permanently. Our methods blend advocacy, communication, and strategic leadership on issues affecting low-income people. National in scope, the Shriver Center's work extends from the Beltway to state capitols and into communities building strategic alliances. Through its Women's Law and Policy Project, the Shriver Center works on issues related to women's access to high-wage employment. Discriminatory employment policies and practices have a negative impact on women's immediate and long-term employment and economic security. Nondiscrimination in all industries and occupations is vital if women are ever to obtain true economic well-being. The Shriver Center has a strong interest in the eradication of unfair and unjust employment policies and practices that limit women's economic opportunities and serve as a barrier to economic equity.

The *Union for Reform Judaism (URJ)* includes 900 congregations in North America, encompassing 1.5 million Reform Jews. The URJ comes to this issue out of our longtime commitment to asserting the principle, and furthering the practice, of the full equality of women on every level of life. We oppose discrimination against all individuals, and recognize the need to end sex discrimination in the workplace, including in pay and promotions.

The *Washington Lawyers' Committee for Civil Rights and Urban Affairs* is a non-profit civil rights organization that works to eradicate discrimination by litigating under our nation's civil rights laws. In the Committee's 40-year history, its attorneys have represented tens of thousands of individuals who have experienced discrimination on the basis of their gender, race, national origin, disability and/or other protected characteristic. The Committee's Equal Employment Opportunity Project has successfully prosecuted hundreds of employment discrimination cases, including more than sixty class actions. Although the Project's cases invoke a wide range of civil rights laws, the Project has focused its efforts on enforcing Title VII of the Civil Rights Act of 1964. From this extensive employment discrimination and class action litigation history, the Committee has amassed expertise regarding the questions of law and procedure raised in the present matter, and accordingly hopes to assist the Court in resolving these questions.

Wider Opportunities for Women (WOW) works nationally and in our home community of Washington, DC, to help women achieve economic security and equality of opportunity for themselves and their families at all stages of life. Providing equal opportunities for women in the workplace and providing career paths to earning self-sufficiency wages and benefits are key to women's ability to meet the financial needs of themselves and their families. WOW has developed indexes of income needed to cover basic needs at the county level and for different family types and ages to measure that goal. Establishing real opportunities for female employees, creating a workplace free of discrimination and harassment and providing redress for female employees who have been discriminated against are basic values under consideration in this case.

Women Employed is a national organization based in Chicago whose mission is to improve the economic status of women and remove barriers to economic equity. Since 1973, the organization has fought to outlaw pay discrimination, pregnancy discrimination and sexual harassment and to strengthen federal equal opportunity policies and work/family benefits. Women Employed strongly believes that pay discrimination is one of the main barriers to achieving equal opportunity and economic equity for women in the workplace and that class actions are an indispensable tool for eradicating illegal, company-wide employment discrimination.

Women Lawyers of Sacramento ("WLS"), founded in 1962, is the leading women's bar association in the Sacramento Valley of California. WLS supports and encourages every woman lawyer in her career aspirations and helps promote a society that places no limits on where a woman's skills and talent can take her. WLS is dedicated to (1) promoting the full and equal participation of women lawyers and judges in the legal profession, (2) maintaining the integrity of our legal system by advocating principles of fairness and equal access to justice, (3) improving the status of women in our society, and (4) advocating for equal rights, reproductive choice, equal opportunity and pay for women, and current social, political, economic, or legal issues of concern to its members. WLS is premised on the belief that women deserve equal rights, respect, and opportunities in the workplace and society at large. To that end, WLS has a strong interest in the present case, since the Court's decision will have wide-ranging impacts on women nationwide who suffer discrimination in the workplace, including their ability to bring claims and obtain effective relief. The decision will also affect the status of women in society and their ability to achieve equality in the workplace.

Women's City Club of New York (WCC) supports the rights of all disadvantaged people to seek redress through all possible avenues. The class action lawsuit is an important way for individuals to seek justice. Denying them the creation of the class is tantamount to denying them access to justice as they will not be able to afford the cost or time involved in pursuing individual claims. If the Supreme Court reverses the Ninth Circuit decision to allow the class action to proceed, it would not only adversely affect female employees at Wal-Mart. It would hereafter deal a broad blow to women and other victims of discrimination. The WCC cannot be silent about such profound consequences.

The *Women's Law Center of Maryland, Inc.* is a nonprofit membership organization established in 1971 with a mission of improving and protecting the legal rights of women, particularly regarding gender discrimination, sexual harassment, employment law and family law. Through its direct services, including an Employment Law Hotline, and advocacy, the Women's Law Center seeks to protect women's legal rights and ensure gender equality in the workplace.

The *Women's Law Project (WLP)* is a non-profit public interest law firm with offices in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, the WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public policy development, public education and individual counseling. Throughout its history, the WLP has worked to eliminate sex discrimination, bringing and supporting litigation challenging discriminatory practices prohibited by federal civil rights laws. The WLP has a strong interest in the proper application of the law to ensure equal treatment in the workplace.

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BRIEF OF *AMICI CURIAE* AMERICAN SOCIOLOGICAL ASSOCIATION AND THE LAW AND SOCIETY ASSOCIATION IN SUPPORT OF RESPONDENTS

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OTHER AUTHORITIES

A. Giddens, M. Duneier, R. P. Applebaum, and D. C. Carr, INTRO. TO SOC. (7th ed. 2009) 10

A. Kalev, F. Dobbin, and E. Kelley, *Best Practices or Best Guesses? Diversity Management and the Remediation of Inequality*, 71 AM. SOC. REV. 589 (2006) 22, 23, 26, 29

A. M. Konrad and F. Linnehan, *Formalized HRM structures: Coordinating equal employment opportunity or concealing organizational practices?*, 38 ACADEMY OF MANAGEMENT J. 787 (1995) .. 27, 29

A. M. Konrad, S. Winter, and B. *Gutek, Diversity in work group sex composition: Implications for majority and minority members*, 10 RES. IN THE SOC. OF ORGANIZATIONS 115 (1992) 25-26

B. F. Reskin and D. B. McBrier, *Why Not Ascription? Organizations' Employment of Male and Female Managers*, 65 AM. SOC. REV. 222 (2000) 23-24, 25

B. F. Reskin, D. B. McBrier and J. Kmec, *The Determinants and Consequences of Work-place Sex and Race Composition*, 25 ANN. REV. OF SOC. 335 (1999) 25, 30

Page

B. S. Mittman, *Theoretical and Methodological Issues in the Study of Organizational Demography and Demographic Change*, 10 Res. in the Soc. of Organizations 3 (1992) 24

B. Somekh & C. Lewin, Research Methods in the Social Sciences (2005) 6

C. G. Rutte, K. A. Diekmann, J. T. Polzer, F. J. Crosby and David M. Messick, *Organization of Information and the Detection of Gender Discrimination*, 5 Psych. Sci. 226 (1994) 30

C. Goldin and C. Rouse, *Orchestrating Impartiality: The impact of "blind" auditions on female musicians*, 90 Am. Econ. Rev. 715 (2000) 25

C. N. Macrae and G. V. Bodenhausen, *Social Cognition: Thinking Categorically about Others*, 51 Ann. Rev. of Psych. 93 (2000) 20

C. O'Reilly and J. Chatman, *Culture as Social Control: Corporations, Cults and Commitment*, 18 Res. In Organizational Behav. 157 (1996) 14

D. Guthrie and L. Roth, *The state, courts, and equal opportunities for female CEOs in US organizations: Specifying institutional mechanisms*, 78 Soc. Forces 511 (1999) 24

	Page
D. L. Faigman, *The Limits of Science in the Courtroom*, Beyond Common Sense: Psychological Science in the Courtroom (E. Borgida & S. T. Fiske eds. 2008)	13
D. L. Westby, *A Typology of Authority in Complex Organizations*, 44 Soc. Forces 484 (1966)	18
D. Pager and H. Shepherd, *The Sociology of Discrimination: Racial discrimination in employment, housing, credit, and consumer markets*, 34 Ann. Rev. Soc. 181 (2008)	26
D. Tomaskovic-Devey, A. Kalleberg, and P. V. Marsden, *Gender Differences and Organizational Commitment*, Organizations in America: Analyzing Their Structures and Human Resource Practices 297 (A. Kalleberg et al., eds., 1996)	24
E. Borgotta and R. Montgomery, eds., International Encyclopedia of Soc. V. 1 567 (2000)	14
E. H. Schein, Organizational Culture and Leadership (4th ed 2010)	15
E. J. Castilla, *Gender, Race, and Meritocracy in Organizational Careers*, 113 Am. J. Sociol. 1479 (2008)	28-29

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E. Kelly and F. Dobbin, *How Affirmative Action Became Diversity Management*, 41 Am. Behav. Scientist 976 (1998)	15, 22
E. L. Kelly and A. Kalev, *Managing flexible work arrangements in US organizations: formalized discretion or "a right to ask,"* 4 Socio-Economic Rev. 379 (2006)	24
E. Schein, Culture: *The Missing Concept in Organizational Studies*, 41 Admin. Sci. Quart. 229 (1996)	14
Elizabeth Gorman, *Gender Stereotypes, Same-Gender Preferences, and Organizational Variation in the Hiring of Women: Evidence from Law Firms*, 70 Am. Soc Rev. 702 (2005)	19-20
F. Dobbin, Inventing Equal Opportunity (2009)	10, 23
F. Dobbin, D. Schrage and A. Kalev, *Someone to Watch over Me: Coupling, Decoupling, and Unintended Consequences in Corporate Equal Opportunity*, Working Paper, Department of Sociology, Harvard University (2009)	24, 28
H. R. Bernard, Social Research Methods: Qualitative and Quantitative Application (2000)	7
G. A. Fine, *Negotiated Orders and Organizational Cultures*, 10 Ann. Rev. Soc. 239 (1984)	16

TABLE OF AUTHORITIES—Continued

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G. Mitchell, *Good Causes and Bad Science*, 63 VAND. L. REV. 133 (2010) 13

G. R. Siniscalco, *Subjective Decisionmaking: Proper or Problematic?*, talk presented at the National Conference on Equal Employment Opportunity Law (2006) 18

G. R. Salancik and J. Pfeffer, *Uncertainty, Secrecy, and the Choice of Similar Others*, 41 SOC. PSYCH. 246 (1978) 20, 27

Gareth R. Jones, ORGANIZATIONAL THEORY, DESIGN, AND CHANGE 104 (6th ed. 2010) .. 21

J. A. Kmec, *White Hiring Agents' Organizational Practices and Out-Group Hiring*, 35 SOC. SCI. RES. 668 (2005) 23

J. Allmendinger and R. Hackman, *The More, the Better? A Four-Nation Study of the Inclusion of Women in Symphony Orchestras*, 74 SOC. FORCES 423 (1995) ... 20

J. Cohen, H. Broschak, H. Haveman, *And then there were more? The effect of organizational sex composition on the hiring and promotion of managers*, 63 AM. SOC. REV 711 (1998) 19, 20, 25

J. Lincoln and A. Kalleberg, CULTURE, CONTROL, AND COMMITMENT: A STUDY OF WORK ORGANIZATION AND WORK ATTITUDES IN THE UNITED STATES AND JAPAN (1990) 15

Page

J. M. Ruane, ESSENTIALS OF RESEARCH METHODS: A GUIDE TO SOCIAL RESEARCH (2004) 7

J. Monahan, L. Walker & G. Mitchell, *The Limits of Social Framework Evidence*, 8 LAW, PROBABILITY & RISK 307 (2009) 13

J. N. Baron and D. M. Kreps, STRATEGIC HUMAN RESOURCES: FRAMEWORKS FOR GENERAL MANAGERS (1999) 15, 16

J. N. Baron, B. S. Mittman, and A. E. Newman, *Targets of opportunity: organizational and environmental determinants of gender integration within the California civil service*, 1979–1985, 96 AM. J. OF SOC. 1362 (1991) 26

J. N. Baron, D. Burton and M. T. Hannan, *The Road Taken: Origins and Early Evolution of Employment Systems in Emerging Companies*, 5 INDUSTRIAL AND CORPORATE CHANGE 239 (1996) 18

J. N. Baron, M. T. Hannan, G Hsu, and O. Kocak, *In the company of women: Gender inequality and the logic of bureaucracy in start-up firms*, 34 WORK AND OCCUPATIONS 35 (2007) 23

Jefferson P. Marquis et al., MANAGING DIVERSITY IN CORPORATE AMERICA (2008) 22

TABLE OF AUTHORITIES—Continued

Page

John Monahan et al., Essay, *Contextual Evidence of Gender Discrimination: the Ascendance of "Social Frameworks,"* 94 VA. L. REV. 1715 (2008) 12

K. S. Lyness, and M. E. Heilman, *When fit is fundamental: Performance evaluations and promotions of upper-level female and male managers*, 91 J. OF APPLIED PSYCH. 777 (2006) 19

L. B. Edelman and S. Petterson, *Symbols and Substance in Organizational Response to Civil Rights Law*, 17 RES. IN SOC. STRATIFICATION AND MOBILITY 107 (1999) 26

L. I. Langbein, *Ownership, Empowerment, and Productivity: Some Empirical Evidence on the Causes and Consequences of Employee Discretion*, 19 J. OF POLICY RES. 427 (2000) 30

L. M. Roth, SELLING WOMEN SHORT: GENDER INEQUALITY ON WALL STREET (2006) 10, 19

L. Sinclair and Z. Kunda, *Motivated stereotyping of women: she's fine if she praised me but incompetent if she criticized me*, 26 PERSONALITY AND SOC. PSYCH. BULLETIN 1329 (2000) 19

Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987) 11, 12

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Laurie Rudman, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. of Soc. Issues 743 (2001)	19
M. Burawoy, Manufacturing Consent: Changes in the Labor Process Under Monopoly Capitalism (1982)	16
M. E. Heilman, *Description and prescription: How gender stereotypes prevent women's ascent up the organizational ladder*, 57 J. of Soc. Issues 657 (2001)	19
M. E. Heilman, *Sex Bias in Working Settings: The Lack of Fit Model*, 5 Res. In Organizational Behav. 269 (1983)	25
M. E. Heilman, A.S. Wallen, D. Fuchs, and M. M. Tamkins, *Penalties for success: Reactions to women who succeed at male tasks*, 89 J. of Applied Psych., 416 (2004)	19
M. E. Heilman and M. C. Haynes, *Subjectivity in the Appraisal Process: A Facilitator of Gender Bias in Work Settings*, Beyond Common Sense: Psychological Science in the Courtroom (E. Borgida and S. Fiske, eds., 2008)	17, 18, 19, 27
M. Elvira and M. Graham, *Not Just a Formality: pay system formalization and sex-related earnings effects*, 13 Organization Sci. 601 (2002)	28

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M. Gangul, *Causal Inference in Sociological Research*, 36 Ann. Rev. Soc. 21 (2010) 6

M. Hart and P. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 Fordham L. Rev. 37 (2009) 13

M. Hewstone, M. Rubin, and H. Willis, *Intergroup Bias*, 53 Ann. Rev. of Psych. 575 (2002) 20

M. M. Elvira and M. E. Graham, *Pay System Formalization and Sex-Related Earnings Effects*, 13 Organization Sci. 601 (2002) 25

N. Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and their Behavioral Manifestations*, 17 Soc. Justice Res. 143 (2004) 20

N. P. Mero, S.J. Motowidlo, and A. Anna, *Effects of Accountability on Rating Behavior and Rater Accuracy*, 33 J. of Applied Soc. Psych. 2493 (2003) 27

P. DiMaggio, Culture and Cognition, 23 Ann. Rev. of Soc. 265 (1997) 14

Philip Tetlock, *Accountability: The Neglected Social Context of Judgment and Choice*, 7 Res. in Organizational Behav. 297 (1985) 28

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Philip Tetlock, *The Impact of Accountability on Judgment and Choice: Toward a Social Contingency Model*, 25 Advances in Experimental Soc. Psych. 331 (1992) ... 28

R. A. Noe, Employee Training and Development (2002) ... 29

R. Edwards, Contested Terrain: The Transformation of the Workforce in the Twentieth Century (1979) ... 23

R. F. Szafran, *What Kinds of Firms Hire and Promote Women and Blacks? A Review of the Literature*, 23 Soc. Quarterly 171 (1982) ... 24

R. G. Schaeffer and E.F. Lynton, Corporate Experience in Improving Women's Job Opportunities, Rept. 755, The Conference Bd. (1979) ... 26-27

R. L. Daft, Organizational Theory and Design 374 (10th ed. 2010) ... 14

R. M. Kanter, Evolve!: Succeeding in the Digital Culture of Tomorrow (2001) ... 15

R. M. Kanter, Men and Women of the Organization (1977) ... 20

R. Nelson and W. Bridges, Legalizing Gender Inequality: Courts, Markets, and Unequal Pay For Women (1999) ... 10

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Robert D. Gatewood, Hubert S. Field, and Murray Barrick, HUMAN RESOURCE SELECTION 410 (6th ed. 2010) 21

Roberto Fernandez and N. Weinberg, *Sifting and Sorting: Personal Contacts and Hiring in a Retail Bank*, 62 AM. SOC. REV. 883 (1997) 25

S. M. Jacoby, EMPLOYING BUREAUCRACY: MANAGERS, UNIONS, AND THE TRANSFORMATION OF WORK IN THE 20TH CENTURY (Rev. Ed., 2004) 23

Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001) 30

T. DiPrete and W. Soule, *The Organization of Career Lines: Equal Employment Opportunity and Status Advancement in a Federal Bureaucracy*, 51 AM. SOC. REV. 295 (1986) 23

V. Roscigno, S. Mong, R. Byron, G. Tester, *Age discrimination, social closure, and employment*, 86 SOC. FORCES 313 (2007) 26

W. N. Espeland and B.I. Vannebo, *Accountability, Quantification, and the Law*, 3 ANN. REV. OF LAW AND SOC. SCI. 21 (2007) 30

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICI CURIAE* AMERICAN SOCIOLOGICAL ASSOCIATION AND THE LAW AND SOCIETY ASSOCIATION IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST[1]

The American Sociological Association (ASA) is the national professional and scholarly association of sociologists in the United States. Founded in 1905, the organization has more than 14,000 members, including most sociologists holding doctoral degrees from accredited universities. ASA publishes nine leading peer-reviewed journals.

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[1] Counsel for each party has consented to the filing of this Brief, as indicated by letters filed with the Clerk of the Court. Pursuant to Rule 37.6, *amici curiae* state that no counsel for a party authored any part of this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

The Law and Society Association (LSA) is a professional association of over 1,600 scholars in the social sciences, humanities and law who study the place of law in social, political, economic and cultural life. The LSA publishes the leading peer-reviewed journal in the interdisciplinary study of law and society.

Over the past fifty years, sociologists and other social scientists have produced an extensive body of scholarship about research methodology, proper case-study research techniques, organizational behavior, sex discrimination in the workplace, and how organizations can mitigate inequality. *Amici* offer their expertise to aid the Court in evaluating the use of social science evidence such as the evidence in the record in this case as a source of valid information about the effects of corporate culture and policy on potential discrimination, including the effects of corporate culture on individual-level decision-making. The research summarized in this Brief also addresses organizational policies and practices that place discretion within formal parameters, thereby reducing the potential for biased decision-making, an issue of significance in determining whether a class should have been certified under Rule 23 in this case.

SUMMARY OF ARGUMENT

The Court should affirm the Ninth Circuit's use of social science evidence as a source of valid information about the effects of corporate culture and policy on potential discrimination. Sociology is a social science that provides systematic research methodologies for analyzing data on individual and organizational behavior. Like natural science methods, social science methods meet rigorous disciplinary standards that include blind peer review and professional accountability for published work.

Sociological methods allow researchers to use aggregate data to form testable hypothesis about specific cases. Some research questions offer and test causal explanations for social phenomena, while others identify consistent patterns and relationships that emerge in given empirical circumstances. Sociologists can determine with a great deal of certainty, given a strong body of empirical evidence, when particular conditions or practices lead to common outcomes. Such conclusions draw on case studies, or in-depth investigations of individual cases, and other methodologies to form hypotheses about likely patterns in similar cases. A large body of research on organizations has shown that particular corporate practices and policies tend to have similar effects on personnel outcomes across cases. These findings inform researchers' preliminary hypotheses about new cases, which are subject to testing and additional research.

"Social framework analysis" is not a sociological method, but rather a legal term for some kinds of research. What constitutes high quality "social framework analysis" continues to be vigorously debated among scholars. As such, the Court should assess the underlying social science methods, as practiced by social science researchers and vetted in the peer-reviewed journals of those fields, instead of the "social framework analysis" construct when deciding whether social scientific work is valid.

Systematic social science research has shown that corporate culture may affect individual-level decision-making in common ways. Corporate culture is a set of norms and values that convey messages to employees about appropriate behavior. Corporations may actively try to engineer corporate cultures by implementing policies and practices that convey norms and values. Informal cultures also emerge in the workplace when employees interact, and may either reinforce or resist formal culture as well as promote other non-sanctioned norms. The extent to which corporate cultures, both formal and informal, influence individuals' behavior depends on the strength of the cultures and also on the degree of discretion that company personnel policies give to individual decision-makers.

Social science researchers have shown how personnel policies that condone discretionary decision-making by managers, in the absence of formal guidelines and detailed guidance on how to exercise discretion or oversight, tend to lead to biased decision-making. According to social science research, unchecked discretion is associated with the unequal treatment of female and male workers because it permits subjective decisions that incorporate stereotypes about women unrelated to job performance and allow managers to favor in-groups. While some discretion is inevitable in organizational practice, policies that condone discretion without guiding parameters can lead to biased decision-making and disparate gender outcomes.

Social science research has identified organizational policies and practices that place discretion within formal parameters, thereby reducing the potential for biased decision-making without eliminating necessary managerial judgment. In addition, they have proved more effective than corporate programs that generally stress "diversity," which lacks a consensus definition. These programs vary widely in their content.

Namely, corporations have been shown to reduce gender disparities by instituting formal personnel policies, creating accountability processes for managers, and self-monitoring their employment patterns in order to highlight and address disparities. Extensive research in sociology and other social sciences has shown that these practices equalize gender disparities in the workplace by placing central checks on individual discretion that leads to biased decision-making, but do not eliminate all discretion from managerial practice.

ARGUMENT

I. SOCIAL SCIENCES IN GENERAL, AND SOCIOLOGY IN PARTICULAR, PROVIDE SYSTEMATIC AND SCIENTIFIC RESEARCH METHODOLOGIES FOR ANALYZING INDIVIDUAL AND ORGANIZATIONAL BEHAVIOR, AND SHOULD BE CONSIDERED ALONG WITH OTHER SOURCES OF EVIDENCE TO INFORM LEGAL ANALYSIS

A. Social Sciences Use Rigorous Scientific Methods

Social sciences, like natural sciences, employ the scientific method in the pursuit of knowledge. This scientific method is highly reliable because it permits researchers to replicate, refine, and further test empirical findings. Social science researchers define problems for study, review existing literature, select a research design most appropriate for the research question, and collect and analyze data. *See, e.g.*, B. Somekh & C. Lewin, RESEARCH METHODS IN THE SOCIAL SCIENCES (2005). Research articles are submitted to professional journals such as the *American Sociological Review* and the *American Journal of Sociology* which employ a rigorous, blind, peer-review editorial process.

Sociology is one of the social science disciplines dedicated to the study of the social world, human behavior, and structures and institutions within society. Sociology, like other established social sciences such as economics and psychology, has a professional infrastructure that holds researchers ethically, theoretically, and methodologically accountable for the work they produce as members of the discipline. The domestic governing body of sociology is the American Sociological Association (ASA) which organizes professional conferences, establishes rules and norms for professional researchers, publishes the discipline's flagship journal and several specialty journals, and defines the discipline.

B. Sociologists Make Causal Arguments in Limited Circumstances and with Great Methodological Care, Using Aggregate Data and Case Studies to Form Testable Hypotheses about New Cases

The general aim of social science research is to identify and "describe[] the structure of populations, social relationships, and processes." M. Gangul, *Causal Inference in Sociological Research*, 36 ANN. REV. SOCIOLOGY 21, 22 (2010). Empirical investigation that provides causal explanations for social processes is possible, subject to stringent methodological requirements. A researcher's ability to draw causal conclusions depends on the scope of information available, the type of data she collects, and the methods she employs to analyze the data. Equally valid for some research purposes are techniques that focus on correlations between social phenomena instead of on causal relationships. Sociologists can determine with a great deal of certainty, given a strong body of empirical evidence, when particular conditions or practices lead to common outcomes. It is through consistent empirical findings over multiple studies that theories acquire strong explanatory power, which may be supplemented with causal analysis when research goals so dictate and conditions so allow.

Social scientists analyze aggregate data to inform analysis in particular case studies. *See, e.g.*, J.M. Ruane, ESSENTIALS OF RESEARCH METHODS: A GUIDE TO SOCIAL RESEARCH (2004); H. R. Bernard, SOCIAL RESEARCH METHODS: QUALITATIVE AND QUANTITATIVE APPLICATION (2000). For example, a large body of research completed over time shows that employment practices affect individuals' opportunities and rewards on the basis of their race and gender. There is general agreement in the social sciences that personnel practices affect workplace discrimination and inequality. That well-established, scientifically tested set of findings can appropriately be used in a particular case study to provide a preliminary hypothesis for further analysis.

Using proper case study methodology (see below), most social scientists who are presented with precollected data in a particular case alleging discrimination are properly reluctant to draw causal conclusions about the reasons for sex-based disparities in that case. More likely, they would apply a set of relationships reported in high quality, relevant, peer-reviewed scholarly research to assess whether that company's practices were likely to have prevented, permitted, promoted, or encouraged discrimination.

In keeping with social scientists' reluctance to assert causality without appropriate and often hard-to-come-by data, social scientists cannot predict either the exact likelihood that some outcome will occur or the number of times it will occur. However, social scientists routinely use the laws of probability to predict that under certain conditions, certain outcomes are likely to occur.

There is a long history of social science research about the workplace, corporate culture, and the mechanisms for limiting discretion. Although researchers specializing in these topics employ diverse methodologies including surveys, in-depth interviews, archival research, and experiments, one particularly effective research design to examine these issues is the case study, a technique in which researchers exhaustively study a particular organization.

Case study research on workplaces shows that internal policies and practices play a significant role in shaping the culture of the workplace, and that workplace cultures may in turn help to sustain or minimize bias. Research has also shown that internal accountability practices can reduce the likelihood that managers' and supervisors' biases will improperly affect their pay and promotion decisions (see below). This body of knowledge allows researchers analyzing new cases to form hypotheses about likely patterns of discrimination. Social scientific standards mandate that such hypotheses are necessarily subject to revision or rejection based on additional research on the particular case at hand.

C. Given the Established Social Science about Corporate Culture and Effective Mechanisms for Limiting Discretion (Which Can Lead to Bias), Well-Done Case Studies that are Methodologically Valid and Which Draw on the Large Body of Social Science Research to Inform Hypotheses about Particular Cases Should be Considered by the Courts

While we offer no opinion on the substance of Dr. Bielby's testimony or conclusions, we stress that the methods through which he reached these conclusions are widely accepted and are the basis for research published in the top peer-reviewed social science research journals. These methods include (1) strong reliance on established research findings, (2) careful review of relevant, case-specific statistical analyses, and (3) careful examination of all available qualitative and documentary evidence about the organization from a variety of sources regarding its culture and personnel practices.

1. Dr. Bielby systematically cites to published, peer-reviewed research on several issues of relevance to the Wal-Mart case, which are broadly supported in social science literature and which inform his analysis of Wal-Mart as a specific employer.

2. Dr. Bielby reviews the statistical results provided by other experts concerning the gender composition of hourly and management jobs in Wal-Mart.

3. Dr. Bielby refers to qualitative evidence on a variety of Wal-Mart organizational and personnel practices, including quotations from Sam Walton and the deposition testimony of Wal-Mart managers. Dr.

Bielby's analysis of qualitative data is a standard practice in many social scientific analyses of organizations and their personnel systems. *See, e.g.*, F. Dobbin, INVENTING EQUAL OPPORTUNITY (2009); L. M. Roth, SELLING WOMEN SHORT: GENDER INEQUALITY ON WALL STREET (2006); R. Nelson and W. Bridges, LEGALIZING GENDER INEQUALITY: COURTS, MARKETS, AND UNEQUAL PAY FOR WOMEN (1999).

Again, our purpose here is not to comment on the substance of Dr. Bielby's conclusions. But his use of a combination of social science research findings and statistical and qualitative data specific to Wal-Mart is well within our discipline's accepted methods for conducting a preliminary case study of a particular organization, especially when direct access to the organization is not available to the researcher. Dr. Bielby's findings are meaningful in sociology even absent a finding of causality.[2]

In sum, contrary to the defendant's claim that Dr. Bielby's methods "lack reliable, scientific basis for linking general research to the corporate setting," Pet. Br. at 30, the methods Dr. Bielby used are those social scientists rely on in scientific research that is published in top-quality peer-reviewed journals. Dr. Bielby's analysis of Wal-Mart is presented as an example of the application of sociological knowledge in the newest edition of an important sociology textbook. A. Giddens, M. Duneier, R. P. Applebaum, and D. C. Carr, INTRODUCTION TO SOCIOLOGY (7th ed. 2009).

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[2] While the American Sociological Association cannot attest to the steps that Dr. Bielby took to arrive at his conclusions, we have no reason to doubt that he conducted the analyses that he described under penalty of perjury.

D. "Social Framework Analysis" is Not a Sociological Method, but Rather a Legal Concept that is Actively Debated in Law Reviews; Rather than Relying on this Concept the Court should assess the Underlying Social Science Methods that Dictate When and How Aggregate Data can Inform Rigorous Case Studies

"Social framework analysis" is not a term generally recognized among sociologists. A full-text search of all available issues of the four leading sociological journals[3] locates no references to "social framework analysis." The American Sociological Association features no sections or working groups that deal with the concept and it is not featured in sociology textbooks or taught in methodology or theory courses. Thus, a definition of "social framework analysis" cannot be obtained from within the sociology discipline. It is instead a concept about research methods proposed primarily outside peer-reviewed social science journals to illustrate how social science research may productively inform litigation. Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 Va. L. Rev. 559, 559 (1987).[4] Accordingly, a search of Westlaw's journal and law reviews database produces twenty-three articles addressing social framework analysis, many from practitioners' guides.[5]

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[3] Search term "social framework analysis" entered on 2/8/2011 in archived databases of the *American Journal of Sociology*, *American Sociological Review*, *Social Forces*, and *Social Problems*.

[4] While sociologists in legal settings have sometimes borrowed the term "social framework analysis" to describe their work for a legal audience, as did Dr. Bielby in this case, the concept itself exists outside sociology and fails to address the actual methodologies that dictate how general and specific data relate. Dr. Bielby's analysis, including the use of the term "social framework analysis" as a shorthand way of conveying

The legal scholarship defines social framework analysis as "general [social science] research results . . . used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a specific case." John Monahan et al. Essay, *Contextual Evidence of Gender Discrimination: the Ascendance of "Social Frameworks,"* 94 Va. L. Rev. 1715, 1717 (2008), citing Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 Va. L. Rev. 559, 559 (1987). Legal scholars, including those who first devised the concept, recently have urged courts to limit its use by prohibiting social scientists from linking their general research to the specific cases at hand. Monahan et al. Essay, *supra* at 1718, 1734. These critiques argue that expert testimony on specific cases is "unscientific," "subjective," and lacking in "rigor" based on the mistaken belief that social science "lacks a reliable, scientific basis for linking general research to the corporate setting." *Id.* at 1745 n 83; Pet. Br. at 30, quoting *id.* at 1745 n.83.[6] Notably, attacks on

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that he is using social science methods in a legal setting is proper, but the validity of his work should be evaluated in accordance with the peer-reviewed standards of sociology as described above

[5] Search term "social framework analysis" entered in Westlaw's Journals and Law Reviews database on 2/8/2011

[6] Several amicus briefs filed on behalf of Wal-Mart in this case similarly question social framework analysis. *See* Brief of Costco Wholesale Corporation as Amicus Curiae in Support of Wal-Mart Stores, Inc. at 20-26; Brief of Altria Group, Inc. et al. as Amici Curiae at 26-30; Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioner at 26 n. 1.

social framework analysis have come in law reviews, not in peer-reviewed sociology journals whose audiences have the most in-depth expertise in case studies.[7] Indeed, the use of the results of prior social science research in analyzing case-study or survey data is an essential component of social scientific research.

The current debate about social framework analysis largely ignores that principled social science methods already dictate when and how general findings inform specific cases, as described above and in the following sections. Proper social scientific research does not draw unsupported conclusions about specific cases based on general patterns in aggregate data, but rather formulates testable hypotheses based on existing research. The probability that a given case will conform to predicted patterns varies with the strength of past findings as well as available data on the specific case. Social scientists thus necessarily consider both "general" and "specific" information within a rigorous structure that acknowledges variable certainty.

Dr. Bielby's unwillingness to draw causal inferences is consistent with sociologists' prudent reluctance to assert causality in the absence of appropriate methodological safeguards. *See* Bielby Dep. 33:20-34:15, cited in Bielby Motion to Strike, 9th Cir. ECF Docket No. 263 at 9 n.15. It is not true that social scientists cannot rigorously use general data to understand specific cases. The court should look beyond petitioner's opposition to legally defined "social framework analysis" and to the actual social science methods that inform research.

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[7] Study of the legal scholarship reveals an on-going debate. *See, e.g.*, G. Mitchell, *Good Causes and Bad Science*, 63 VAND. L. REV. 133, 137 (2010); J. Monahan, L. Walker & G. Mitchell, *The Limits of Social Framework Evidence*, 8 LAW, PROBABILITY & RISK 307 (2009); D. L. Faigman, *The Limits of Science in the Courtroom*, in E. Borgida & S. T. Fiske eds., BEYOND COMMON SENSE: PSYCHOLOGICAL SCIENCE IN THE COURTROOM 303, 310 (2008). But *see* M. Hart and P. Secunda, *A Matter of Context. Social Framework Evidence in Employment Discrimination Class Actions*, 78 FORDHAM L. REV. 37 (2009), for a lawyers' review of the debate's political nature and defense of social framework analysis.

II. ORGANIZATIONAL CULTURES, BOTH FORMAL AND INFORMAL, MAY INFLUENCE MULTIPLE DISCRETIONARY DECISION-MAKERS TO ADOPT COMMON VALUES AND NORMS THAT SHAPE THEIR BEHAVIORS, WITHIN AND APART FROM CORPORATE POLICIES

A corporation's culture comprises its assumptions, values and norms about how things should be done. E. Schein, *Culture: The Missing Concept in Organizational Studies*, 41 ADMINISTRATIVE SCIENCE QUARTERLY 229 (1996); C. O'Reilly and J. Chatman, *Culture as Social Control: Corporations, Cults and Commitment*, 18 RESEARCH IN ORGANIZATIONAL BEHAVIOR 157 (1996); R. L. Daft, ORGANIZATIONAL THEORY AND DESIGN 374 (10th ed. 2010).

Values include ideas about what is "right" and "wrong." Norms include a set of "rule-like" ideas about permissible conduct that members can draw on to define appropriate behavior and shape workplace interactions. P. DiMaggio, *Culture and Cognition*, 23 ANN. REV. OF SOCIOLOGY 265 (1997); E. Borgotta and R. Montgomery, eds., INTERNATIONAL ENCYCLOPEDIA OF SOCIOLOGY V. 1 567 (2000). Corporate culture is thus one of the features that define acceptable workplace conduct.

A. Corporations May Use Strategies to Proactively Create and Promote Corporate Cultures that Embody Corporate Identity and Shape Individual-Level Conduct

Because formal practices and policies may in some cases give rise to norms and values, corporate policy and practices may influence the corporate culture. Corporations may adopt policies and practices explicitly because they want to convey cultural norms and values such as diversity, E. Kelly and F. Dobbin, *How Affirmative Action Became Diversity Management*, 41 AMERICAN BEHAVIORAL SCIENTIST 976 (1998), or creativity, R. M. Kanter, EVOLVE!: SUCCEEDING IN THE DIGITAL CULTURE OF TOMORROW (2001). *See also* J. Lincoln and A. Kalleberg, CULTURE, CONTROL, AND COMMITMENT: A STUDY OF WORK ORGANIZATION AND WORK ATTITUDES IN THE UNITED STATES AND JAPAN (1990).

B. Corporate Cultures May Arise Informally through Interactions among Employees

In addition to the formal or "official" corporate culture which impacts individual decision-making in organizations, sociologists long have recognized that informal corporate cultures or "sub-cultures" may emerge in organizations. J. N. Baron and D. M. Kreps, STRATEGIC HUMAN RESOURCES: FRAMEWORKS FOR GENERAL MANAGERS 19-20 (1999) [hereinafter Baron and Kreps]; E. H. Schein, ORGANIZATIONAL CULTURE AND LEADERSHIP (4th ed 2010). Informal corporate cultures can complement, disparage, or even explicitly conflict with formal corporate culture. M. Burawoy, MANUFACTURING CONSENT: CHANGES IN THE LABOR PROCESS UNDER MONOPOLY CAPITALISM (1982); G. A. Fine, *Negotiated Orders and Organizational Cultures*, 10 ANN. REV. SOCIOLOGY 239 (1984).

C. The Extent to Which Corporate Culture (Either Formal or Informal) Influences Individual Decision-Making Depends on the Strength of Formal and Informal Cultures as Well as the Degree of Discretion that Corporate Policies Permit

Organizations often attempt to manufacture corporate cultures that focus on such values as diversity, creativity, entrepreneurialism, competition, or quality. These "engineered" or "created" corporate cultures, with associated policies and implementation systems, "can send powerful messages that are likely to influence organizational norms and values as experienced by employees." Baron and Kreps, *supra*, at 20. Social science has demonstrated that while these norms and values do not fully control individual attitudes, behaviors, or decision-making, corporate cultures shape what employees view as acceptable conduct.

Corporations make decisions about the kind of corporate culture they promote. Employees act on these norms in the context of personnel policies that directly shape decision-making. In the area of gender, corporations may promote norms that value or discourage equality. This may lead to bias in pay and promotion decisions if corporate policy allows managers to make subjective judgments about women workers. Conversely, centralized formal guidelines are more likely to limit the extent to which cultural biases in organizations translate into pay and promotion disparities.

III. SOCIAL SCIENCE RESEARCH SHOWS THAT EMPLOYMENT POLICIES AND PRACTICES THAT ALLOW UNCHECKED MANAGERIAL DISCRETION CAN LEAD TO BIASED DECISION-MAKING, WHILE POLICIES AND PRACTICES THAT PLACE LIMITS ON DISCRETION CAN REDUCE THE LIKELIHOOD OF BIAS

Managers require some discretion to carry out their responsibilities. However, social science research shows that excessive or unchecked subjective discretion invites biased decisions that can lead to sex-linked disparities among the individuals they supervise. Substantial research has focused on the conditions under which discretion becomes excessive. M. E. Heilman and M. C. Haynes, *Subjectivity in the Appraisal Process: A Facilitator of Gender Bias in Work Settings*, in E. Borgida and S. Fiske, eds., BEYOND COMMON SENSE: PSYCHOLOGICAL SCIENCE IN THE COURTROOM 128 (2008) [hereinafter Heilman and Haynes].

A. Corporate Policies and Practices that Cede Decision-Making to Individual Managers without Central Oversight or Accountability Mechanisms Predictably Permit Biased Decision-Making

Corporate policies that institutionalize managerial discretion allow managers to make decisions based primarily on their own criteria. In such systems, managers enjoy considerable discretion to decide how they will go about filling positions, how they will choose among candidates, how to evaluate and reward employees, and the magnitude of rewards. Although such systems may entail specified practices for filling and rewarding positions, they typically lack formal oversight structures and grievance procedures for individuals to appeal managers' decisions. G. R. Siniscalco, *Subjective Decisionmaking: Proper or Problematic?*, Talk presented at the National Conference on Equal Employment Opportunity Law (2006). This pattern institutionalizes a form of authority that does not distinguish organizationally relevant statuses from personal characteristics or relationships. J. N. Baron, D. Burton and M. T. Hannan, *The Road Taken: Origins and Early Evolution of Employment Systems in Emerging Companies*, 5 INDUSTRIAL AND CORPORATE CHANGE 239 (1996); D. L. Westby, *A Typology of Authority in Complex Organizations*, 44 SOCIAL FORCES 484 (1966). Managers enjoy trust in decision-making based on their backgrounds and interpersonal ties. Because substantial discretion in personnel decisions is a perquisite of managerial status, central oversight can be perceived as inconsistent with trust, competence, and privilege.

The extent to which corporations permit discretionary decision-making without oversight or criteria anchored in observable behavior can affect individual workers' opportunities to advance because of irrelevant characteristics such as their race or gender. According to social science research, unchecked discretion is associated with the unequal treatment of female and male workers because discretion permits subjective decisions. Subjective decisions require inference because judgments are based on outcomes and criteria that are open to interpretation. Heilman and Haynes, *supra*, at 128. Social psychological research has established that subjective assessments are susceptible to influence by irrelevant and sex-biased factors such as whether one "fits" into the work environment, conforms to prescriptive stereotypes about how women ought to be, or resembles the decision maker or other workers on characteristics that are irrelevant to job performance.[8] In the absence of guidelines and oversight, managers have little incentive to suppress stereotypes and are more likely to favor persons of their same sex. Heilman and Haynes, *supra*, at 143; L. M. Roth, SELLING WOMEN SHORT: GENDER INEQUALITY ON WALL STREET (2006); Elizabeth Gorman, *Gender Stereotypes, Same-Gender Preferences, and Organizational Variation in the Hiring of Women: Evidence from Law Firms*, 70

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[8] Women who engage in "self promotion" come across as less likeable than men, presumably because self promotion violates the female norm of modesty. Laurie Rudman, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. OF SOCIAL ISSUES 743 (2001). Being disliked negatively affects women's performance evaluations, chance of promotion, and pay raises. M.E. Heilman, A.S. Wallen, D. Fuchs, and M.M. Tamkins, *Penalties for success: Reactions to women who succeed at male tasks*, 89 J. OF APPLIED PSYCHOLOGY, 416 (2004); M.E. Heilman, *Description and prescription: How gender stereotypes prevent women's ascent up the organizational ladder*, 57 J. OF SOCIAL ISSUES 657 (2001); L. Sinclair and Z. Kunda, *Motivated stereotyping of women: she's fine if she praised me but incompetent if she criticized me*, 26 PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN 1329 (2000). According to several case studies, performance evaluations have a weaker effect on promotion for men than for women, suggesting that other criteria are more important for men. K.S. Lyness, and M. E. Heilman, *When fit is fundamental: Performance evaluations and promotions of upper-level female and male managers*, 91 JOURNAL OF APPLIED PSYCHOLOGY 777 (2006). Women have less access to high-level jobs if the previous incumbent was male. J. Cohen, H. Broschak, and H. Haveman, *And then there were more? The effect of organizational sex composition on the hiring and promotion of managers*, 63 AM. SOC. REV. 711 (1998).

AM. SOC. REV. 702 (2005); J. Cohen, H. Broschak, H. Haveman, *And then there were more? The effect of organizational sex composition on the hiring and promotion of managers*, 63 AM. SOC. REV 711 (1998); J. Allmendinger and R. Hackman, *The More, the Better? A Four-Nation Study of the Inclusion of Women in Symphony Orchestras*, 74 SOCIAL FORCES 423 (1995); G.R. Salancik and J. Pfeffer, *Uncertainty, Secrecy, and the Choice of Similar Others*, 41 SOCIAL PSYCHOLOGY 246, 253 (1978) [hereinafter Salancik]; R. M. Kanter, MEN AND WOMEN OF THE ORGANIZATION (1977).

When subjective discretion is not cordoned by corporate culture or policy, it permits managers' stereotypes and ingroup preferences to prejudice their evaluations and employment decisions in ways that disadvantage women. N. Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and their Behavioral Manifestations*, 17 SOCIAL JUSTICE RESEARCH 143 (2004); M. Hewstone, M. Rubin, and H. Willis, *Intergroup Bias*, 53 ANNUAL REVIEW OF PSYCHOLOGY 575 (2002); C. N. Macrae and G. V. Bodenhausen, *Social Cognition: Thinking Categorically about Others*, 51 ANNUAL REVIEW OF PSYCHOLOGY 93 (2000).[9]

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[9] As the *amicus* brief filed in support of Wal-Mart by the Society for Human Resource Management observed, quoting its own work, "It is easy for managers to allow their impressions of employees or their personal feelings about them to dominate the performance rating process." Brief Amici Curiae Society for Human Resource Management and HR Policy Association in Support of Petitioner at 13. And as Altria's *amicus* brief in support of Wal-Mart wrote, "If authority is too decentralized . . . managers have so much freedom that they can pursue their own functional goals and objectives at the expense of organizational goals." Brief of Altria Group, Inc. et al. as Amici Curiae in

B. Social Science Research Has Identified Organizational Policies and Practices that Place Subjective Discretion within Formal Parameters that Limit the Risk of Biased Decisions without Eliminating Necessary Managerial Judgment

In the absence of oversight, subjective discretion creates opportunities for bias and stereotyping to limit workers' compensation and their chance to advance. A large body of social science research has identified types of policies and practices that reduce personnel actions that are harmful to individuals on the basis of irrelevant characteristics by placing checks on discretionary decision-making. While this brief cannot review the extensive findings, three important corporate practices that curb discretion are (1) formalized, objective criteria regarding job assignments, promotions and raises, (2) implementation of procedures that hold managers accountable for complying with hiring guidelines, including formal appeals, and (3) collection and monitoring of data that allow detection of sex and race disparities across corporate locations and levels. These mechanisms do not eliminate all managerial discretion; rather they place it within frameworks of central accountability and oversight that have been scientifically shown to reduce bias (see below).

Support of Petitioner at 20-11, quoting Gareth R. Jones, ORGANIZATIONAL THEORY, DESIGN, AND CHANGE 104 (6th ed. 2010). Other organizational scholars have similarly concluded that "[S]upervisory ratings are notorious for their subjectivity and sometimes for their low reliability." Robert D. Gatewood, Hubert S. Field, and Murray Barrick, HUMAN RESOURCE SELECTION 410 (6th ed. 2010).

Research has shown that specific procedures including the three discussed here more effectively reduce discrimination than a corporate focus on "diversity". There is no generally shared definition of the concept of diversity. E. Kelly and F. Dobbin, *How Affirmative Action Became Diversity Management*, 41 AMERICAN BEHAVIORAL SCIENTIST 976 (1998). "Diversity" refers to everything from mandatory extended training for managers to short electronic training exercises that can be done on a computer, and the subject matter ranges from Equal Employment Opportunity (EEO) laws and regulations to the business case for a diverse workforce. This nonspecific nature of "diversity" made it popular among corporations.[10] Diversity programs' effectiveness in promoting equal treatment of employees depends on what a corporation's diversity program entails. Recent research suggests that the most common diversity practices had little effect on women's access to managerial jobs. A. Kalev, F. Dobbin, and E. Kelley, *Best Practices or Best Guesses? Diversity Management and the Remediation of Inequality*, 71 AMERICAN SOCIOLOGICAL REVIEW 589 (2006).[11] In contrast, the specific procedures discussed below have been shown to reduce disparities across a variety of cases.

1. Formalized personnel practices tend to decrease gender disparities

Formalized personnel procedures are grounded in written rules that stipulate how specific personnel decisions must be conducted. Corporations formalized personnel practices in part to check the abuses that can be associated with unchecked supervisory discretion. F. Dobbin, INVENTING EQUAL OPPORTUNITY (2009); S. M. Jacoby, EMPLOYING BUREAUCRACY: MANAGERS, UNIONS, AND THE TRANSFORMATION OF WORK IN THE 20TH CENTURY (Revised Edition, 2004); R. Edwards, CONTESTED TERRAIN: THE TRANSFORMATION OF THE WORKFORCE IN THE TWENTIETH CENTURY (1979). Formalized policies require that managers and supervisors conduct personnel tasks in a uniform manner that is consistent with organizational goals. Formal policies replace subjective individual criteria with organizationally-relevant standards, and also specify general processes that all decision-makers must follow. For example, they may require managers to formally describe jobs along with required qualifications, and to advertise positions both inside and outside of the organization. J. N. Baron, M. T. Hannan, G Hsu, and O. Kocak, *In the company of women: Gender inequality and the logic of bureaucracy in start-up firms*, 34 WORK AND OCCUPATIONS 35 (2007).

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[10] By 2000, three-fourths of Fortune 500 companies had some kind of diversity program. Jefferson P. Marquis et al., MANAGING DIVERSITY IN CORPORATE AMERICA 1 (2008).

Formalized personnel practice can equalize pay and promotion opportunities by reducing any adverse effects of unchecked subjective discretion that allows candidates' sex and race to influence personnel decisions. A. Kalev, F. Dobbin, and E. Kelly, *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV 589 (2006); J. A. Kmec, *White Hiring Agents' Organizational Practices and Out-Group Hiring*, 35 SOCIAL SCIENCE RESEARCH 668 (2005); T. DiPrete and W. Soule, *The Organization of Career Lines: Equal Employment Opportunity and Status Advancement in a Federal Bureaucracy*, 51 AM. SOC. REV. 295 (1986). *See also* B. F. Reskin and D. B. McBrier, *Why Not Ascription? Organizations'*

Employment of Male and Female Managers, 65 AM. SOC. REV 222 (2000); D. Guthrie and L. Roth, *The State, Courts, and Equal Opportunities for Female CEOs in US organizations: Specifying Institutional Mechanisms*, 78 SOCIAL FORCES 511, 528 (1999); D. Tomaskovic-Devey, A. Kalleberg, and P. V. Marsden, *Gender Differences and Organizational Commitment*, in A. Kalleberg et al., eds., ORGANIZATIONS IN AMERICA: ANALYZING THEIR STRUCTURES AND HUMAN RESOURCE PRACTICES 297 (1996); B. S. Mittman, *Theoretical and Methodological Issues in the Study of Organizational Demography and Demographic Change*, 10 RESEARCH IN THE SOCIOLOGY OF ORGANIZATIONS 3 (1992); R. F. Szafran, *What Kinds of Firms Hire and Promote Women and Blacks? A Review of the Literature*, 23 SOCIOLOGICAL QUARTERLY 171 (1982).[12]

An econometric study dramatically showed the importance of formalizing personnel procedures: major symphony orchestras that used open auditions in which judges knew the auditioners' sex systematically favored male musicians; implementing blind auditions as a formal practice increased women's representation across these orchestras. C. Goldin and C. Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AM. ECON. REV. 715 (2000).

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[12] While the positive evidence is substantial, formalization does not always have this effect for a variety of reasons. F. Dobbin, D. Schrage and A. Kalev, *Someone to Watch over Me: Coupling, Decoupling, and Unintended Consequences in Corporate Equal Opportunity*, Working Paper, Department of Sociology, Harvard University (2009). For example, formalization may fail to advance women's careers when employers formalize the use of discretion instead of actual guidelines. In this case formalized discretion may institutionalize and legitimate unequal access to workplace rewards, rather than challenging patterns of inequality. E. L. Kelly and A. Kalev, *Managing flexible work arrangements in US organizations: formalized discretion or "a right to ask,"* 4 SOCIO-ECONOMIC REVIEW 379 (2006).

Formalized personnel practices tend to increase women's share of managerial jobs. B. F. Reskin and D. B. McBrier, *Why Not Ascription? Organizations' Employment of Male and Female Managers*, 65 AM. SOC. REV. 222 (2000), and to reduce the penalty associated with a largely female workforce on women's earnings. M. M. Elvira and M. E. Graham, *Pay System Formalization and Sex-Related Earnings Effects*, 13 ORGANIZATION SCIENCE 601 (2002). In contrast, informal personnel practices tend to reproduce the demographic composition of the current workforce. J. Cohen, H. Broschak, and H. Haveman, *And Then There Were More? The Effect of Organizational Sex Composition on the Hiring and Promotion of Managers*, 63 AM. SOC. REV 711 (1998) [hereinafter Cohen et al.]; Roberto Fernandez and N. Weinberg, *Sifting and Sorting: Personal Contacts and Hiring in a Retail Bank*, 62 AM. SOC. REV. 883 (1997). Jobs that are filled almost exclusively by members of one group become "labeled" as belonging to or appropriate for members of those groups, B.F. Reskin, D.B. McBrier and J. Kmec, *The Determinants and Consequences of Workplace Sex and Race Composition*, 25 ANNUAL REVIEW OF SOCIOLOGY 335 (1999) [hereinafter Reskin et al. (1999)]; Cohen et al., *supra*; M. E. Heilman, *Sex Bias in Working Settings: The Lack of Fit Model*, 5 RESEARCH IN ORGANIZATIONAL BEHAVIOR 269 (1983). Surprisingly, this pattern may be exacerbated when decision makers belong to that group. Reskin et al. (1999), *supra*; Cohen et al., *supra*; A. M. Konrad, S. Winter, and B. Gutek, *Diversity in Work Group Sex Composition: Implications* *for Majority and Minority Members*, 10 RESEARCH IN THE SOCIOLOGY OF ORGANIZATIONS 115 (1992).

Formalization in and of itself is not a panacea. For instance, some research shows that formalization contributes to equal treatment only if organizations take steps to ensure that managers comply with the corporation's rules. Bias against workers may persist if corporations implement formalized processes to emulate peer corporations or to create a facade of objectivity while departing from formal criteria in actual decision-making. V. Roscigno, S. Mong, R. Byron, G. Tester, *Age discrimination, social closure, and employment*, 86 SOCIAL FORCES 313 (2007); D. Pager and H. Shepherd, *The Sociology of Discrimination: Racial discrimination in employment, housing, credit, and consumer markets*, 34 ANN. REV. SOC. 181 (2008).

In short, for formalized practices to limit the use of individuals' irrelevant and inappropriate characteristics, these practices must be enforced with adequate resources and subject to accountability processes. A. Kalev, F. Dobbin, and E. Kelly, *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV 589 (2006); L. B. Edelman and S. Petterson, *Symbols and Substance in Organizational Response to Civil Rights Law*, 17 RESEARCH IN SOCIAL STRATIFICATION AND MOBILITY 107 (1999); J. N. Baron, B. S. Mittman, and A. E. Newman, *Targets of Opportunity: Organizational and Environmental Determinants of Gender Integration Within The California Civil Service*, 1979–1985, 96 AMERICAN JOURNAL OF SOCIOLOGY 1362 (1991); R. G. Schaeffer and E. F. Lynton, CORPORATE EXPERIENCE IN IMPROVING

WOMEN'S JOB OPPORTUNITIES. Report 755. The Conference Bd. (1979).

2. Accountability Tends to Reduce Bias in Subjective Personnel Decisions

Accountability – the practice of holding decisionmakers accountable for their decisions, Heilman and Haynes, *supra* at 141 – is a fundamental principle in organizational governance. Organizations achieve compliance with policies by making organizational managers accountable for complying with the process itself as well as its outcome. Effective accountability systems preserve managerial discretion while also requiring decision makers to assess the consequences of their decisions by documenting and justifying them to central reviewers. In the context of personnel management, this obligation potentially can check the effects of decision makers' propensities to view subordinates differently based on their group membership. Supervisors who must justify their decisions regarding compensation, bonuses, job assignments, and layoffs are less likely to make those decisions based on irrelevant criteria of favoritism or stereotypes, and are more likely to heed organizational policies.

Holding managers accountable for their decisions has been shown to reduce exclusionary outcomes. N. P. Mero, S. J. Motowidlo, and A. Anna, *Effects of Accountability on Rating Behavior and Rater Accuracy*, 33 JOURNAL OF APPLIED SOCIAL PSYCHOLOGY 2493 (2003); A. M. Konrad and F. Linnehan, *Formalized HRM Structures: Coordinating Equal Employment Opportunity or Concealing Organizational Practices?*, 38 ACADEMY OF MANAGEMENT JOURNAL 787 (1995); Salancik, *supra*. Indeed, ensuring decision makers that they may have to account for their behavior leads them to regulate their biases. F. Dobbin, D. Schrage and A. Kalev, *Someone to Watch over Me: Coupling, Decoupling, and Unintended Consequences in Corporate Equal Opportunity*, Working Paper, Department of Sociology, Harvard University (2009). According to experimental research, people not only make different kinds of decisions when they expect to be accountable, but they also store the information they use in decision-making differently when they know ahead of time that they will be held accountable for their decisions. Philip Tetlock, *The Impact of Accountability on Judgment and Choice: Toward a Social Contingency Model*, 25 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 331 (1992); Philip Tetlock, *Accountability: The Neglected Social Context of Judgment and Choice*, 7 RESEARCH IN ORGANIZATIONAL BEHAVIOR 297 (1985).

Accountability has been studied in relation to compensation policy using both survey research and case studies. A case study of a corporation that had separated performance evaluation from compensation decisions illustrates its effect. No sex bias existed in the evaluations of first-line supervisors whose managers oversaw their assessments. However, the raises based on these evaluations that were set by a different group of managers who were not subject to corporate oversight were significantly higher for men, although the women's performance evaluations were as high as the men's.[13] E. J. Castilla, *Gender, Race,*

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[13] *See also* M. Elvira and M. Graham, *Not Just a Formality: Pay System Formalization and Sex-Related Earnings Effects*, 13 ORGANIZATION SCIENCE 601, 614 (2002), concluding from a case study that "(t)he lack of accountability for decisions, the lack of normative structure defining appropriate action, and the

and Meritocracy in Organizational Careers, 113 AM. J. SOCIOL. 1479 (2008). Organizations that based managers' and supervisors' evaluations and pay on nondiscriminatory behavior employed more women in nontraditional jobs. R. A. Noe, EMPLOYEE TRAINING AND DEVELOPMENT (2002).

Research on a cross-section of firms has further documented the importance of accountability in hiring for reducing exclusionary practices. Konrad and Linnehan, *supra*. Thus, social science research has shown that practices designed to increase organizational accountability can help to prevent workers' sex or race from influencing personnel decisions. Accountability structures – personnel staff whose duty is to monitor progress and that hold managers responsible for fair decisions – have been shown to increase women's access to managerial jobs, but these structures make a difference only if some organizational entity is responsible for regularly assessing the decision making practices and their outcomes and providing feedback to those higher in the organizational hierarchy who are in a position to sanction noncompliant behavior. A. Kalev, F. Dobbin, and E. Kelly, *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV 589 (2006).

C. Monitoring Tends to Decrease Gender Disparities

Corporations routinely monitor their performance with respect to their core functions, realizing that without data they cannot remain competitive. For

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greater the ambiguity in performance criteria, the more likely personnel decisions will be influenced by bias."

the same reason, monitoring the outcomes of personnel decisions is necessary to discover and address disparities. Reskin et al. (1999), *supra*, at 64-5. As in monitoring any form of corporate performance, the extent to which subjective discretionary decisions systematically disadvantages members of some groups is not immediately obvious. Without systematic data, disparities are difficult to detect. C.G. Rutte, K.A. Diekmann, J.T. Polzer, F.J. Crosby and David M. Messick, *Organization of Information and the Detection of Gender Discrimination*, 5 PSYCHOLOGICAL SCIENCE 226-231 (1994). As accountability specialists point out, "tracking [the effects of] discretion can be difficult, as assumptions, uncertainty and ambiguity are buried in layers of small decisions . . . ." W. N. Espeland and B. I. Vannebo, *Accountability, Quantification, and the Law*, 3 ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE 21, 39 (2007). Nonetheless, research indicates that monitoring checks the effects of discretion. L. I. Langbein, *Ownership, Empowerment, and Productivity: Some Empirical Evidence on the Causes and Consequences of Employee Discretion*, *19* J. OF POLICY RESEARCH 427 (2000).

In addition to recording and comparing the results of personnel decisions, corporations may monitor their personnel procedures by analyzing complaints brought to grievance-resolution structures or by systematically surveying employees about their perceptions of bias. They can then use this information to develop more effective policies and procedures. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

CONCLUSION

For these reasons, *amici* urge the Court to affirm the Ninth Circuit's decision allowing certification of the class under Rule 23.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

16

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In the Supreme Court of the United States

WAL-MART STORES, INC.,

Petitioner,

v.

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, KAREN WILLIAMSON, DEBORAH GUNTER, CHRISTINE KWAPKNOSKI, CLEO PAGE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE ASSOCIATION OF GLOBAL AUTOMAKERS, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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In re Air Bag Prods. Liab. Litig.,
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In re Allstate Ins. Co.,
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TABLE OF AUTHORITIES—continued

Page(s)

In re HP LaserJet Printer Litig.,
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In re Hydrogen Peroxide Antitrust Litig.,
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Page(s)

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Sup. Ct. Rule 37.6 1

Cal. Bus. & Prof. Code § 17200 *et seq.* 13

MISCELLANEOUS

Dan B. Dobbs, Law of Remedies (2d ed. 1993) 13

Henry J. Friendly, Federal Jurisdiction: A
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TABLE OF AUTHORITIES—continued

Page(s)

Emery G. Lee III & Thomas E. Willging, *Impact of the Class Action Fairness Act of 2005 on the Federal Courts: Fourth Interim Report to the Judicial Conference Advisory Committee on Civil Rules* (Fed. Jud. Ctr. Apr. 2008), at http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/$file/cafa0408.pdf 2

Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991) 15

1 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS (6th ed. Supp. 2009) 10

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Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71 15

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TABLE OF AUTHORITIES—continued

Page(s)

Neil Weinberg, *Shakedown Street*, Forbes.com, Feb. 11, 2008, at http://www.forbes.com/2008/02/11/lerach-milberg-weiss-biz-cz_nw_0211lerach.html. 15

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BRIEF OF THE ASSOCIATION OF GLOBAL AUTOMAKERS, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The Association of Global Automakers, Inc. ("Global Automakers")—formerly known as the Association of International Automobile Manufacturers, Inc.—is a nonprofit trade organization whose vehicle manufacturer members include American Honda Motor Co., American Suzuki Motor Corp., Aston Martin Lagonda of North America, Inc., Ferrari North America, Inc., Hyundai Motor America, Isuzu Motors America, LLC, Kia Motors America, Inc., Mahindra & Mahindra Ltd., Maserati North America, Inc., McLaren Automotive, Ltd., Mitsubishi Motors North America, Nissan North America, Peugeot Motors of America, Subaru of America, Inc., and Toyota Motor North America, Inc. Global Automakers also represents original equipment suppliers and other automotive-related trade associations.[1]

Collectively, Global Automakers members account for almost 40 percent of annual sales of passenger cars and light trucks in the United States. Nationwide, Global Automakers members have invested nearly $44 billion in U.S.-based production facilities. They directly employ over 81,000 Americans and indirectly generate over 500,000 other U.S. jobs through dealerships and suppliers nationwide.

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

The mission of Global Automakers is to advance the interests of international automobile manufacturers in the United States, including on issues such as free trade, motor vehicle safety, and environmental and energy policy. Global Automakers regularly files *amicus* briefs in cases of importance to its members and the motor vehicle industry.

Global Automakers takes no position on the issues of employment-discrimination law underlying the class-certification order here. Rather, it is the effect of this Court's decision on general principles of class certification that motivates Global Automakers to participate in this case. The interpretation of Rule 23 applied by the court of appeals presents a serious threat to its members' interests in a stable, predictable, and fair legal environment for business in the United States. Although this Court may intend its articulation of the principles governing class certification to be tailored to this case, those principles will not necessarily be limited to employment discrimination cases, which account for less than half the class action proceedings in the federal courts. Emery G. Lee III & Thomas E. Willging, *Impact of the Class Action Fairness Act of 2005 on the Federal Courts: Fourth Interim Report to the Judicial Conference Advisory Committee on Civil Rules* 4 (Fed. Jud. Ctr. Apr. 2008), at http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/$file/cafa0408.pdf.

To the contrary, parties to future actions may argue that the principles announced in this case are generally applicable to every class action in every context—including antitrust, product-liability, warranty, and false-advertising lawsuits. As explained below, the Rule 23 issues presented here arise in class-action litigation against Global Automakers members with some frequency in cases that have nothing to do with employment matters.

Global Automakers has a strong interest in the formulation of those principles because the decision below, if broadly construed, may vastly expand the exposure of Global Automakers members to unwarranted class-action litigation. Because the plaintiffs' bar views Global Automakers members as attractive deep-pocket defendants, members are routinely targeted by improper class-action litigation. Global Automakers accordingly has a powerful interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Federal Rule of Civil Procedure 23 provides a closely circumscribed exception to the fundamental principle that individual cases are tried on an individual basis and on their own facts. The Rule recognizes that, in some circumstances, similar claims may be aggregated when they can be tried together efficiently and fairly.

But when a court certifies a class action comprising factually dissimilar claims, Rule 23 becomes a means of sacrificing to administrative convenience the right to present individualized defenses to particular class members' claims. And because the class lacks the cohesiveness that aligns the incentives of the class and its representative, Rule 23 becomes a vehicle for the class representative (and his counsel) to sell the rights of the absent class members for private gain. For these reasons, this Court has repeatedly warned "against adventurous application of"

Rule 23 that might lead to improper class certifications. *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 845 (1999); see also *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 622-625 (1997).

The principles applied below, however, threaten to authorize the certification of a class to pursue almost any claim for monetary relief that can colorably be alleged to affect a large number of persons, whether or not that claim can be resolved by common proof. One of the chief protections against the improper certification of those claims is Rule 23(b)(3)'s requirement that common issues predominate over individualized ones. The decision below, however, provides plaintiffs with a potential path around that safeguard whenever a complaint can artfully characterize a damages claim as supplementary to a claim for injunctive relief. The plaintiff then could seek certification under Rule 23(b)(2). But the plain language of Rule 23(b)(2) reserves it for the certification of claims for "final injunctive relief or corresponding declaratory relief"—not money damages. Those terms should preclude insinuation of substantial monetary claims into a class certified under Rule 23(b)(2). The rule permits certification of claims for injunctive or declaratory relief. It does not authorize certification of any combination of injunctive and pecuniary claims so long as a court concludes that injunctive relief is "predominant[ ]," based on an inherently subjective assessment that the injunctive component is "superior in strength, influence, [and] authority" to the pecuniary relief. Pet. App. 86a (internal quotation marks omitted).

Like other forms of "judicial inventiveness" in construing Rule 23 (*Amchem*, 521 U.S. at 620), the Ninth Circuit's approach should be rejected. Certifying a claim for massive pecuniary relief under Rule 23(b)(2) deprives absent class members of their rights to be notified of the proceedings and to opt out of the class. Moreover, because the claim avoids scrutiny under Rule 23(b)(3), that rule's predominance and superiority requirements can no longer winnow out damages claims that lack the cohesiveness to warrant class-action status. Certification under Rule 23(b)(2) should be limited to the actions identified in the Rule itself.

This Court also should articulate the requirements of Rule 23(a) to place concrete and administrable limits on class-certification analysis. In particular, the Court should define the commonality requirement of Rule 23(a)(2) to ensure that only cases suitable for resolution by common proof can satisfy the requirement in Rule 23(b)(3) that common issues predominate over individualized ones. The Court should also clarify that the threshold showing of commonality required by Rule 23(a)(2) rests on the weight of the pertinent evidence rather than mere assertion or a scintilla of supporting evidence. The Ninth Circuit took a different view, mistakenly holding that commonality may be demonstrated by any evidence suggesting that the defendant has a common policy that affects the class. That holding absolves plaintiffs from rebutting defendant's proof—no matter how strong—that no such policy exists, at least until the plaintiff has the added leverage of a prematurely certified class. Uncritical acceptance of allegations (or scant evidence) of a policy or practice lifts plaintiffs' burden of demonstrating that the class members' claims can be resolved by common proof. Yet that inquiry is key to determining whether class-wide adjudication is an appropriate way to resolve the claims.

Another aspect of the decision below reflects the need for this Court to articulate commonality in clearer and more concrete terms. The court of appeals developed an additional means to absolve plaintiffs from presenting evidence that their claims could be resolved collectively through class-wide, common proof. Forced to acknowledge that no plaintiff could recover without prevailing on several individualized issues, the Ninth Circuit proposed that the district court try a series of "sample" cases. That, of course, is a scientific-sounding way of saying that certain individualized trials would be given class-wide significance even though factually disparate individual claims could not be resolved through common proof. Under the Ninth Circuit's plan, the district court would consider the individualized evidence needed to resolve the claims of a few class members, and then generalize the outcome of the "sample" cases to the rest of the class. This "rough justice" approach (Pet. App. 254a) may be inventive, but it violates the Rules Enabling Act. No aspect of the federal rules may "abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2072(b). Adjudication by sampling "abridge[s]" a defendant's right to present defenses to each class member's claim. And the rights of plaintiffs who lack meritorious claims are "enlarge[d]"—at the expense of both the defendant and any class members who may have viable claims.

The class-certification issues in this case transcend their employment-discrimination setting, although particular employment-discrimination doctrines may affect the outcome in this case. This Court should return class-certification jurisprudence to the firm moorings of Rule 23. Skewing the Rule 23 analysis to favor certification, as in the decision below, would have a deleterious impact on the national economy. Because of the massive stakes and enormous defense costs of a class action, class certification already gives plaintiffs the leverage to extract settlements from defendants of even meritless claims. By eliminating the traditional safeguards against the improper certification of damages claims, excessively lenient certification principles encourage shake-down class actions. To prevent that outcome, this Court should articulate and impose a principled certification analysis.

ARGUMENT

I. PERMITTING RULE 23(B)(2) CERTIFICATION TO ENCOMPASS CLAIMS FOR MONETARY RELIEF WOULD ENCOURAGE ARTFUL PLEADING AND VEXATIOUS LITIGATION.

A. Claims For Monetary Relief Cannot Be Certified Under Rule 23(b)(2).

Rule 23(b)(2) authorizes the certification of a class only if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."

As petitioner has demonstrated, the most straightforward—and correct—reading of the rule is that it prescribes the standard for certifying claims that seek only injunctive or declaratory relief. Pet. Br. 46-50. Requests to certify claims for monetary relief are governed by Rules 23(b)(1)(B) and 23(b)(3), which were drafted with monetary claims in mind. See FED. R. CIV. P. 23 advisory committee's note, 1966 amendment (Rule 23(b)(1)(B) is for damages claims "made by numerous persons against a fund [that is] insufficient to satisfy all claims"); *ibid.* (cases in which "individuals within the class" seek "damages" may proceed under Rule 23(b)(3)).

A straightforward reading of Rule 23(b)(2)'s plain language also makes practical sense because of the effects of Rule 23(b)(2) certification on absent class members. Unlike a Rule 23(b)(3) class, a Rule 23(b)(2) class is "mandatory"; class members receive neither notice of the litigation nor the ability to opt out of the class. As this Court has observed, "[b]y its terms subdivision [23](c)(2)," which governs class notice, "is inapplicable to class actions for injunctive or declaratory relief maintained under subdivision (b)(2)." *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 177 n.14 (1974).

These features of mandatory class actions are departures from "our deep-rooted historic tradition that everyone should have his own day in court." *Ortiz*, 527 U.S. at 846 (quoting *Martin* v. *Wilks*, 490 U.S. 755, 762 (1989) (further citation omitted). Accordingly, as this Court has observed, "mandatory class actions aggregating damages claims implicate the due process 'principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'" *Ibid.* (quoting *Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940)). Indeed, this Court has cautioned that due process may require that "actions seeking monetary damages * * * can be certified only under Rule 23(b)(3), which permits opt-out, and not under Rules 23(b)(1) and (b)(2), which do not." *Ticor Title Ins. Co.* v.

Brown, 511 U.S. 117, 121 (1994).[2] Due process may not require opt-out rights in a class action seeking a class-wide injunction because an order compelling lawful conduct almost inevitably will resolve any class member's claim for an order addressing the same conduct. But a claim for monetary relief is not similarly indivisible, and so there is no justification for depriving class members of the option to pursue (or abandon) their own claims.[3]

In addition, the certification of damages claims under Rule 23(b)(2) permits representative litigation without regard to one of the fundamental safeguards of the due process rights of both defendants and absent class members alike: the predominance requirement of Rule 23(b)(3). To aggregate claims for monetary relief under Rule 23(b)(3), the plaintiff must establish, among other things, that common issues "predominate" over individualized ones. FED. R. CIV. P. 23(b)(3). The predominance requirement winnows out classes in which the members' claims are riddled with idiosyncrasies that defeat class unity. As this Court explained in *Amchem*, the "mission" of this requirement is to "assure the class cohesion that legitimizes representative action in the first place." 521 U.S. at 623. Only when the interests of the class and its representative are aligned as a matter of evidentiary presentation as well as ultimate interest can "the named plaintiff at all times adequately represent the interests of the absent class members," as due process requires. *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 812 (1985) (citing *Hansberry*, 311 U.S. at 42-43).

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[2] In *Ticor*, this Court granted certiorari to determine "[w]hether a federal court may refuse to enforce a prior federal class action judgment, properly certified under Rule 23[(b)(1)(A) and (b)(2)], on grounds that absent class members have a constitutional due process right to opt out of any class action which asserts monetary claims on their behalf." 511 U.S. at 120-121 (internal quotation marks omitted). The Court dismissed the writ as improvidently granted, however. *Id.* at 122.

[3] Some courts have attempted to address this due process problem by permitting a hybrid certification: The class is certified under Rule 23(b)(2) but class members are given notice and a chance to opt out as if it were a Rule 23(b)(3) class. See, e.g., *Lemon v. Int'l Union of Operating Eng'rs*, 216 F.3d 577, 582 (7th Cir. 2000). Even if permitted by Rule 23, this approach does not remediate the due process problem because it bypasses the predominance requirement, which itself is a substantive protection required by due process.

The predominance requirement imposes a "demanding" burden. *Amchem*, 521 U.S. at 623. And it "usually is the greatest obstacle to [Rule 23](b)(3) certification" of dubious class actions. 1 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 5:23 (6th ed. Supp. 2009).

Yet despite the plain language of Rule 23(b)(2) and the constitutional implications of extending it to damages claims, the court below held that some claims for monetary relief may be certified under that rule. Pet. App. 84a-88a. Indeed, the Ninth Circuit presumed that claims seeking both monetary and injunctive relief *could* be certified under Rule 23(b)(2) *unless* the damages component is "superior [in] strength, influence, or authority to [the requested] injunctive and declaratory relief." Pet. App. 86a (internal quotation marks omitted). This "strength, influence, or authority" standard transforms Rule 23(b)(2) from a rule into a preference—and one that turns on its head the common understanding of the Rule's purpose and limitations.

The Ninth Circuit's set of subjective factors for applying its standard contrasts with the simple, objective, and exclusive language of the Rule, and with other circuits' limitation of certification of monetary claims under Rule 23(b)(2) to those that are "incidental to requested injunctive or declaratory relief." *Allison* v. *Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998). In those circuits, Rule 23(b)(2) only encompasses claims for monetary relief that would be "automatic[]" and "flow directly from liability to the class *as a whole* in the claims forming the basis of the injunctive or declaratory relief," without the need for "additional hearings" or the resolution of "new and substantial legal or factual issues." *Ibid.*[4]

The Ninth Circuit's application of the "strength, influence, or authority" standard reveals its malleability. The court first explained that the inquiry involves a "comparison between the amount of monetary damages available *for each plaintiff* and the importance of injunctive * * * relief for each." Pet. App. 89a. But that "comparison" rests on a judicial guess at the subjective importance of the injunction to the absent class members—importance that may vary widely. The Ninth Circuit did not explain why, in its view, the requested backpay did not predominate over the requested injunction but the request for punitive damages might. See Pet. App. 90a-92a, 101a.

If the billions of dollars at stake have less "strength, influence, and authority" than an injunction to alter personnel policies, it is difficult to imagine what sums would be necessary for monetary relief to predominate. And in future cases, plaintiffs may cloud the picture even further by submitting self-serving affidavits extolling the importance of the requested injunction and downplaying the monetary claims as an afterthought. This is no idle concern. See, *e.g.*, *Warren* v. *Xerox Corp.*, 2004 WL 1562884, at *15 (E.D.N.Y. Jan. 26, 2004) (plaintiffs seeking certification under Rule 23(b)(2) testified in deposition that, although they "request significant monetary damages," they "would have pursued this action" even if only injunctive relief were "available").

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[4] See also, *e.g.*, *Reeb* v. *Ohio Dep't of Rehab & Corr.*, 435 F.3d 639, 646-651 (6th Cir. 2006); *In re Allstate Ins. Co.*, 400 F.3d 505, 507 (7th Cir. 2005); *Barabin* v. *Aramark Corp.*, 2003 WL 355417, at *2 (3d Cir. Jan. 24, 2003); *Murray* v. *Auslander*, 244 F.3d 807, 812 (11th Cir. 2001).

Turning to the other factors, the Ninth Circuit declared that "the calculation of backpay generally involves relatively uncomplicated factual determinations and few individualized issues." Pet. App. 93a (internal quotation marks omitted). Yet the same court recognized in the very same opinion that deciding the backpay claims would require so many mini-trials that it would be impossible to conduct more than a tiny percentage of them. *Id.* at 105a-110a. To be sure, backpay calculations are more straightforward and formulaic than claims in the typical consumer-fraud or product-liability class action. But given the sheer number of mini-trials required here, plaintiffs in very different contexts could argue that a particular monetary claim would be less onerous to adjudicate.

The Ninth Circuit did acknowledge that a multi-billion-dollar punitive-damages claim *might* make punitive damages predominate over injunctive relief, in part because punitive damages "will be decided by a jury, rather than a judge." *Id.* at 97a (remanding this point for further consideration). This factor, too, could be readily manipulated by future plaintiffs. They can improperly recast legal claims for damages as "equitable" claims for restitution, constructive trust, an accounting, or another "equitable" claim for monetary relief. See DAN B. DOBBS, LAW OF REMEDIES § 4.3 (2d ed. 1993). Indeed, restitution is the monetary relief available under one of the most frequent bases for class actions seeking large pecuniary recoveries, California's notorious Unfair Competition Law, CAL. BUS. & PROF. CODE § 17200 *et seq.*

The courts of appeal have recognized that an award for backpay under Title VII is *sui generis*, because the award is simply one component of the relief afforded by the injunction. See, *e.g.*, *Allison*, 151 F.3d at 415; *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 332 (4th Cir. 2006). But plaintiffs in future cases will seek to eliminate any stopping point. At a minimum, if the Court were inclined to permit *any* claims for monetary relief to be certified under Rule 23(b)(2), the Court should make clear that its holding is limited to claims for backpay under Title VII. The Court should not interpret Rule 23(b)(2) to be a loophole in search of a limit.

B. Permitting Certification Of Monetary Claims Under Rule 23(b)(2) Would Have Significant Deleterious Effects On Warranty, Advertising, And Other Litigation Against Automobile Manufacturers.

Broadening the scope of Rule 23(b)(2) to permit certification of monetary claims that also seek injunctive relief could have disastrous consequences for the automobile industry by unduly magnifying the risks attending substantive claims that present individualized inquiries or have questionable merit. Already Rule 23(b)(2) class actions have become more common in those circuits that have a demonstrated "willingness * * * to expand the concept of injunctive relief to encompass equitable or ancillary awards of monetary relief to class members." 2 WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS § 4:11 (4th ed. Supp. 2010).

If the "strength, influence, and authority" formulation became the law, that trend would accelerate, exacerbating the pressure on defendants to capitulate to what Judge Friendly termed "blackmail settlements." HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973). As this Court has observed, because of the sheer stakes of a certified class action, "even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial * * *." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 740 (1975); see also, *e.g.*, *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1465 n.3 (2010) (Ginsburg, J., dissenting) ("A court's decision to certify a class * * * places pressure on the defendant to settle even unmeritorious claims."). And the threat of inevitably costly and disruptive class-wide discovery adds an additional "*in terrorem* increment" to the settlement value of the claim. *Blue Chip Stamps*, 421 U.S. at 741.

The ability to bypass Rule 23(b)(3)'s predominance standard and obtain certification of damages claims under Rule 23(b)(2) will exacerbate the problem of blackmail settlements. Many consumer lawsuits could conceivably be converted into an abusive class action by conjuring up a request for injunctive or declaratory relief as a fig leaf for a huge monetary demand. And because class members would not receive notice of the litigation, they would have little or no ability to monitor the conduct of the litigation. Commentators have long warned of the risk for abuse of the class action mechanism when class members exercise insufficient oversight of class counsel.[5] For such reasons, Congress recently found that "there have been abuses of the class action device," leading to situations where "counsel are awarded large fees" while "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed." Class Action Fairness Act of

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[5] See, *e.g.*, Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 77-83 (often "what purports to be a class action, brought primarily to enforce private individuals' substantive rights to compensatory relief, in reality amounts to little more than private attorneys acting as bounty hunters"); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 7-8 (1991) ("[T]he single most salient characteristic of class and derivative litigation is the existence of 'entrepreneurial' plaintiffs' attorneys [who, because they] are not subject to monitoring by their putative clients * * *[,] operate largely according to their own self-interest."). As former securities class action attorney William Lerach once boasted, "I have the greatest practice of law in the world. I have no clients." Neil Weinberg, *Shakedown Street*, FORBES.COM, Feb. 11, 2008, at http://www.forbes.com/2008/02/11/lerach-milberg-weiss-biz-cz_nw_0211lerach.html. In one recent example, an ostensible consumer class representative filed an objection to the settlement, asserting that he did not realize he had been named as the class representative and that class counsel had mishandled the case. See Decl. by Lead Plaintiff James C. Young, Request to Dismiss Current Designated Counsel, Objection to Settlement, Appearance at Hearing, *In re HP LaserJet Printer Litig.*, No. CV 07-0667 AG (RNBx) (C.D. Cal. Jan. 4, 2011).

2005, PUB. L. NO. 109-2, § 2(a)(2)-(3), 119 STAT. 4, 4 (Feb. 18, 2005).

Plaintiffs' lawyers targeting the automotive industry already have forced a wide variety of money-driven litigation under Rule 23(b)(2). For example, one federal district court certified an antitrust class action—premised on sprawling allegations of an anticompetitive conspiracy between domestic automakers and several Global Automakers members to prevent new Canadian vehicles from being imported into the United States—under Rule 23(b)(2). See *In re New Motor Vehicles Canadian Export*, 2006 WL 623591, at *7 (D. Me. Mar. 10, 2006), *rev'd*, 522 F.3d 6 (1st Cir. 2008) (vacating certification because plaintiffs lacked standing to seek injunctive relief). Even though the plaintiffs also sought hundreds of millions—even billions—of dollars in damages under state law, the district court concluded that because "the plaintiffs' federal damages claim * * * has been dismissed," the claims for injunctive relief predominated over any remaining damages claims. *Ibid.*

Other courts have rebuffed plaintiffs' requests for certification under Rule 23(b)(2) as attempted end-runs around the predominance requirement of Rule 23(b)(3). But adoption of a "strength, influence, and authority" standard might change the result. For example:

- In one case, the plaintiffs alleged that automakers and their dealers were violating the antitrust laws in passing along a state tax to car buyers. Although plaintiffs sought treble damages on behalf of every car buyer in Texas during a nine-year period, they tacked on a request for an injunction against future collection of the tax so that they could seek certifica-

tion under Rule 23(b)(2). See *Robinson* v. *Texas Automobile Dealers' Ass'n*, 2003 WL 21756591, at *2 (E.D. Tex. Mar. 25, 2003), rev'd on other grounds, 387 F.3d 416 (5th Cir. 2004).

- Another antitrust plaintiff alleged that the defendants had conspired to inflate the prices of new cars sold or leased in New York during a seven-year period. *In re Mercedes-Benz Antitrust Litig.*, 213 F.R.D. 180, 183 (D.N.J. 2003). To justify certification under Rule 23(b)(2), the plaintiff coupled his request for treble damages with a request for "an injunction against continuing the conspiracy." *Id.* at 186.

- Plaintiffs in another action alleged a transmission defect that could cause the vehicle to "slip into the reverse position while not being placed there by the driver." *Walsh* v. *Ford Motor Co.*, 106 F.R.D. 378, 383 (D.D.C. 1985), *rev'd on other grounds*, 807 F.2d 1000 (D.C. Cir. 1986). The plaintiffs sought to certify immense damages claims under Rule 23(b)(2) because they also requested an injunction ordering the alleged defect repaired. See *id.* at 383-385, 391-392; see also, *e.g.*, *Parks Automotive Group, Inc.* v. *General Motors Corp.*, 237 F.R.D. 567, 569, 573 n.4 (D.S.C. 2006) (similar maneuver by plaintiffs alleging weather-related damage to the paint on some new cars).

- Another product-liability plaintiff justified certification of his damages claim under Rule 23(b)(2) by simply adding a request for an injunction requiring the defendant to "recall" the vehicles—trenching on federal regulators'

> safety-recall authority—and to "return[] the full costs paid for purchase or lease of the defective vehicles." *Rosen* v. *J.M. Auto Inc.*, 2009 WL 7115133, at *1-*2, *10 (S.D. Fla. Jan. 26, 2009) (internal quotation marks omitted).

Under the flexible standard applied below, each of these classes potentially could have been certified under Rule 23(b)(2). Indeed, plaintiffs could invoke the Ninth Circuit's rationale when bringing many automotive-warranty claims that seek a model-wide repair-or-replacement remedy or a recall and inspection to determine whether an asymptomatic part or system had failed. Warranty claims for damages generally would require some showing that a part or system had failed and that the manufacturer failed to repair it when presented with a complaint. That analysis is inherently individualized. Yet add a prayer for injunctive relief—perhaps to recall, inspect, and repair all vehicles, or to replace all parts with a higher-than-normal failure rate even if they had not failed in a particular vehicle—and the only thing necessary for class certification would be a conclusion that injunctive relief had more "strength, influence, and authority" than the accompanying claims for damages, especially claims seeking "restitution" for the supposedly diminished value of a functioning part that had an excessive tendency to fail.

The risk for abuse is obvious. A plaintiff could sue an automaker for allegedly causing the cigarette smell in his car, so long as he can concoct a theory by which the air conditioning system is to blame. An individual claim could be defeated on the merits or settled for nuisance value. But under the decision below, the plaintiff might obtain class certification for a colossal damages claim merely by asking in addition for an order compelling the automaker to repair or replace the air conditioner in every car. A nuisance lawsuit could become a threat to the company's bottom line simply by seeking a broad injunction.

If the ruling below stands, similarly dubious class actions will proliferate. That would benefit no one but a small segment of the plaintiffs' bar.

II. THIS COURT SHOULD ARTICULATE A CLEAR AND COHERENT DEFINITION OF THE COMMONALITY REQUIREMENT IN RULE 23(A)(2).

This Court directed the parties to address whether the class certified in the order under review satisfied the threshold requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy. As petitioner demonstrates, the class does not meet the last three requirements. Pet. Br. 18-33.

We focus here on the proper analysis of commonality: whether "there are questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). What constitutes a "question[ ] of law of fact common to the class" is significant for two reasons. First, the lower federal courts have so diluted the commonality requirement that it is "easily met in most cases." 1 NEWBERG ON CLASS ACTIONS, *supra*, § 3:10. As the leading treatise has observed, because courts "have given [this requirement] a "permissive application," "common questions have been found to exist in a wide range of contexts." 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1763 (3d ed. Supp. 2010).

Second, and more importantly, the definition of commonality has a profound effect on the analysis required for certification under Rule 23(b)(3), which echoes Rule 23(a)(2) in requiring that "the questions of law or fact common to class members *predominate* over any questions affecting only individualized class members." How a court defines a "question * * * common to [the] class" necessarily affects which questions fall on which side of the line drawn in Rule 23(b)(3) between issues consistent with class treatment and issues requiring individual resolution.

As we explain below, this Court should define a "common" question to mean a question amenable to class-wide proof, disapproving the frequent and inappropriate use of legal abstractions to support certification of deeply individualized actions. And the Court should specifically disapprove (or severely limit) two components of the commonality analysis used to certify the class in the order under review. First, the court held that plaintiffs can establish commonality merely by presenting evidence tending to suggest that the class was affected by a common policy or practice, permitting them the advantages of class status (including settlement leverage) while they try to establish the predicate for class-wide cohesion. Second, the court adopted a novel "sampling" technique to shoehorn selected individualized issues into the class action, while sidestepping the rest. Each of these errors increases the likelihood that putative class actions will be inappropriately certified.

A. A "Common" Question Under Rule 23(a) May Not Be Abstract Or Immaterial, But Rather Must Be An Element (Or Subcomponent) Of A Properly Defined Claim That Is Amenable To Class-Wide Common Proof.

The "question of law or fact common to the class" should not be defined so abstractly that any common legal theory or shared factual circumstance would weigh on the "common" side of the balance. The commonality requirement should be defined in accord with its purpose of helping to sift actions that are susceptible to class resolution from those that are not, both as a threshold requirement for all class actions and as one side of the balance in Rule 23(b)(3). As the Court has observed, a class action provides a fair and economical means to litigate disputes that raise questions that apply "*in the same manner* to each member of the class," and thus may be proved through one unified inquiry rather than many. *Califano* v. *Yamasaki*, 442 U.S. 682, 701 (1979) (emphasis added). For an issue to be common, it must be at least "unlikely that differences in the factual background of each claim will affect the outcome of the legal issue." *Ibid.* As a consequence, a "question[] of law or fact common to the class" must be a question that not only shares characteristics across the class members' individual claims, but that also can be resolved—consistent with due process—through common proof on a class-wide basis.

As indicated above, many courts have defined "common" issues so broadly that they necessarily appear in almost any putative class action and predominate far more often than they should. For example, in a product liability action, whether a manufacturer violated a duty to warn of an alleged danger turns in part on the individualized inquiry into whether the omitted warning would have prevented the harm. See, *e.g.*, *Koken* v. *Black & Veatch Constr., Inc.*, 426 F.3d 39, 45 (1st Cir. 2005). Yet courts often deem this question a common one. See, *e.g.*, *Keilholtz* v. *Lennox Hearth Prods., Inc.*, 268 F.R.D. 330, 343 (N.D. Cal. 2010). Moreover, some courts decline to identify the issues of law properly in the case, characterizing disputes over the plaintiff's requirement of proof as themselves "common" issues supporting class certification. Those courts eschew proper evaluation of the *elements* of the pleaded claims at the class-certification stage, viewing that inquiry as an inappropriate and premature evaluation of the merits.

But that is not so. For a question to be "common" to the class so as to weigh in the balance, it must be a question properly presented by the case. Otherwise the mere assertion of a groundless legal theory would be sufficient to force class proceedings. The Ninth Circuit appears to have avoided resolving such a question here. See Pet. App. 53a-79a. While we take no position on that question's proper resolution, we urge the Court to hold that the lower courts have a duty to determine which purportedly common questions are *legitimately* at issue before relying on those questions to support certification. Determining whether and how a question must or can be proved does not inappropriately predetermine the merits, so long as the court does not decide whether the necessary element *has* been proved.

B. A Dispute Over The *Existence* Of A Common Practice Or Policy Affecting Class Members Is Not A "Common Question Of Law Or Fact" Under Rule 23(a).

The cohesion of many properly certified classes hinges on the common question whether a particular common policy is unlawful. Unless the common policy exists, however, there can be no common question. The court below, like some other courts, has short-circuited this inquiry to permit certification of a class of plaintiffs precisely in order to inquire into the existence of a common policy that might support the adjudication of dispositive questions using class-wide common proof. That course improperly permits plaintiffs to derive the benefits and leverage of class certification in order to bolster their case for certification itself. While a court's determination whether a common policy exists (and thus permits class-wide determination of its lawfulness) need not be final, the court cannot defer the determination with one hand while with the other certifying a class whose cohesion depends on the determination's outcome.

In this case, the plaintiffs contend that Wal-Mart has a *de facto* policy of delegating pay and promotion decisions on "excessively subjective" terms, which allegedly leads to discrimination against female employees. Pet. App. 80a. Assuming that such a policy exists, whether it constitutes discrimination under Title VII might be a common question under Rule 23(a)(2). But Wal-Mart denied that any such policy exists, and submitted its own contrary evidence to demonstrate that determining whether its employees were subjected to unlawful discrimination would require considering a welter of individualized evidence. *Id.* at 53a-79a, 110a & n.56. Rather than resolve this disagreement, the Ninth Circuit held that "[t]he disagreement *is* the common question, and deciding which side has been more persuasive is an issue for the next phase of the litigation." *Id.* at 71a.

That approach fundamentally misunderstands commonality under the Rule. As this Court has explained, when a common question may be resolved "in the *same* manner [for] *each* member of the class," a class action "saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." *General Telephone Co.* v. *Falcon*, 457 U.S. 147, 155 (1982) (quoting *Califano*, 442 U.S. at 701) (emphasis added). But the Ninth Circuit focused exclusively on whether, viewed in isolation, the *plaintiffs'* evidence raised a common question; the court declined to determine whether the common policy that would permit common, class-wide resolution of a significant issue actually *existed*.

"Properly understood," however, the commonality inquiry "turns on the capacity of a unitary proceeding to yield common answers" to a question that would advance the litigation. Richard A. Nagareda, *Common Answers for Class Certification*, 63 VAND. L. REV. EN BANC 149, 154 (2010). In determining commonality, "courts should determine whether common answers more likely than not exist, based upon the evidence and legal argumentation offered *both* ways." *Ibid.* (emphasis added). The court may reconsider its answer as the case progresses and evidence comes to light. Rule 23(c)(1)(C) provides a means to correct errors in class-certification orders that are revealed by further evidence. But the court must determine whether common issues *exist* at the certification stage; a court cannot certify a class for the purpose of proving a necessary premise for its own certification.

By refusing to resolve whether plaintiffs had established the existence of a common policy affecting class members, the court below paid only lip service to this Court's command to "evaluate carefully the legitimacy of the named plaintiff's plea that he is a proper class representative under Rule 23(a)," and to ensure "after a rigorous analysis" that the requirements of Rule 23(a) have been met. *Falcon*, 457 U.S. at 160-161. As other courts have recognized, it is not sufficient for a plaintiff simply to present evidence suggesting that the claims at issue may turn on a common question. Rather, the plaintiff must affirmatively prove it.[6]

The Ninth Circuit's approach to commonality could lead to the improper certification of class actions in contexts having nothing to do with either employment or invidious discrimination. For example, plaintiffs suing automobile makers and dealers often attempt to manufacture a common question warranting class certification by alleging the existence of a *de facto* "policy" of some sort—such as to conceal an alleged defect, or to deny full repairs for it. See, *e.g.*, *Veal* v. *Crown Auto Dealerships, Inc.*, 236 F.R.D. 572, 580-581 (M.D. Fla. 2006) (class action plaintiff "alleg[ed] a common scheme and course of conduct" to deceive car buyers about value of the "Etch product"). But if it were enough for the plaintiff to present *some* evidence of the alleged policy—such as declarations from a handful of other plaintiffs who felt misled—then the class could be certified regardless of a defendant's proof that it made disclosures to particular customers and rendered the proper resolution of any class member's claim dependent on individualized factual determinations.[7]

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[6] See, *e.g.*, *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 322 (3d Cir. 2008) (district court should have resolved dispute over whether there was class-wide antitrust injury); *In re Initial Public Offering Sec. Litig.*, 471 F.3d 24, 42-43 (2d Cir. 2006) ("*IPO*") (requiring proof, not merely "some showing," of "the existence of an efficient market to invoke" fraud-on-the-market "presumption").

The potential efficiency gains from certifying a class action would be realized only if the alleged common policy of deceiving customers in fact exists. But if the evidence demonstrates that the existence of such a policy is doubtful, the case for certification is equally suspect. To certify first and ask questions later improperly treats a question that should be a prerequisite for class certification as *itself* a common question justifying certification.

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[7] The vague allegations made in litigation against automakers asserting a "policy" to deceive consumers or to deny warranty claims have nothing in common with the "pattern or practice" discrimination actionable under Title VII. There is no analogue in consumer-fraud and product-liability cases to the *Teamsters* presumption of discrimination against each class member that follows upon a finding of a pattern or practice of discrimination. See *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 358 (1977). Should this Court find commonality satisfied here, it should make clear that its ruling is limited to claims under Title VII and does not resolve the showing necessary to establish commonality for other causes of action.

C. A Question Not Susceptible To Common Proof Cannot Be Made "Common" By Sampling The Individualized Evidence Needed To Answer It.

The Ninth Circuit more than once has acknowledged that purported "class" claims in huge classes cannot be resolved without individualized evidence. See Pet. App. 84a, 88a; see also *Hilao v. Estate of Marcos*, 103 F.3d 767, 785-787 (9th Cir. 1996) (claims of 10,000 plaintiffs claiming to have been harmed by Marcos regime in Philippines). Rather than acknowledge that this defeated predominance under Rule 23(b)(3) (*Hilao*) or the fundamental cohesion required under Rule 23(b)(2), that court simply has relabeled the problem as one of "manageability." Pet. App. 105a. To address that concern, the court proposed sampling techniques. *Id.* at 105a-110a.

Under that approach, the district court would conduct a few "sample" trials to decide individualized issues on elements of the plaintiffs' discrimination claims, and then assume that the same percentage of other class members would prevail on that element. See Pet. App. 110 n.56 (Wal-Mart may "present individual defenses in the randomly selected 'sample cases,' thus revealing the approximate percentage of class members whose unequal pay or nonpromotion was due to something *other* than gender discrimination"). But sampling a series of individual trials and then extrapolating their results to thousands or millions more plaintiffs violates Rule 23 and elementary principles of due process.

The impossibility of considering all of the necessary evidence in one proceeding is proof positive that the claims are not susceptible to common proof, as

Rule 23(a)(2) requires. Moreover, this probabilistic, "rough justice" approach to commonality almost certainly would make a defendant liable to class members who could not prove their claims in an individual trial. See Pet. Br. 36-38. As petitioner has demonstrated, this proposal violates due process and the Rules Enabling Act, 28 U.S.C. § 2072(b), by allowing a person who could not recover on her own nonetheless to recover damages based on harms caused to others. Indeed, for these reasons, the Fifth Circuit has rejected the adoption of a "sampling" approach to the trial of asbestos claims. See *Cimino* v. *Raymark Indus., Inc.*, 151 F.3d 297 (5th Cir. 1998).[8]

Unless this Court condemns adjudication by sampling, such probability-based liability would encourage the pursuit of a limitless number of illegitimate lawsuits involving proposed classes of consumers that were defined irrespective of actual exposure to, or injury from, the challenged conduct of the defendant. In every case, an overbroad class could be defined and liability whittled in bulk by the use of sampling techniques—but only those uninjured parties who were unfortunate enough to be included in the sample would risk being excluded from a windfall based on others' injuries.

Under traditional class-action principles, many product-liability lawsuits against automakers are not suitable for class-wide adjudication precisely because, even when a vehicle component is allegedly defective, the defect does not manifest in most vehicles. An individualized inquiry is therefore needed to determine whether any given vehicle has the problem. The tort law of almost every state bars recovery when an allegedly defective vehicle has never manifested the alleged defect. See, *e.g.*, *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1017 (7th Cir. 2002) ("No injury, no tort, is an ingredient of every state's law."); *Briehl* v. *General Motors Corp.*, 172 F.3d 623, 627-628 (8th Cir. 1999) (collecting cases). And even when a vehicle suffers damage, often the damage could have resulted from other causes, such as driver misuse. These individualized defenses on injury and causation often lead courts to reject requests for class certification. See, *e.g.*, *Cole* v. *General Motors Corp.*, 484 F.3d 717 (5th Cir. 2007) (affirming denial of certification of class of car buyers alleging that a defect causes unexpected side air-bag deployments).

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[8] In addition, to the extent that different juries hear the trials of the common issues and the "sample" cases, the Ninth Circuit's "sampling" approach runs afoul of the defendant's Seventh Amendment right not to have the verdict of one jury reexamined by another. See *In re Rhone-Poulenc Rorer*, 51 F.3d 1293, 1303 (7th Cir. 1995).

Class-action plaintiffs' counsel have responded by recharacterizing their claims under theories of consumer protection or warranty. For example, the plaintiff might allege that the automaker violated a state consumer-protection law by inadequately disclosing the possibility that a defect might affect performance. See, *e.g.*, *Chamberlan* v. *Ford Motor Co.*, 223 F.R.D. 524, 525 (N.D. Cal. 2004), Rule 23(f) pet. denied, 402 F.3d 952 (9th Cir. 2005). Or plaintiffs might assert that the mere possibility that a vehicle component might fail is itself a breach of warranty entitling the purchaser to immediate recovery for any diminution in the value of the vehicle, or restitution for an excessive price paid.

Claims of this type are brought in an effort to render individualized issues of causation and injury irrelevant to class certification. Moreover, these claims are particularly susceptible to abuse because any hypothetical vehicle defect could support a claim. So long as a lawyer (or hired expert) can imagine a way in which a vehicle component might fail or degrade, then all purchasers could state a claim for damages—even if the alleged defect rarely if ever manifests itself or would almost never be the cause of any damage.

Plaintiffs have succeeded in obtaining class certification on these theories in a few cases. For example, in one case, the plaintiffs alleged that a defect in the alignment of certain Land Rover models could cause excessive tire wear in a small fraction of vehicles. *Gable* v. *Jaguar Land Rover N. Am., LLC*, 2008 WL 4441960, *1 (C.D. Cal. Sept. 29, 2008). The district court declined to certify a class of all Land Rover purchasers because individualized issues on causation and injury swamped any common issues. *Id.* at *3. But the Ninth Circuit reversed, pointing to a diminished-value theory of liability that (in its view) rendered these individualized defenses irrelevant. See *Wolin* v. *Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1173-1174 (9th Cir. 2010).

Similarly, in *Daffin* v. *Ford Motor Co.*, 458 F.3d 549 (6th Cir. 2006), a plaintiff alleged that a defect in his van's throttle body assembly caused the accelerator to stick. *Id.* at 550. Although the alleged defect would not cause accelerator problems in the vast majority of vans, and unintended acceleration could result from numerous other issues—such as driver error— the court nonetheless affirmed the certification of a class of all van purchasers on a diminished-value theory. *Id.* at 554; see also, *e.g.*, *Chamberlan*, 402 F.3d at 955 (affirming class certification on a diminished-value theory of claim that alleged defect in manifold might lead to coolant leaks in some vehicles).

Another recent decision involves a variation on the theme. In *Marcus* v. *BMW of North America, LLC*, 2010 WL 4853308 (D.N.J. Nov. 19, 2010), a car buyer sued BMW for the cost of replacing his damaged run-flat tires. When he purported to represent a class of BMW car buyers, BMW pointed out that that there was no common proof: The nail that had punctured the named plaintiff's tire would have destroyed any tire, and given the absence of a defect in the run-flat tires, nothing unified the claims of anyone else whose tires might have been damaged. See *id.* at *4. But a class was certified based on the plaintiff's diminished-value theory that the class had not been adequately informed of how expensive it would be to replace a damaged run-flat tire; the "common" issue was whether BMW knew "that the[tires] were costly and difficult to repair." *Ibid.*; see also *In re Mercedez-Benz Tele Aid Contract Litig.*, 257 F.R.D. 46, 73 (D.N.J. 2009) (certifying claim that Mercedes failed to inform customers that third party supplier might not maintain telecommunications network for road-side assistance service in perpetuity, because "each class member got something less than he or she was promised").

These cases remain outliers. Most courts have rejected plaintiffs' attempts to skirt the individualized issues of injury and causation in product-liability and warranty cases by pursuing a diminished-value claim. As the Seventh Circuit has explained, because "tort law fully compensates those who are physically injured, * * * any recoveries by those whose products function properly mean excess compensation." *Bridgestone/Firestone*, 288 F.3d at 1017. For this reason, plaintiffs' attempts to obtain certification of classes defined irrespective of class members' actual injury often have failed.[9]

But approval of a sampling approach—if extended beyond the employment-discrimination context—could nullify both the commonality screen in Rule 23(a)(2) and the predominance analysis in Rule 23(b)(3). Plaintiffs would not have to rely on a diminished-value theory that few states recognize. Rather, plaintiffs could simply aggregate thousands or millions of consumers in an all-buyers or all-owners class, and then circumvent their inability to try the claims through common proof by proposing to consider individualized evidence in "sample" cases. See Pet. App. 110a n.56.

That result, however, would be profoundly unfair to both the defendant and the absent class members. The defendant would be deprived of the right to present all defenses to each plaintiff's claim, thus "abridg[ing]" the defendant's rights in violation of the Rules Enabling Act, 28 U.S.C. § 2072(b). In addition, that Act, Article III, and due process alike would be violated if "individual plaintiffs who could not recover had they sued separately *can* recover only because their claims were aggregated with others' through the procedural device of the class action." *Philip Morris U.S., Inc. v. Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J., in chambers) (suggesting due process limits on state-court procedure with that result). And the absent class members with meritorious claims would be undercompensated in order to provide a windfall recovery to class members who could not prevail on their own.

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[9] See, *e.g.*, *Briehl*, 172 F.3d at 628-629; *Angus* v. *Shiley Inc.*, 989 F.2d 142, 148 (3d Cir. 1993); *Carlson* v. *General Motors Corp.*, 883 F.2d 287, 297-298 (4th Cir. 1989); *Chin* v. *Chrysler Corp.*, 182 F.R.D. 448, 460 (D.N.J. 1998); *In re Air Bag Prods. Liab. Litig.*, 7 F. Supp. 2d 792, 805 (E.D. La. 1998); *Feinstein* v. *Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 603 (S.D.N.Y. 1982).

Moreover, the actual trials of sample cases would almost certainly never take place. Defendants could not assume the risk, because the consequences of any cases lost would be multiplied a thousandfold or more. Settlement would become nearly inevitable if certification were that easy. While plaintiffs always have the option to pursue individual actions or actions on behalf of a properly defined but smaller class, for the defendant, class certification often *is* the whole ball game. See page 14, *supra*. The enormous potential liability forces a settlement regardless of the merits.

If class certification became automatic because individualized issues of causation and injury (and thus standing and Article III jurisdiction) may be pigeonholed as "manageability" issues and resolved through sampling, class certification would become the primary (but fundamentally unfair) mode of dispute resolution. Congress never intended Rule 23—and Rule 23(a)(2) in particular—to have that result.

* * * * *

The commonality requirement of Rule 23(a)(2) is not a simple pleading exercise, but provides a critical tool for separating cases that can be resolved through common proof from those that cannot. Failing to articulate firm, concrete, and practically applicable standards for commonality (and thus for the Rule 23(b)(3) predominance analysis that incorporates it) would allow certification of class actions that could never be tried consistent with due process. The Court should clarify the Rule's meaning to prevent that result.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 2011

AMICUS
CURIAE
BRIEF

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No. 10-277

IN THE

Supreme Court of the United States

WAL-MART STORES, INC.,
Petitioner,

v.

BETTY DUKES, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION AND NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amici Curiae will address the question

Whether the class certification ordered under Federal Rule of Civil Procedure 23(b)(2) was consistent with Rule 23(a).

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, *amicus* Atlantic Legal Foundation states that it is a Pennsylvania not-for-profit corporation. It does not have shareholders, and is not the parent or subsidiary of any other corporation that is publicly held.

Pursuant to Rule 29.6, *amicus* New England Legal Foundation states that it is a Massachusetts not-for-profit corporation. It does not have shareholders, and is not the parent or subsidiary of any other corporation that is publicly held.

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Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 Colum. L. Rev. 1872 (2006) 18

Thomas E. Willging *et al.*, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U.L. Rev. 74 (1996) 17-18

INTEREST OF *AMICI CURIAE*[1]

Amicus Curiae Atlantic Legal Foundation is a nonprofit, nonpartisan public interest law firm that provides effective legal advice, without fee, to parents, scientists, educators, and other individuals and trade associations. Atlantic Legal Foundation is guided by a basic but fundamental philosophy: Justice prevails only in the presence of reason and in the absence of prejudice. Accordingly, Atlantic Legal Foundation promotes sound thinking in the resolution of legal disputes and the formulation of public policy. Among other things, the Atlantic Legal Foundation's mission is to advance the rule of law in courts and before administrative agencies by advocating limited and efficient government, free enterprise, individual liberty, school choice, and sound science.

Atlantic Legal Foundation's leadership includes distinguished legal scholars and practitioners from across the legal community. Atlantic Legal Foundation has an abiding interest in the application of sound principles of science and other disciplines to expert evidence, and has served as *amicus curiae* or counsel for *amicus curiae* in numerous cases including, of particular relevance here, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

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[1] Pursuant to Rule 37.3(a), all parties have consented to the filing of this brief. Copies of those consents have been lodged with the Clerk.

Pursuant to Rule 37.6, *amici curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

Amicus Curiae New England Legal Foundation is a non-profit, nonpartisan public interest law firm, incorporated in Massachusetts in 1977. It is headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth for the United States and the New England region, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations from all parts of New England and the United States.

NELF has regularly appeared in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities.

Because class actions can increase greatly the costs and burdens of litigation for business defendants, this case raises just such an issue of general economic significance for the business community. NELF has consistently advocated strict enforcement of Rule 23's requirements and has filed *amicus curiae* briefs opposing certification of class actions in cases where, NELF has argued, the plaintiffs have failed to offer adequate evidence of commonality. *See, e.g., Salvas v. Wal-Mart Stores, Inc.*, 453 Mass. 337, 893 N.E.2d 1187 (Mass. 2008); *Macomber v. Travelers Property and Cas. Corp.*, 273 Conn. 617, 894 A.2d 240 (Conn. 2006).

SUMMARY OF THE ARGUMENT

In their effort to satisfy the commonality requirement of Rule 23(a), Plaintiffs relied in part on expert witness William Bielby, who opined concerning the supposed prevalence of gender discrimination in large institutions like Wal-Mart. Bielby's testimony was not adequately scrutinized for reliability by the district court, despite Wal-Mart's motion challenging the testimony under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

Both the district court and the Ninth Circuit erred in failing to acknowledge that the *Daubert* standard applies to expert testimony proffered by plaintiffs in order to satisfy Rule 23's class certification requirements. Instead, the lower courts ruled that a *Daubert* inquiry would intrude on merits issues in a manner supposedly prohibited at the class certification stage and that therefore Rule 23's requirements were satisfied by applying a less demanding standard to evaluate the reliability, and hence admissibility, of Bielby's testimony.

Federal Rule of Evidence 702 and the Court's holding in *Daubert* create a single standard for evaluating the reliability of expert testimony, whether at trial or at the class certification stage of an action. Scrutiny of proffered expert testimony is no less important at the certification stage than at any other part of the litigation process. Indeed, recognizing the important consequences of class certification, this Court has ruled, specifically in the context of Title VII, the Court has ruled that a trial court may certify a class only after it has conducted a "rigorous analysis" to determine that all of Rule 23(a)'s requirements have truly been satisfied. *Gen. Tel. Co. of the Southwest v. Falcon* ("*Falcon*"), 457 U.S. 147 (1982).

Numerous circuit courts have therefore properly ruled that, for the purpose of this "rigorous analysis," a trial court's Rule 23 inquiry may permissibly, and sometimes must, overlap merits issues.

Here the lower courts failed to follow the jurisprudence of this Court and the reasoning of courts in other circuits. They thereby permitted a class to be certified, at least in part, on the basis of expert testimony that was never properly tested for reliability under the *Daubert* standard but was instead admitted under a less rigorous, ad hoc, standard.

The failure to apply sufficiently rigorous standards to Rule 23(a) determinations increases the likelihood that classes will be certified improperly, increasing the li kelihood that defendants will be required to litigate meritless class actions. In such situations, business defendants are faced with the choice between hazarding trial and possible liability for huge money judgments or settling for large sums despite the weakness of the plaintiffs' class claims.

It is to avoid this situation that the Court has required a rigorous analysis of Rule 23(a)'s requirements which, in this case, required a *Daubert* analysis of the expert testimony proffered by the plaintiffs in support of certification.

ARGUMENT

I.

THE CERTIFICATION ORDER IS NOT CONSISTENT WITH RULE 23(a)

There is no dispute that Rule 23(a) requires that the claims of the class meet requirements of numerosity, commonality, typicality, and adequacy of representation. *See Gen. Tel. Co. of the Southwest v. Falcon* ("*Falcon*"), 457 U.S. 147, 157, n. 13 (1982). Further, a class action may be certified only if the court is satisfied, *"after a rigorous analysis,"* that the prerequisites of Rule 23(a) have been satisfied, and these criteria apply to Title VII class actions. *Id.* at 161.

Plaintiffs in this case have not demonstrated that there are sufficient "questions of law or fact common to the class," or that the "claims . . . of the representative parties [that] are typical of the claims . . . of the class," *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 613 (1997).[2]

Plaintiffs rely on three types of evidence to establish typicality and commonality: statistical, sociological, and anecdotal. *Amici* will address the errors of the district court and the Ninth Circuit in their approach to Plaintiffs' sociological evidence.

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[2] "The commonality and typicality requirements of Rule 23(a) tend to merge," and "[b]oth serve as guideposts for determining whether . . . the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Falcon*, 457 U.S. at 157, n.13. *See also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 479 (1978).

Plaintiffs rely heavily on their sociology expert, William Bielby, who opined that Wal-Mart and other large organizations are "vulnerable to gender bias." Pet. App. 195a. This thesis, if accepted, would render every large organization -- public or private, commercial or governmental or non-profit -- open to a Title VII claim.

The Ninth Circuit itself recognized that Bielby merely "interpret[ed] . . . facts that *suggest* that Wal-Mart has and promotes a strong corporate culture – a culture that *may* include gender stereotyping." *Dukes v. Wal-Mart Stores*, 603 F.3d 571 (*en banc*) (9th Cir. 2010), Pet. App. 54a, 192a (emphasis added). The district court recognized that "Bielby's opinions have a built-in degree of conjecture"[3] and that Bielby did not opine on how often gender stereotyping *actually* occurred or that it was common to all class members. Bielby did not opine that Wal-Mart's corporate culture *does in fact* include stereotyping.

Bielby's testimony, even if taken as true, could at most prove that Wall-Mart's employment policies were potentially "vulnerable" to discrimination. J.A.

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[3] Bielby "conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking." *Dukes v. Wal-Mart*, 222 F.R.D. 189, 192 (N.D.Cal. 2004).

525a, but not that any discriminatory practices or procedures that are actionable under Title VII were in fact found at Wal-Mart. In sum, this expert evidence proffered by plaintiffs tends to show, at most, that Wal-Mart's pay and promotion system *could possibly* result in individual disparities, not that it was designed or intended to do so or that it would inevitably or even "more likely than not" do so with respect to members of the class.

Bielby's testimony was nothing more than speculation, *see General Electric Co. v. Joiner*, 522 U.S. 136, 140 (1997), and his conclusions were connected to the data only by his *ipse dixit* and there is too great an analytical gap between the data and the opinion proffered. *Id.* at 146.[4] Moreover, Bielby's evidence did not support plaintiffs' ultimate contention that Wal-Mart discriminated against the putative class.

We submit, however, that this Court need not reach the substance of Bielby's testimony, because both the district court and the Ninth Circuit erred in a significant way by not sufficiently scrutinizing Bielby's evidence to ensure its reliability, and this Court should therefore reverse and either vacate the class certification order or remand for an appropriate, thorough, assessment of Bielby's methodology and whether his testimony "fits" the legal conclusion it was proffered to support.

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[4] As one scholar in the field concluded, Bielby's "research did not meet the standards expected of social scientific research into stereotyping and discrimination." *See* John Monahan *et al.*, *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* 94 Va. L. Rev. 1715, 1747 (2008). Bielby's testimony "explicitly link[ing] general research findings on gender discrimination to specific factual conclusions about Wal-Mart in particular, exceeded the limitations on expert testimony established by the Federal Rules of Evidence and by . . . 'social framework' evidence." *Id.* at 1719.

Wal-Mart moved to strike Bielby's testimony as unreliable and inadmissible, but the district court rejected Wal-Mart's motion, reasoning that it was proscribed from undertaking a "*Daubert*" inquiry under *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). *Dukes v. Wal-Mart Stores*, 222 F.R.D. 189 at 191. The Ninth Circuit affirmed, albeit on somewhat different grounds, holding that *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), does not have "exactly the same application at the class certification stage as it does to expert testimony . . . at trial." Pet. App. 57a n.22. This statement is inexplicable in light of this Court's *Daubert* jurisprudence.

Amici submit that the lower courts erred. Federal Rule of Evidence 702, which governs the reliability of expert testimony and implements *Daubert*, is not limited to trial. Its purpose is to ensure that expert testimony is "relevant and reliable," *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141, 152 (1999), as the basis for decision at all stages of a litigation. Indeed, *Daubert* motions are made and *Daubert* evidentiary hearings are commonly held, at or before the summary judgment stage. Indeed, all three of the "Daubert trilogy" of cases (*Daubert*, *Joiner* and *Kumho Tire*) reached this Court after summary judgment decisions. There is no principled reason why *Daubert* criteria should not be used at the class certification stage, and *amici* contend that they should be.

An assessment of the relevance and reliability of expert evidence is equally important (and for the reasons stated in Point II, *infra*, is especially important) at the class certification stage, when the district court must "assess all of the relevant evidence admitted . . . and determine whether each Rule 23 requirement has been met, just as the judge would resolve a dispute about any other threshold prerequisite for continuing a law-suit . . . ." *In re IPO Sec. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006).

This Court has held that "a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, *after a rigorous analysis*, that the prerequisites of Rule 23(a) have been satisfied." *Falcon*, 457 U.S. at 161 (emphasis supplied). District courts must, perform a rigorous analysis to ensure that each of the prerequisites of Rule 23 have been satisfied, and this will often require looking behind the pleadings to issues overlapping with the merits of the underlying claims. *See Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 677 (7th Cir. 2001); *see also West v. Prudential Securities, Inc.*, 282 F.3d 935, 938 (7th Cir. 2002) ("Tough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives.").

The appropriate scrutiny requires the court to "first determine whether Plaintiffs' expert testimony supporting class certification is reliable." *Unger v. Amedisys Inc.*, 401 F.3d 316, 325 (5th Cir. 2005) (citation omitted) (the court "must engage in a thorough [class certification] analysis, weigh the relevant factors . . . and base its ruling on admissible evidence"); *see also Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 816 (7th Cir. 2010) (per curiam) ("The court must also resolve any challenge to the reliability of information provided by an expert if that information is relevant to establishing any of the Rule 23 requirements for class certification.").[5]

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[5] Here, the district court, applied a "lower" standard in mistaken deference to *Eisen*, and ruled that Bielby's testimony "sufficed," *Dukes v. Wal-Mart Stores*, 222 F.R.D. 137, 155 and was not "so flawed" as to be without "sufficient"probative value. *Dukes v. Wal-Mart Stores*, 222 F.R.D. 189, 192. Plainly, in comparison to a proper *Daubert* evaluation, the judge lowered the bar for admissibility of expert testimony in the context of class certification. Other courts have quite properly rejected this approach. *See IPO*, 471 F.3d at 42 ("We also disavow the suggestion . . . that an expert's testimony may establish a component of a Rule 23 requirement simply by being not fatally flawed."); *id.* ("[T]he important point is that the requirements of Rule 23 must be met, not just supported by some evidence.") (commenting on significance of *Falcon*); *Hydrogen Peroxide Antitrust*

(continued...)

Although the district court in *American Honda* had "definite reservations" about the reliability of the expert's opinions, it declined to conduct a full *Daubert* analysis at the early stage of the proceedings. *Id.* at 814-16. This, the Seventh Circuit held, was an abuse of discretion. *Id.* at 816: "[A] district court must make the necessary factual and legal inquiries and decide all relevant contested issues prior to certification." The Seventh Circuit determined that the lower court's failure to evaluate plaintiff's expert's opinions pursuant to *Daubert* was a return to "provisional" class certification, a practice has been rejected. *Id.* at 817.[6]

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[5](...continued)
Litigation, 552 F.3d 305, 321 (3rd Cir. 2008) (citing *IPO*). As the Third Circuit, in contrast to the district court and circuit court here, has held:

> Expert opinion with respect to class certification, like any matter relevant to a Rule 23 requirement, calls for rigorous analysis. . . . Weighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands.

Id. at 323 (citing *Blades v. Monsanto Co.*, 400 F.3d 562, 575 (8th Cir. 2005)).

[6] This is consistent with the renewed emphasis on trial courts making firm certification decisions after a thorough inquiry into whether a plaintiff satisfies Rule 23

(continued...)

The district court in this case failed to scrutinize Bielby's testimony rigorously, believing that *Eisen* prohibited such a review for purposes of class certification.[7] In this case, the district court applied a "lower" standard under which Dr. Bielby's testimony was found to be not "so flawed" as to be inadmissible. *See Dukes*, 222 F.R.D. 189 at 192. We submit that the "not so flawed" standard is far from the "rigorous analysis" required by *Falcon* and the "searching inquiry" required by *Daubert*.[8]

The Ninth Circuit correctly rejected the district court's reading of *Eisen* as prohibiting an inquiry into facts overlapping with the merits of the case in

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[6](...continued)
requirements, the provision of Rule 23(c)(1)(C) permitting "conditional" certification was deleted in the amendments. As the Advisory Committee Notes describe this change, "A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met."

[7] As noted, the district court applied the "not fatally flawed" standard, which has been expressly rejected by the Second Circuit in *IPO*, 471 F.3d 24, 42; *Hydrogen Peroxide*, 552 F.3d 305, 318. This Court should likewise hold that the "fatally flawed" standard is inconsistent with Fed.R.Evid. 702 and *Falcon*.

[8] "Since *Daubert*, moreover, parties relying on expert evidence have had notice of the exacting standards of reliability such evidence must meet." *Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000).

analyzing the Rule 23 requirements, but it erred by adopting the equally mistaken corollary that *Daubert* should not apply at the class certification stage because it is a merits-type inquiry. *See* Pet. App. 22a-25a, 31a, 57a n.22.[9]

The fact that at the class certification stage a *Daubert* review of an expert's testimony might overlap the merits in some respects in no way distinguishes such a review from any other aspect of the rigorous analytical inquiry the trial court must conduct in order to reach a definitive decision on certification. *American Honda*, 600 F.3d 813, 815; *Hydrogen Peroxide*, 552 F.3d at 316.[10]

The Ninth Circuit's view that *Daubert* should not apply at the class certification stage because it is a merits-type inquiry is neither supported by reason nor by the jurisprudence of this Court, and marks a departure from other federal courts of appeal. If left undisturbed, the Ninth Circuit's opinion will have far-reaching and adverse consequences on defendants and absent class members. The Seventh Circuit has most explicitly directly drawn the proper conclusion concerning *Daubert* and class determination, writing in a recent decision:

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[9] *Eisen* merely restricts a court from expanding the Rule 23 certification analysis to include consideration of whether the proposed class is likely to prevail on the merits.

[10] *See* Advisory Committee Notes to 2003 Amendment to Rule 23(c)(1)(A):

> Although an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. In this sense it is appropriate to conduct controlled discovery into the merits, limited to those aspects relevant to making the certification decision on an informed basis.

> In *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir.2001), we held that a district court must make whatever factual and legal inquiries are necessary to ensure that requirements for class certification are satisfied before deciding whether a class should be certified, even if those considerations over-lap the merits of the case. . . . But we have not yet specifically addressed whether a district court must resolve a *Daubert* challenge prior to ruling on class certification if the testimony challenged is integral to the plaintiffs' satisfaction of Rule 23's requirements. . . . We hold that when an expert's report or testimony is critical to class certification, as it is here, . . . a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion. That is, the district court must perform a full *Daubert* analysis before certifying the class if the situation warrants.

Am. Honda Motor Co., 600 F.3d at 815-16.

The Seventh Circuit's decision is surely the correct one for the certification stage of litigation. Only a full *Daubert* analysis of expert testimony comports, with the rigorous analysis mandated for Rule 23 certification issues generally by this Court in *Falcon*. To employ a lower, less rigorous standard, as the district court here did, represents an approach that is inconsistent with both *Falcon* and *Daubert* and should be rejected.

The lower courts' views should be rejected for the additional reason that a *Daubert* review is especially appropriate and necessary at the class certification stage because, in many instances, the expert's testimony proffered in support of certification will never be subject to scrutiny again in the case. *See Szabo*, 249 F.3d 672, 676 ("[A]n order certifying a class usually is the district judge's last word on the subject; there is no later test of the decision's factual premises (and, if the case is settled, there could not be such an examination even if the district judge viewed the certification as provisional).")

II.

PERMITTING COURTS TO CONSIDER EXPERT TESTIMONY ON A CLASS CERTIFICATION MOTION WITHOUT A *DAUBERT* ANALYSIS DOES NOT SERVE THE INTERESTS OF JUSTICE

As a practical matter, class certification can create tremendous pressure on a defendant to settle. *See, e.g., Hydrogen Peroxide*, 552 F.3d 305, 310.

Because of the aggregation of individual claims, class certification "turns a $200,000 dispute . . . into a $200 million dispute," creating a "bet-the-company" situation for a defendant that "may induce a substantial settlement even if the [plaintiffs'] position is weak." *Szabo*, 249 F.3d at 675. "An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Advisory Committee Notes to 1998 Amendment to Fed. R. Civ. P. 23(f).[11] One scholar has calculated that "[t]he percentage of certified class actions terminated by a class settlement ranged from 62% to 100%, while settlement rates (including stipulated dismissals) for cases not certified ranged from 20% to 30%." Thomas E. Willging *et al.*, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U.L. Rev. 74, 143

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[11] Fed. R. Civ. P. 23 was amended expressly to ameliorate this potentially distorting effect of class certification by creating a discretionary right to interlocutory appellate review.

(1996); *see also* Gary M. Kramer, *No Class: Post-1991 Barriers to Rule 23 Certification of Across-The-Board Employment Discrimination Cases*, 2000 Lab. Law. 415, 416. *See also* Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 Colum. L. Rev. 1872, 1873 (2006)("[C]lass certification operates most disturbingly when the underlying merits of class members' claims are most dubious.").

This Court recently cautioned that certain class actions may present prime opportunities for plaintiffs to exert pressure upon defendants to settle weak claims. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). The potential for unwarranted settlement pressure "is a factor that should be weighed in the certification calculus." *Hydrogen Peroxide*, 552 F.3d 305 (3d Cir. 2008).

This case illustrates the potentially ruinous impact of class certification after inadequate inquiry into whether the Rule 23 requirements have been met. The putative class consists of approximately 1.5 million female Wal-Mart employees who worked in more than individual 3,400 stores scattered throughout the United States, were allegedly had a myriad of experiences unique to their specific job titles, employment histories and past job performance, different backgrounds, at different store locations, and with different store managers, among other factors.[12]

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[12] As noted in Point I, the named plaintiffs sought

(continued...)

In view of the fact that certification of such a huge class creates immense financial exposure (even for a company Wal-Mart's size), together with corresponding pressure to settle regardless of the merits of the class claims, this Court should require that no defendant be placed in such a position as a result of a Rule 23(a) analysis of commonality that short-circuits a searching scrutiny under the *Daubert* standard.

In short, fundamental fairness requires that expert witnesses proffered to bolster a plaintiff's motion for class certification be subject to the standard that this Court has established for "any and all scientific testimony," *Daubert*, 509 U.S. at 589, and not to some "lower" standard.

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[12](...continued)
class certification by portraying themselves as representatives of a uniform class suffering a common injury arising from common employment policies, relying in critical part on Bielby's challenged testimony.

CONCLUSION

For the foregoing reasons, amici curiae Atlantic Legal Foundation and New England Legal Foundation request that the Court find that the certification order is inconsistent with Rule 23(a), reverse the order of the Court of Appeals for the Ninth Circuit and decertify the class, or, in the alternative, remand for the "rigorous analysis" required by *Falcon* and the "searching inquiry" required by *Daubert*.

January 2011

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AMICUS
CURIAE
BRIEF

14

No. 10-277

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IN THE

Supreme Court of the United States

WAL-MART STORES, INC.,

Petitioner,

v.

BETTY DUKES, PATRICIA SURGESON,
EDITH ARANA, KAREN WILLIAMSON,
DEBORAH GUNTER, CHRISTINE KWAPNOSKI,
CLEO PAGE, on behalf of themselves and all
others similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE CALIFORNIA EMPLOYMENT LAW COUNCIL IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The California Employment Law Council (CELC) is an organization of approximately 50 major employers, many of them nationwide, that operate in the Ninth Circuit. CELC regularly files amicus briefs in major employment cases. CELC's objective is fair and moderate employment laws, fair to employer and employee alike.

All of CELC's members are subject to Title VII of the Civil Rights Act of 1964 (Title VII) and other employment-related statutes and regulations. All of CELC's nationwide members operate in California. Therefore, anyone desirous of bringing a nationwide class action against any of the CELC members has the option of doing so in the Ninth Circuit. As the strong dissent of Judge Ikuta to the 6-5 *en banc* decision makes clear, nationwide class certification against such employers is virtually automatic in the Ninth Circuit after its *en banc* decision since there are only three prerequisites, all easily available in most circumstances: (1) the opinion of an expert such as Professor Bielby that white male decisionmakers, because of ingrained stereotypical views, cannot help discriminating if allowed to exercise subjective judgments; (2) a handful of uncorroborated, untestable perceptions of discrimination by class members (in the instant case one for every 12,500 class members); and (3) aggregated nationwide statistics which, based on an untestable choice of variables by the plaintiffs' expert, shows statistical significance against the class in question. (Statistical significance is based on two factors: degree of disparity and sample size. With the large sample size of any nationwide certification, the smallest of disparities shown by choice of variables will yield statistical significance.) *See* Dissent, *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 652 (9th Cir. 2010). ("Put simply, the door is now open to Title VII lawsuits targeting national and international companies, regardless of size and diversity, based on nothing more than general and conclusory allegations, a handful of anecdotes, and statistical disparities that bear little relation to the alleged discriminatory decisions.") Such a rule virtually guaranteeing nationwide class certifications against any nationwide employer that operates in the Ninth Circuit puts even the most non-discriminatory of America's nationwide employers at unfair risk.

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[1] Counsel for *amicus curiae* authored this brief in its entirety. He has been CELC's General Counsel for over 25 years. He was one of the lawyers representing Wal-Mart in the district court and was listed as one of the counsel of record on the panel but not the *en banc* appeal. No person or entity, other than the *amicus curiae* and its members, made a monetary contribution to the preparation or submission of this brief. Wal-Mart is not a member of CELC. Both parties have consented in writing to the filing of this brief, and the consent letters have been filed with the Clerk.

SUMMARY OF ARGUMENT

This brief focuses only on the principal allegation in the case, allegedly discriminatory pay decisions made in a subjective fashion at the store level by the store managers of Wal-Mart's 3,400 stores. CELC will focus on two issues:

A. The Store-By-Store Statistics Differ Dramatically and Destroy Commonality and Typicality, and Demonstrate the Necessity for a 23(b)(3) Predominance Analysis.

Plaintiffs relied on three categories of evidence in seeking a nationwide class certification: (1) the opinion of a sociologist; (2) a handful of anecdotes; and (3) statistics aggregated across region and nation. Only Wal-Mart's statistician did a store-by-store analysis.[2] The following is undisputed: 90% of Wal-Mart stores showed no statistically significant disparity with respect to male/female pay, 2.5% of the stores showed a statistical disparity *which favored women*, and 7.5% of the stores showed a statistical disparity which favored men. The dissent discussed the undisputed nature of the store-by-store analysis, with a citation to the district court opinion, at *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 630 (9th Cir. 2010).

B. Any Trial Plan Compliant with § 706(g) and This Court's *Teamsters* Line of Cases Would Require Individual Hearings Inconsistent with the Simple Injunctive Relief Cases for which 23(b)(2) Was Designed.

The majority in each of the three Ninth Circuit opinions has found it impossible to come up with a trial plan that is consistent with § 706(g) and this Court's *Teamsters* line of cases. The original panel, by a 2-1 vote, with Judge Pregerson writing the majority opinion, affirmed in all respects, including affirming the trial court's trial plan. Under that trial plan, at Phase 1, the jury would determine whether there was a pattern or practice of discrimination. If so, there would be no Phase II – based on expert opinion the total disparity in pay would be converted to a lump sum, which, along with any punitive damages awarded, would be distributed to discriminatee and non-discriminatee alike by formula. This would mean, for example, that any female employee under the male average (half of male employees are of course under the male average) working at a store where the statistics indicated females were favored or a store where the statistics showed no favoritism whatsoever would receive monetary relief. Following a petition for *en banc* hearing, which pointed out that the trial plan totally contradicted this Court's *Teamsters* line of cases (*Teamsters v. United States*, 431 U.S. 324 (1977)), and the statute, particularly § 706(g) (court cannot award back pay to non-discriminatees), the panel totally withdrew their earlier opinion, totally rewrote it, and expressed no opinion on the district court's trial plan, stating that the panel was confident that the trial court could construct a trial plan which was defensible. Rehearing *en banc* was then granted, and by a 6-5 vote, the *en banc* court majority (Judges Reinhardt, Hawkins, Graber, Fisher, Paez, and Berzon) affirmed the nationwide certification, with two exceptions: It directed the trial court to reconsider for possible 23(b)(3) certification punitive damages and relief for persons who were ex-employees at the time the complaint was originally filed. As was the case with the second panel opinion, the *en banc* majority refused to rule on the propriety of the district court's trial plan.

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[2] In fact, she did two store-by-store analyses: (1) analyzing grocery departments separately (only a minority of Wal-Mart stores have grocery departments), she compared all non-grocery operations; and (2) she compared separately Wal-Mart's basic merchandising operation, and specialty operations such as opticians, hearing aids, and grocery. Plaintiffs' expert admitted starting to do a store-by-store analysis, and then abandoning the effort.

Section 706(g)(2)(A) was crucial to the passage of Title VII. It prohibits a court from awarding back pay to any non-victim, a prohibition necessarily violated by any trial plan discussed by the district court or the court of appeals. Although heavily relied upon by the *en banc* dissent, the majority simply ignored and did not discuss this clear statutory prohibition.

Separately, § 706(g)(2)(B), added by the 1991 Civil Rights Act, states that even if an employer has been shown to be discriminatory, it can avoid back pay by proving "a same decision" defense. Any trial plan discussed by the district court or the court of appeals would violate this back pay prohibition.

Separately, any trial plan would disregard this Court's mandate that in class-action Title VII pattern-or-practice cases, there be a Phase I (liability) and Phase II (individual's entitlement to relief). *Teamsters v. United States*, 431 U.S. 324 (1977), and its progeny, relying on § 706(g), held that in a Title VII class action, at Phase I plaintiffs must prove a pattern or practice of discrimination. At Phase II, individual claimants are presumed entitled to relief unless the employer can demonstrate that despite the pattern of discrimination the particular claimant was not a victim. Under any of the trial plans discussed by the district court or court of appeals, there would be no Phase II.

Next, the Rules Enabling Act provides that federal rules cannot abridge substantive rights. In order to create a manageable class action, Wal-Mart's substantive right not to pay money to non-discriminatees will have to be abridged.

All of this makes it clear that this is not the simple type of injunctive-relief case for which 23(b)(2) was designed.

ARGUMENT

A. Any Trial Plan Compliant with § 706(g), as Construed By at Least Five U.S. Supreme Court Decisions, Would Not Be Appropriate for 23(b)(2) Certification.

Under all trial plans discussed or proposed to make manageable a class that could potentially include more than 3,000,000 women,[3] a pool of money will be calculated based on expert testimony, and distributed by formula to victim and non-victim alike. This procedure, under which Wal-Mart is precluded from proving which back-pay claimants are not discriminatees, conflicts with § 706(g)(2)(A) (court has no authority to award back pay to non-victims), as construed in at least five U.S. Supreme Court decisions, and with the Rules Enabling Act. Furthermore, it conflicts with § 706(g)(2)(B) (mixed motive; employer proved to be biased can avoid back pay by proving same decision would have been made in non-discriminatory environment).

Under any of the trial plans proposed or discussed (none of which has been approved even by the panel majority) the defendant will not be given the opportunity, at any stage of the case, to demonstrate that particular class members are not discrimination victims. Thus, numerous class members who are not discriminatees will recover back pay. That approach is incompatible with Title VII and due process.

The district court recognized, and the Ninth Circuit did not dispute, that the case was manageable as a class only if Wal-Mart was denied the right (i) to prove, at any phase of the trial, that particular persons (or groups of persons, such as employees at particular stores)[4] were not discriminated against, and (ii) to contest the eligibility of those individuals to back pay.

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[3] The panel majority's lower estimate ignores the fact that every woman hired since the year 2003, when class certification was briefed and argued, could potentially be in the class.

Under the district court's trial plan, which the majority neither approved nor disapproved, a "formula" would be used to determine the total amount of back pay. The trial plan envisions appointing a special master to identify the potential discriminatees, using "objective" evidence captured in Wal-Mart's personnel database (which, the court acknowledged, lacks relevant information such as the principal determinant of starting pay, prior experience, ER 1213).[5]

This procedure simply and demonstrably violates § 706(g)(2)(A) of Title VII. The mode of adjudication of a Title VII class action has been established since *Teamsters v. United States*, 431 U.S. 324 (1977). In Phase I, plaintiffs carry the burden of demonstrating that a pattern or practice of discrimination generally exists. Each class member seeking monetary relief enters Phase II with a presumption in her favor, but the employer has an opportunity to prove that, despite the finding of a pattern of discrimination, a particular claimant was not a victim and is not entitled to relief. But here there will be no Phase II.

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[4] The parties' briefs reveal that the undisputed statistical evidence is that there is no statistically significant difference in pay between men and women at more than 90% of Wal-Mart stores nationwide, and that at 35-40% of the stores any disparity tends to favor *women*. The undisputed statistics thus suggest that the class includes hundreds of thousands of women who work at stores where women were statistically favored and thus do not appear to be even potential discriminatees.

[5] This means, for example, that a female meat cutter with one year of experience, hired at $15 per hour, on the same day that a male meat cutter with 20 years of experience is hired at $16 per hour, will be statistically presumed to be a discrimination victim and entitled to back pay. The potential discriminatees would receive back pay according to formula, with no opportunity for the defendant to prove the absence of discrimination.

The federal courts are not free to sacrifice substance in the name of procedure. Section 706(g) of Title VII provides, in relevant part: "No order of the court shall require . . . payment to [any individual] of any back pay, if such individual . . . was [treated as he or she was] for any reason other than discrimination . . . ."

Thirty years of Supreme Court cases have explained the origin and significance of that section. *Teamsters* made clear that mere membership in a disadvantaged class is insufficient to warrant judicial relief: "The [district] court will have to make a substantial number of individual decisions in deciding which of the minority employees were actual victims." 431 U.S. at 371. *Accord: Id.* at 361-62 ("To determine the scope of individual relief" following a pattern or practice finding, the employer may "demonstrate that the individual . . . was denied an employment opportunity for lawful reasons.").

Teamsters reaffirmed the holding of *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976). The Court in *Franks* (per Brennan, J.) cautioned that, even after a finding of a pattern or practice of discrimination at Phase I, the employer in the remedial phase will have the opportunity "to prove that [specific] individuals . . . were not in fact victims of . . . discrimination." *Id.* at 772.

Then, in *East Texas Motor Freight System Inc. v. Rodriguez*, 431 U.S. 395 (1977), the court of appeals had certified a class notwithstanding the district court's finding that certain persons were not qualified for the jobs they sought. This Court unanimously reversed: "Even assuming, *arguendo*, that the company's failure even to consider [plaintiffs'] applications was discriminatory, the company was entitled to prove at trial that the [plaintiffs] had not been injured because they were not qualified and would not have been hired in any event." *Id.* at 404 n.9.

In *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984), the Court again considered the issue of relief to persons not shown to be discrimination victims. The statute "provide[s] make-whole relief only to those who have been actual victims of illegal discrimination." *Id.* at 580. This Court reviewed the legislative history, noting that Title VII's opponents had sought to scuttle the bill by speculating that employers could be ordered to grant formula relief to non-discriminatees. The *Stotts* Court quoted Senator Hubert Humphrey's dispositive response in the legislative history at the time:

> [Under the proposed bill] [n]o court order can require . . . payment of back pay for anyone who was not . . . refused employment or advancement . . . by an act of discrimination forbidden by this title. This is stated expressly in [§ 706(g)] . . . .

Id. (quoting 110 Cong. Rec. 6549 (1964)) (remarks of Sen. Humphrey). *Stotts* also quoted "the authoritative" interpretative memorandum of the bill by Senators Clark and Case, "the bipartisan 'captains' of Title VII." *Id.* at 580 n.14. Under the proposed bill, those Senators explained, "a court was not authorized to give [any relief] to nonvictims." *Id.* at 581 (quoting 110 Cong. Rec. at 7214).

Where there is a pattern or practice of discrimination, a court of course may order injunctive or other affirmative relief to put a stop to the discriminatory practice. But individual-specific monetary or equitable relief cannot be granted to non-victims, *Stotts* explained. This Court cited Title VII's bipartisan sponsors' newsletter: "[N]ot even a court, much less the [Equal Employment Opportunity] Commission, could order . . . payment of back pay for anyone who was not discriminated against in violation of this title." *Id.* at 581-82 (quoting 110 Cong. Rec. at 14465).

Thereafter, in *PriceWaterhouse v. Hopkins*, 490 U.S. 228 (1989), the Court considered the special problem of plaintiffs who may have been denied job benefits partly for legitimate and partly for discriminatory motives. Citing § 706(g), the plurality opinion reiterated "that Title VII does not authorize affirmative relief for individuals as to whom, the employer shows, the existence of systemic discrimination had no effect. [Citations to *Franks*, *Teamsters* and *Rodriguez* omitted.] These decisions suggest that the proper focus of § 706(g) is on claims of systemic discrimination . . . ." *Id.* at 245. Systemic discrimination is exactly the allegation here.[6]

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[6] The Civil Rights Act of 1991 codified *PriceWaterhouse* in part and modified it in part on grounds not material here. "The 1991 Act affirmed the *PriceWaterhouse* holding that mixed motive is an affirmative defense" for the employer to invoke. Barbara Lindemann & Paul Grossman, EMPLOYMENT DISCRIMINATION LAW 99 & n.318 (4th ed. 2007) (quoting 42 U.S.C. § 2000e-5(g)(2)(B)) (permitting the employer to demonstrate that it "would have taken the same action in the absence of the impermissible motivating factor").

The *en banc* majority's decision here is irreconcilable with *Teamsters* and the other above-described cases of this Court construing § 706(g).[7] What has essentially been done is that substantive law (Wal-Mart's right not to pay money to non-victims) has been ignored in order to cram a particular case into the class action device.[8] The Rules Enabling Act says otherwise. 28 U.S.C. § 2072(b). As the Supreme Court said, in discussing Rule 23:

> The Rules Enabling Act underscores the need for caution. As we said in *Amchem*, no reading of [Rule 23] can ignore the Act's mandate that rules of procedure shall not abridge, enlarge or modify any substantive right.

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[7] The *en banc* majority relies on the outlier case of *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996), which was a class action protesting torture, summary execution and disappearance at the hands of Ferdinand Marcos, the Philippines' former President. *Id.* at 771. Even ignoring the outlier nature of *Hilao*, it was not an employment discrimination case. Thus, § 706(g) and the *Teamsters* line of Supreme Court decisions, barring relief to non-victims, were inapplicable.

[8] One fallacy, not expressed in but perhaps underlying the *en banc* majority's decision, is that it must be "this class or no class," and that Wal-Mart because of its size is seeking an effective exemption from the law. Not so. More narrowly tailored litigation of course is possible. Here, as noted above, the undisputed store-by-store statistics show that only 10% of Wal-Mart stores had a statistically significant difference in pay (with one-fourth of those stores favoring women). If this Court reverses class certification, the nationwide consortium of law firms representing plaintiffs surely will bring individual store class actions at the stores where the statistics indicate that a real problem may have existed in the past. Wal-Mart stores are large, and an individual store class action, if certified, would average hundreds of class members, the size of a typical, manageable Title VII class action.

Ortiz v. Fibreboard Corp., 527 U.S. 815, 845 (1999) (internal quotation marks and citations omitted); *accord: e.g., In Re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002) ("Tempting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties' legal rights may be respected.").

Once it is recognized that Wal-Mart has a right not to pay money to non-discriminatees, and that a Phase II is in fact necessary, the case is inappropriate for 23(b)(2) certification and, indeed, could not meet the predominance standard of 23(b)(3).

B. The Undisputed Store-By-Store Statistics in This Multiple-Facility Excess-Subjectivity Nationwide Certification Demonstrate a Lack of Commonality and Typicality and the Inappropriateness of (b)(2) Certification.

All material pay decisions are made at the store-manager level. Wal-Mart's statistical expert did two different store-by-store studies: (1) she compared each store's entire store operations, excluding only a separate line of business, the grocery departments, for those stores that had grocery departments; and (2) she compared the core merchandising business of each store, and, separately, the specialty departments such as tires, hearing aids, optical and grocery. Each led to substantially similar findings: At 90% of Wal-Mart's 3,400 stores, there was no statistically significant difference in pay between men and women; at 30-40% of the stores women were favored, although not to a statistically significant degree. Women were favored in 2.5% of the stores to a statistically significant degree; 7.5% of the stores favored men to a statistically significant degree. Plaintiffs' expert admitted that he began a store-by-store analysis, but abandoned it. He submitted only aggregated statistics, nationwide and by region (a region includes approximately 80 stores).

Even without the store-by-store statistics, it is intuitively obvious that when the plaintiffs' theory is "excess subjectivity" – that managers at geographically separate locations made biased subjective judgments at the local level – the effect of these subjective judgments would differ facility-by-facility, rendering a multiple-facility excess subjectivity case, absent unusual facts, analytically impossible. There would be no commonality and typicality – every location would require a separate analysis. That is precisely what the D.C. Circuit has held.

In *Garcia v. Johanns*, 444 F.3d 625 (D.C. Cir. 2006), a national origin lending discrimination case, the allegation was that multiple-facility decisionmaking was subjective and led to discrimination. The D.C. Circuit affirmed a denial of class certification:

> Establishing commonality for a disparate treatment class is particularly difficult where, as here, multiple decisionmakers with significant local autonomy exist.

Id. at 632.

> [T]heir claims arise from multiple individual decisions . . . . [Plaintiffs did] not cite a single reversal of a district court's denial of class certification based on no commonality resulting from the geographic spread of the decisionmakers. [numerous citations omitted]

Id. at 633. Plaintiffs argued, as do the plaintiffs in the Wal-Mart case, that excess subjectivity was both disparate treatment and disparate impact. The D.C. Circuit rejected the idea that either could be attacked on an excess subjectivity theory spread over numerous decisionmaking locations: The "subjective decisionmaking process constitutes the [allegedly] common facially neutral practice." *Id.* at 633-34. "We reject both theories and instead affirm the district court's denial of class certification because the appellants failed to show a common facially neutral . . . policy . . . ." *Id.* at 634.

In language equally applicable herein, the D.C. Circuit stated: "It does not suffice under Rule 23(a)(2) to show an ethnic imbalance . . .; rather the appellants must show that a common facially neutral policy caused the imbalance." *Id.* at 635.

The D.C. Circuit in *Love v. Johanns*, a companion case charging sex discrimination in lending at multiple geographic locations, noted in language also equally applicable to the Wal-Mart case that if the class was certified "the outcome . . . would nevertheless turn on a series of individualized inquiries into . . . practices in more than 2,700 . . . offices across the country . . . ." *Id.* at 730. "The District Court concluded that the geographic dispersal and decentralized organization . . . 'cut[] against any inference for class action commonality.'" *Id.*

Perhaps the most extensive analysis of why an excess subjectivity multiple-facility class action cannot be certified was done in *Reid v. Lockheed Martin Aeronautics Co.*, 205 F.R.D. 655 (N.D. Ga. 2001). After reviewing numerous excess subjectivity multiple-facility cases, the court denied class certification because plaintiffs seemed to be contending that the employer "had a centralized policy of decentralization, which is insufficient . . . to satisfy commonality or typicality" with respect to a multi-facility class. *Id.* at 670. The court noted that this Court in *Falcon* required significant proof to justify certification of a broad class based on excess subjectivity and this is not shown by aggregated statistics.

CONCLUSION

The judgment of the Ninth Circuit is that nationwide Title VII class certification is automatic based simply on the submission of three categories of evidence: (1) the opinion of a sociologist which will not be reviewed under Daubert; (2) anecdotal claims of discrimination from 1/100th of 1% of the class which cannot be tested; and (3) aggregated nationwide statistics. Dissent, *Id.* at 652 ("Put simply, the door is now open to Title VII lawsuits targeting national and international companies . . . based on nothing more than general and conclusory [expert] allegations, a handful of anecdotes, and statistical disparities that bear little relation to the alleged discriminatory decisions."). This judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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AMICUS
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BRIEF

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IN THE

Supreme Court of the United States

WAL-MART STORES, INC.,
Petitioner,

v.

BETTY DUKES, ET AL., on behalf of themselves and all others similarly situated,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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OTHER AUTHORITY

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Note,
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Mark A. Perry & Rachel S. Brass,
Rule 23(b)(2) Certification of Employment Class Actions: A Return to First Principles, 65 N.Y.U. Ann. Surv. Am. L. 681 (2010) 6

George Rutherglen,
Title VII Class Actions, 47 U. Chi. L. Rev. 688 (1980) 12

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Federal Practice and Procedure (3d ed. 2005) ... 6

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States of America ("Chamber") respectfully submits this brief as *amicus curiae* in support of petitioner Wal-Mart Stores, Inc. ("Petitioner").[1]

STATEMENT OF INTEREST

The Chamber is the world's largest business federation, representing three hundred thousand direct members and an underlying membership of more than three million U.S. businesses and professional organizations. The Chamber represents its members' interests by, among other activities, filing briefs in cases implicating issues of vital concern to the nation's business community.

The Chamber's members operate in nearly every industry and business sector in the United States, and many are subject to Title VII of the Civil Rights Act of 1964, which is a focus of the decision below. The Chamber's members devote extensive resources to developing employment practices and programs designed to ensure compliance with Title VII and other legal requirements.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3, Petitioner and Respondents have each filed with the Clerk of the Court a letter granting blanket consent to the filing of *amicus* briefs.

The Chamber's members also have an interest in the ruling below because the Ninth Circuit's ill-considered application of Rule 23 will likely provoke an avalanche of new class action litigation on a broad array of subject matters, beyond employment issues. If allowed to stand, the ruling has the potential to dramatically increase the class action exposure of the Chamber's members and all companies doing business in the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

Rule 23(b)(2) permits class certification where, among other things, the plaintiffs bringing suit present claims that are "typical" of those of the class, and the defendant has acted "on grounds that apply generally to the class, so that final injunctive relief . . . is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(a)(3), (b)(2). Neither condition is met here. The 1.5 million class members in this action occupied various positions at more than 3,400 stores across the country, and they seek billions of dollars in monetary compensation, the entitlement to which admittedly turns on individualized considerations. In short, the only things that are "typical" of or "apply generally to the class" are the class members' "sex and this lawsuit." *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 652 (9th Cir. 2010) (Kozinski, J., dissenting).

Nonetheless, the court below found that these superficial links justified class treatment, simply because the class seeks "injunctive relief." That conclusion was clearly erroneous. First, the class does not satisfy Rule 23(b)(2), which authorizes certification only where "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." The court of appeals construed this provision to allow certification of claims seeking money damages – regardless of whether they satisfy the exacting requirements of Rule 23(b)(3) – as long as the plaintiffs also request injunctive relief that is "'superior [in] strength, influence, or authority' to" the requested monetary relief.

Id. at 616 (quoting *Merriam-Webster's Collegiate Dictionary* 978 (11th ed. 2004)). This reading elevates form over substance and ignores the individualized issues that plaintiffs' damages claims will inevitably inject into the litigation. The court should have followed the lead of eight other courts of appeals that have interpreted Rule 23(b)(2) to require "cohesiveness," particularly where plaintiffs' claims include a damages component.

Second, the class does not satisfy Rule 23(a)(3), which allows class certification "only if the claims or defenses of the representative parties are typical of the claims or defenses of the class." According to the court of appeals, the typicality requirement merely demands that a representative's claims be "reasonably coextensive" with those of the class members – a standard that is apparently satisfied even where "individual employees in different stores with different managers may have received different levels of pay or may have been denied promotion or promoted at different rates." *Id.* at 613 (internal quotation marks and citation omitted). The typicality requirement is not so flimsy, as many other courts of appeals have long recognized. Rather, like the predominance requirement of Rule 23(b)(3), typicality bars class treatment where resolution of class members' claims would "depend[] on each individual's particular interactions." *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998).

The Ninth Circuit's loose approach to certification departs dramatically from those of the other courts of appeals, with potentially devastating implications for American business. If the ruling below is allowed to stand, it would dramatically expand the exposure of American businesses to potentially bankrupting class actions by inviting self-appointed private attorneys general to bring damages claims under Rule 23(b)(2) that would never be allowed under Rule 23(b)(3). Anyone with a claim that is "reasonably coextensive" with those of other potential plaintiffs – be it a personal-injury, consumer-fraud, or medical-monitoring claim – would now have a viable class action, as long as the class also seeks injunctive relief – for example, to stop making a product, or to change a warning. Such a result would erase decades of class-action precedents protecting defendants from unfair trials – and would bury American businesses in abusive class-action lawsuits to the detriment of consumers, the U.S. economy and the judicial system itself. This Court should reverse the Ninth Circuit's decision and prevent such a result.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN UPHOLDING CERTIFICATION OF A NON-COHESIVE CLASS SEEKING MONETARY RELIEF UNDER RULE 23(b)(2).

The court of appeals first erred in concluding that class certification of a claim for monetary relief under Rule 23(b)(2) is appropriate as long as that claim is not "superior [in] strength" to an accompanying claim for injunctive or declaratory relief. 603 F.3d at 616 (internal quotation marks and citation omitted). As Petitioner explains in its brief on the merits, Rule 23(b)(2) was intended to apply only to a narrow group of cases involving pure injunctive relief. *See also* Mark A. Perry & Rachel S. Brass, *Rule 23(b)(2) Certification of Employment Class Actions: A Return to First Principles*, 65 N.Y.U. Ann. Surv. Am. L. 681 (2010). But even assuming plaintiffs' claims were properly considered under the Rule 23(b)(2) framework, certification should have been denied because the class is not cohesive, making it impossible to fairly resolve all of the class members' claims in a single trial.

By its terms, Rule 23(b)(2) requires the proponent of certification to show that "the party opposing the class has acted or refused to act on grounds that apply *generally* to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class *as a whole*." Fed. R. Civ. P. 23(b)(2) (emphases added). These terms reflect important assumptions underlying Rule 23(b)(2) – that the defendant's "actions would affect all persons similarly situated so that those acts apply generally to the whole class," 7AA Charles Alan Wright et al., *Federal Practice and Procedure* § 1775, at 41 (3d ed. 2005), and that the class members' claims "involve uniform group remedies," *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 414 (5th Cir. 1998). Succinctly stated, Rule 23(b)(2) rests on an "assumption[] of cohesiveness" within the class. *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1156 (11th Cir. 1983); *Allison*, 151 F.3d at 432 (noting same assumption and citing *Thomas v. Albright*, 139 F.3d 227, 234-35 (D.C. Cir. 1998), in support).

For this reason, almost every court of appeals has insisted on a showing that proposed (b)(2) classes are "cohesive," a requirement that is analogous to Rule 23(b)(3)'s predominance prong. *See, e.g.*, *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998) (stating that under Rule 23(b)(2) it is "well established that the class claims must be cohesive"); *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 330 (4th Cir. 2006) (recognizing that a Rule 23(b)(2) class must be "sufficiently cohesive" for the class-action device to be employed); *Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 524 (5th Cir. 2007) (holding that a Rule 23(b)(2) class cannot be certified where "individualized issues . . . overwhelm class cohesiveness"); *Romberio v. UnumProvident Corp.*, 385 F. App'x 423, 432-33 (6th Cir. 2009); *Lemon v. Int'l Union of Operating Eng'rs*, 216 F.3d 577, 580 (7th Cir. 2000); *In re St. Jude Med. Inc.*, 425 F.3d 1116, 1121-22 (8th Cir. 2005) ("Because unnamed members are bound by the action without the opportunity to opt out of a Rule 23(b)(2) class, even greater cohesiveness generally is required than in a Rule 23(b)(3) class.") (internal quotation marks and citation omitted); *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1199 (10th Cir. 2010) (noting that Rule 23(b)(2) requires "cohesiveness among class members with respect to their injuries") (internal quotation marks and citation omitted); *Holmes*, 706 F.2d at 1156.

As these courts have explained, a (b)(2) class requires even "*more* cohesiveness than a (b)(3) class." *Barnes*, 161 F.3d at 142-43 (emphasis added); *see also Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 41 (1st Cir. 2003) ("Rule 23(b)(3) is intended to be a less stringent requirement than Rule 23(b)(1) or (b)(2)"); *Romberio*, 385 F. App'x at 432 (cohesiveness is the "defining characteristic" of a Rule 23(b)(2) action and mandates strict "homogeneity of the interests of the members of the class.") (internal quotation marks and citation omitted). "This is so because in [(b)(2) classes] unnamed members [can be] bound by the action without [notice or an] opportunity to opt out." *Barnes*, 161 F.3d at 142-43. As a result, if "significant individual issues . . . pervade the entire action," absent class members could find themselves bound by a judgment that is adverse to their interests. *Id.* at 143 (internal quotation marks and citation omitted). Accordingly, unless "the case will not depend on adjudication of facts particular to any subset of the class nor require a remedy that differentiates materially among class members," class treatment is barred. *Lemon*, 216 F.3d at 580.

The cohesiveness requirement also serves important practical considerations. As Rule 23 recognizes with respect to actions under Rule 23(b)(3) – the "typical vehicle for a class action when compensatory damages are sought," *Butler v. Sterling, Inc.*, No. 98-3223, 2000 WL 353502, at *6 (6th Cir. Mar. 31, 2000) – courts must evaluate "the likely difficulties in managing a class action" as part of the decision whether to certify, Fed. R. Civ. P. 23(b)(3)(D). The same is true under Rule 23(b)(2); a "suit could become unmanageable and little value would be gained in proceeding as a class action . . . if significant individual issues were to arise consistently." *Barnes*, 161 F.3d at 143 (internal quotation marks and citation omitted); *see also Shook v. El Paso County*, 386 F.3d 963, 972-73 (10th Cir. 2004); *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 759 n.5 (4th Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999). Cohesiveness is critical to the (b)(2) analysis because it protects against that result. Certainly, the drafters of Rule 23 did not intend that (b)(2) class actions would be certified regardless of whether a class trial would be manageable (or fair).[2]

As other courts of appeals have recognized, claims like those here – that involve monetary relief – generally fail Rule 23(b)(2)'s cohesiveness requirement. After all, where damages are sought, relief for one is no longer relief for all. Instead, entitlement to relief will usually differ materially among individual plaintiffs because "[m]onetary remedies are more often related directly to the disparate merits of individual claims." *Allison*, 151 F.3d at 413; *accord, e.g.*, *Thorn*, 445 F.3d at 330 ("[B]ecause the goal of the damage phase is to compensate the *plaintiffs* for their *individual injuries*, the claim will generally require the court to conduct individual hearings to determine the particular amount of damages to which each plaintiff is entitled."); *Rice v. City of Philadelphia*, 66 F.R.D 17, 20 (E.D. Pa. 1974) ("[N]ot only would the calculation of the amount of damages depend upon the individual facts of each claimant's case, but virtually all of the issues would have to be litigated individually in order to determine whether a particular alleged class member was entitled to any damages at all."); *Lukenas v. Bryce's Mountain Resort, Inc.*, 538 F.2d 594, 596 (4th Cir. 1976) ("It is a monetary judgment that the plaintiffs seek and that is obvious from the phrasing of their prayer. Such an action is not suitable for treatment as a class action under Rule 23(b)(2).")). For this reason, cohesiveness "'begins to break down when the class seeks to recover back pay or other forms of monetary relief to be allocated based on individual injuries.'" *Allison*, 151 F.3d at 413 (quoting *Eubanks v. Billington*, 110 F.3d 87, 95 (D.C. Cir. 1997)).

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[2] To the extent Rule 23(b)(2) is interpreted to lack a manageability requirement, the only explanation would be that the drafters intended it to apply only to a very narrow category of pure injunctive relief cases in which a trial would, by definition, be manageable.

That is precisely the case here. Plaintiffs' class is not cohesive – and should have been rejected – because their claims "turn[] on the defendant's individual dealings with each plaintiff." *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 975 (5th Cir. 2000). For example, under well-established federal law, Wal-Mart has the right to raise affirmative defenses as to each class member's claim. *See* Civil Rights Act of 1964 § 706(g), 42 U.S.C. § 2000e-5(g); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 359-60 (1977). As recognized by the dissent below, the only way for Wal-Mart to assert those defenses would be to hold "individual hearings" where the "court must allow up to 1.5 million individual determinations of liability." 603 F.3d at 629 (Ikuta, J., dissenting); *see also Franks v. Bowman Transp. Co.*, 424 U.S. 747, 772 (1976) (indicating that "evidence that particular individuals were not in fact victims of . . . discrimination" is "material" under Title VII); *Teamsters*, 431 U.S. at 371-72 (remanding case to district court for hearings "with respect to each specific individual" to determine whether they were individually entitled to relief). Obviously, such an undertaking would be completely unmanageable – as one court has held, even 500 mini-trials would be too much. *Cf. San Antonio Tel. Co. v. AT&T Co.*, 68 F.R.D. 435, 438 (W.D. Tex. 1975) ("Once again, the fact of damage must be proved as to each individual member of the class. Such proof, in light of a class size of up to 500, makes the class action unmanageable in this respect."). But such mini-trials would be necessary to preserve Wal-Mart's due-process right "to present every available defense" at trial. *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (internal quotation marks and citation omitted). Thus, classwide resolution is not possible in this case, and the court of appeals erred in holding otherwise.

The Ninth Circuit's contrary conclusion was based on its apparent belief that any time a class representative adds a claim for monetary relief to a lawsuit, as long as the claim for damages is not "'superior [in] strength, influence, or authority' to" the requested injunctive relief, certification is appropriate. 603 F.3d at 616 (quoting *Merriam-Webster's Collegiate Dictionary* 978 (11th ed. 2004)). The court arrived at this conclusion by turning to the dictionary to understand the meaning of the advisory committee's notes to the 1966 amendment to Rule 23, which explain that Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or *predominantly* to money damages." *See id.* (emphasis added). But the committee notes only say that Rule 23(b)(2) *is not* appropriate in cases in which "final relief relates exclusively or predominately to money damages"; they do not state that certification under Rule 23(b)(2) *is* appropriate in all other cases.

The Ninth Circuit also purported to find support for its approach in the suggestion in the advisory committee's notes that "various actions in the civil-rights field" are proper candidates for class treatment under Rule 23(b)(2). *See* 603 F.3d at 619. But again, while the notes suggest certification *may* be appropriate in such cases, they do not state that it is *categorically* appropriate in such cases. Thus, there is no legal presumption in favor of certifying civil-rights cases. *Thorn*, 445 F.3d at 330; *see also* George Rutherglen, *Title VII Class Actions*, 47 U. Chi. L. Rev. 688, 701-02 (1980) (noting that the advisory committee's mere use of civil rights cases as an example of cases that may be suitable for (b)(2) certification is not evidence of an intent to give special treatment to civil rights cases). In fact, the lynchpin of Rule 23(b)(2) is that members of the "group" that was allegedly discriminated against are seeking a remedy that will not vary according to individual circumstances. *See Thorn*, 445 F.3d at 330 (noting that Rule 23(b)(2) is particularly suited for class actions alleging discrimination and "seeking a court order putting an end to that discrimination"); *Penson v. Terminal Transp. Co.*, 634 F.2d 989, 994 (5th Cir. Unit B Jan. 1981) (indicating that the cohesiveness of a (b)(2) class stems, in part, from the "broad character of the relief sought").

In short, even if plaintiffs' class were eligible for (b)(2) consideration in the first place, it should have been rejected because the class members' claims are not cohesive.

II. THE COURT OF APPEALS IMPROPERLY DILUTED RULE 23'S TYPICALITY REQUIREMENT.

Even if Rule 23(b)(2) did not include an implicit requirement of "cohesiveness," certification would still have been improper because the class failed at least one requirement of Rule 23(a): typicality. According to the Ninth Circuit ruling, typicality is a low threshold, one that is satisfied any time a representative's claims are "reasonably coextensive" with those of the class members. 603 F.3d at 613 (internal quotation marks and citation omitted). The court thus found that the named plaintiffs were typical of absent class members by virtue of plaintiffs' allegation of "common practices" of discrimination. This, too, was wrong.

Certification under Rule 23(b)(2) is only available, of course, where a class also satisfies the prerequisites of Rule 23(a). Fed. R. Civ. P. 23(b) (indicating that a (b)(2) class action "may be maintained if Rule 23(a) is satisfied[.]"). This includes the requirement that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Typicality ensures that only those plaintiffs who advance the same factual arguments – rather than "factually distinct" ones – may be grouped together as a class. *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 340 (4th Cir. 1998) (citation omitted); *Pinkard v. Pullman-Standard, a Div. of Pullman, Inc.*, 678 F.2d 1211, 1215 (5th Cir. 1982). "The premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff[s], so go the claims of the class." *Sprague*, 133 F.3d at 399. Only when typicality is satisfied can "the rights of the *entire* class [be] vindicated" by a class remedy. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 796 (3d Cir. 1995) (noting that such a result is required by due process); *see also*

Spano v. The Boeing Co., --- F.3d ---, 2011 WL 183974, at *12 (7th Cir. Jan. 21, 2011) ("Too liberal an application of the mandatory-class device risks depriving people of one of their most important due process rights: the right to their own day in court.").

In evaluating typicality, courts must scrutinize the allegations of a class complaint to determine whether proof of one plaintiff's claim would, perforce, prove the claims of all other class members. Thus, typicality is not satisfied where the class members' claims would be based on "widely divergent facts," *Sprague*, 133 F.3d at 399, or where the experiences of the class representatives are markedly different from those of other members of the class, *see, e.g., Parke v. First Reliance Standard Life Ins. Co.*, 368 F.3d 999, 1004 (8th Cir. 2004), and courts have refused to certify (b)(2) classes under such circumstances. *See Carson P. ex rel. Foreman v. Heineman*, 240 F.R.D. 456, 508 (D. Neb. 2007) ("The plaintiffs' putative [(b)(2)] class is diverse, both in membership and claims specific members can raise. The proposed class includes children ranging in age from newborn to nineteen[.]"); *Killo v. Bethlehem Assocs.*, 104 F.R.D. 457, 458-59 (E.D. Pa. 1985) ("[T]here are no factual averments to indicate that any other potential [class] members were similarly treated[.]").

Bigger classes are less likely to satisfy the typicality requirement, because with size often comes diversity – and diversity is the antithesis of typicality. *Cf. In re Welding Fume Prods. Liab. Litig.*, 245 F.R.D. 279, 303 (N.D. Ohio 2007) ("Given the large size of the class, the differences in defendants' conduct, and the variable working environments in which all of the . . . plaintiffs performed, each class member's claims involve so many distinct factual questions that class certification becomes inappropriate."). This is no less true with respect to employment-discrimination claims – the bigger the class, the less likely the named plaintiff(s) can represent the mix of interests in the class. *See, e.g., Hines v. Widnall*, 334 F.3d 1253, 1258 (11th Cir. 2003) (holding that typicality requirement was not met where class representatives could not "adequately represent the spectrum of . . . employees"); *Morgan v. Metro. Dist. Comm'n*, 222 F.R.D. 220, 232 (D. Conn. 2004) ("The putative class members also vary greatly in terms of their departments, supervisors, the number of years they have been employed by [the organization], and their individual circumstances. Thus, while most . . . of the named Plaintiffs and affiants allege discrimination in promotions, there is little to bind their claims together[.]"); *Wright v. Circuit City Stores, Inc.*, 201 F.R.D. 526, 541 (N.D. Ala. 2001) ("[T]he purported class is comprised of a large group of diverse and differently situated employees whose highly individualized claims of discrimination do not lend themselves to class-wide proof.").

The class here – comprising 1.5 million people – fell far short of the typicality requirement of Rule 23(a)(3). Six plaintiffs seek to represent class members who "work hourly in 53 different departments and 170 different job classifications; these positions include cashiers, associates, team leads, and department managers." 603 F.3d at 629 (Ikuta, J., dissenting). Some of the named plaintiffs are hourly-wage employees, while others are salaried employees. *Id.* And plaintiffs seek to represent class members who worked at Wal-Mart over the course of a decade. *Id.* at 628. Although the plaintiffs offered affidavits in an attempt to show that the alleged discriminatory conduct could have affected everyone in the same way, those affidavits "describe[d] the affiants' experiences in, at most, 235 of Wal-Mart's 3,400 stores, meaning that the affidavits provide[d] no information about working conditions in over 3,100 stores." *Id.* at 634. That showing was insufficient. As the dissent explained, "[a] single affidavit from a single store in Michigan tells little about whether there is discrimination at each of the other 72 stores in Michigan, let alone the rest of the company." *Id.* Thus, "this is not a case where a named plaintiff who proved her own claim would prove anyone else's," *Elkins v. Am. Showa, Inc.*, 219 F.R.D. 414, 425 (S.D. Ohio 2002), and typicality is therefore lacking.

The court of appeals nonetheless found the typicality requirement satisfied on the mere ground that the named plaintiffs alleged "common practices" of discrimination. 603 F.3d at 613. This conclusion was flawed for at least two reasons. First, the court applied the wrong standard for typicality. According to the court, typicality is a "permissive standard[]" that merely requires that the class representatives' claims be "reasonably coextensive" with those of the rest of the class. *Id.* (internal quotation marks and citation omitted). The court thus seemed to view typicality as akin to the commonality requirement – as long as the class members' claims have something in common with those of the class representatives, the requirement is satisfied, irrespective of their differences. *See id.* (comparing commonality and typicality).

That analysis was improper. Although the commonality and typicality requirements are sometimes examined together, they focus on different things. "[U]nder the commonality prong, a court must ask whether there are sufficient factual or legal questions *in common*." *In re Welding Fume*, 245 F.R.D. at 303 (internal quotation marks and citation omitted). Typicality, by contrast, requires a court to ask whether, "despite the presence of common questions, each class member's claim involves so many *distinct* factual or legal questions as to make class certification inappropriate." *Id.* (internal quotation marks and citation omitted).

The court of appeals was also wrong to conclude that the mere allegation of a "common" question of discrimination satisfies the typicality requirement – as though discrimination against one, if proven, would necessarily prove discrimination against 1.5 million. In fact, mere allegations of a "common practice" or "common legal theory" cannot manufacture a basis for certification "when proof of a violation requires individualized inquiry." *Elizabeth M. v. Montenez*, 458 F.3d 779, 787 (8th Cir. 2006); *see also Hyatt v. United Aircraft Corp., Sikorsky Aircraft Div.*, 50 F.R.D. 242, 247 (D. Conn. 1970) (holding, in a civil-rights action against an employer, that there was no typicality where some members of a class sought back pay based on alleged discrimination whereas other members sought declaratory and injunctive relief). The fact is, "[s]ex discrimination may take such a wide variety of guises in this setting that the facts of one woman's claim may be markedly different from another's." *Merrill v. S. Methodist Univ.*, 806 F.2d 600, 608 (5th Cir. 1986).

This Court rejected precisely the sort of reasoning applied by the Ninth Circuit in *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982). There, the Court held that isolated allegations of discriminatory conduct were not sufficient to show an entrenched, companywide practice of discrimination: "If one allegation of specific discriminatory treatment were sufficient to support an across-the-board attack, every Title VII case would be a potential companywide class action. We find nothing in the statute to indicate that Congress intended to authorize such a wholesale expansion of class-action litigation." *Id.* at 159. Since *Falcon*, numerous courts have thus refused to certify "across-the-board" gender discrimination cases. *See, e.g.*, *Walker v. Jim Dandy Co.*, 747 F.2d 1360, 1364-65 (11th Cir. 1984); *Fleming v. Travenol Labs., Inc.*, 707 F.2d 829, 833 (5th Cir. 1983); *Stambaugh v. Kan. Dep't of Corr.*, 151 F.R.D. 664, 676-77 (D. Kan. 1993); *Price v. Cannon Mills*, 113 F.R.D. 66, 69-71 (M.D.N.C. 1986); *see also Troup v. Piper, Jaffray & Hopwood, Inc.*, No. 4-74 Civ. 166, 1975 WL 325, at *2 (D. Minn. Dec. 11, 1975) ("[T]he leveling of a single charge of discrimination by a dissatisfied former employee may expose a company to a 'full-scale inquiry' concerning discriminatory practices which may or may not have a basis in fact."). The Ninth Circuit improperly veered from this precedent. *See* Note, *Certifying Classes & Subclasses in Title VII Suits*, 99 Harv. L. Rev. 619, 621-24, 630-32 (1986) (critiquing courts that have used the "across-the-board" approach post-*Falcon*).

In sum, the court of appeals erred in holding that the idiosyncratic claims of the six named plaintiffs in this suit were typical of the 1.5 million class members they seek to represent. For this reason too, class certification should have been denied, and the decision of the Court of Appeals should be reversed.

III. THE NINTH CIRCUIT'S RULING THREATENS TO COMPROMISE THE VITALITY OF OUR NATION'S ECONOMY.

If adopted by this Court, the Ninth Circuit's loose certification standard would strike a serious blow against American businesses. *See* Richard A. Nagareda, *Common Answers for Class Certification*, 63 Vand. L. Rev. En Banc 149, 170 (2010) ("*Dukes* threatens to undermine the progress made in the law of class certification elsewhere among the federal appellate courts by virtually inviting certification efforts . . . especially in the kinds of high-stakes, national-market class actions in which careful certification analysis is most needed.").

The Ninth Circuit's toothless Rule 23(b)(2) standard would send a strong message to plaintiffs' counsel that they can shoehorn damages actions into the Rule 23(b)(2) framework, without having to satisfy the procedural safeguards of Rule 23(b)(3). This invitation, needless to say, would be welcomed with open arms. *See Bolin*, 231 F.3d at 976 ("The incentives to do so are large. Plaintiffs' counsel effectively gathers clients – often thousands of clients – by a certification under (b)(2)."); Judy Greenwald, *In 2010, bias cases dominate employment legal landscape*, Business Insurance, Jan. 10, 2011 ("[p]laintiffs lawyers have continued to push the envelope in crafting damages theories to expand the size of classes and the scope of recoveries") (internal quotation marks and citation omitted). Notably, plaintiffs' counsel is already using the Ninth Circuit ruling in *Dukes* as a springboard for similar "across-the-board" employment discrimination suits against other companies. *See* Wal-Mart Class Website, Home Page, *available at* http://www.walmartclass.com/public_home.html (providing a link that states "You may also be interested in the Costco gender discrimination class action lawsuit").

But employment cases are just the tip of the iceberg. As commentators have recognized, *Dukes* could pave the way for a variety of class actions against a host of industries, from antitrust cases to product liability actions to medical-monitoring claims. *See, e.g.*, Antitrust Chronicle, Competition Policy International, Aug. 10, 2010 ("Because *Dukes* lowers the bar to class certification in the Ninth Circuit, businesses that may be targeted by antitrust class actions should be prepared to face more litigation there, and should be sure to preserve important issues for potential Supreme Court review."); Drug and Device Law, *Dukes v. Wal-Mart – On to the Supreme Court, We Hope*, Apr. 26, 2010 (advocating reversal of Ninth Circuit decision); Howard M. Erichson, *En Banc Rehearing in Dukes v. Wal-Mart*, Mass Tort Litigation Blog, Feb. 19, 2009 ("OK, it's not a mass tort. But for anyone interested in mass litigation, the *Dukes* case represents an important test of the limits of Rule 23(b)(2) class actions in which significant monetary damages are sought along with injunctive relief"); Nagareda, *supra*, at 153 ("[T]he potential impact of

Dukes on the law of class certification extends well beyond the employment discrimination context.").

These implications cannot be overstated. It has long been recognized that loose certification standards have serious repercussions for American business. In particular, loose certification raises the stakes of litigation and the risk of gargantuan verdicts – not to mention bankruptcy. Mark Moller, *The Anti-Constitutional Culture of Class Action Law: An expected Supreme Court case involving Wal-Mart may radically alter the American legal landscape*, 30 Reg. 50, 53 (Summer 2007) ("[L]oose certification standards are vulnerable to trial judges' political biases. A populist trial judge with a strong aversion to large corporations might, for example, want to punish big corporate interests, 'sending a message' that they must respect the little guy. Inaugurating a large class action, triggering reams of negative press and sending the defendant's stock price through the floor, is a good way to do so."). "Following certification, class actions often head straight down the settlement path because of the very high cost for everybody concerned, courts, defendants, plaintiffs of litigating a class action . . . ." Bruce Hoffman, Remarks, *Panel 7: Class Actions as an Alternative to Regulation: The Unique Challenges Presented by Multiple Enforcers and Follow-On Lawsuits*, 18 Geo. J. Legal Ethics 1311, 1329 (2005) (panel discussion statement of Bruce Hoffman, then Deputy Director of the Federal Trade Commission's Bureau of Competition). For this reason, "certification is the whole shooting match" in most cases. David L. Wallace, *A Litigator's Guide to the 'Siren Song' of 'Consumer Law' Class Actions*, LJN's Prod. Liab. L. & Strategy (Feb. 2009), and defendants faced with improvidently certified, meritless lawsuits feel "intense pressure to settle" before trial, *see In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (stating that defendants in a class action lawsuit "may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle."); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("These settlements have been referred to as judicial blackmail."); Jim Copland, *These actions have no class*, San Fran. Examiner, Sept. 15, 2004 (analyzing *Dukes v. Wal-Mart* and stating: "to permit hundreds or even millions of plaintiffs to join class action suits without letting the employers address individual bias claims on their merits is . . . no more than [a] corporate shakedown[]."),

By inviting baseless class-action lawsuits, the Ninth Circuit's ruling also threatens to disrupt the free flow of commerce. Frivolous class actions have the unfortunate effects of "jeopardizing jobs and driving up prices for consumers." William Branigin, *Congress Changes Class Action Rules*, Wash. Post, Feb. 17, 2005 (quoting then-House Majority Whip Roy Blunt); *see also* Anne Freedman, *A Look at 2010 Employment-Law Cases*, The Leader Board, Jan. 6, 2011 (observing, in response to Wal-Mart's legal battles in *Dukes* and other class-action lawsuits, that it "[m]ust be getting harder to keep those prices low when they're paying those kinds of legal costs."). Moreover, as the costs of conducting business increase, baseless class actions often force companies to scale back operations or discontinue certain products or services.

If approved by this Court, the Ninth Circuit's ruling would turn back two decades of jurisprudence in federal courts around the country seeking to ensure that class certification is only available where a trial of the named plaintiffs' claims would fairly adjudicate the claims of absent class members. Such a result would encourage class-action abuse and undermine the vitality of American businesses, to the detriment of the U.S. economy and American consumers. For this reason too, the ruling should be reversed.

CONCLUSION

For the foregoing reasons, and those stated by petitioner Wal-Mart Stores, Inc., the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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WAL-MART STORES, INC.,
Petitioner,
v.

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, KAREN WILLIAMSON, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, on behalf of themselves and all others similarly situated,
Respondents.

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Kaplan, Benjamin, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L.Rev. 356 (1967) 6, 9

Kaplan, Benjamin, *A Prefatory Note*, 10 B.C. Indus. & Comm. L. Rev. 497 (1969) 27, 28

Manual for Complex Litigation 4th ed 32

Miller, Arthur R., *Overview of Class Actions: Past, Present and Future* (1977) 6

Rubenstein, William B., Alba Conte and Herbert Newberg, 8 *Newberg on Class Actions* (4th ed. 2010) 18

Wright, Charles A., Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* (3d ed. 2010) 8, 9, 11

INTEREST OF *AMICI CURIAE*[1]

As law professors and scholars with expertise in civil procedure and class action law, *amici* are concerned about access to the courts as a crucial means of enforcing substantive law, as well as the proper interpretation of the Federal Rules of Civil Procedure to ensure the efficient adjudication of disputes.

The 31 professors who have signed on to this brief are scholars at law schools around the United States who teach and write in Civil Procedure, Complex Litigation, Employment Discrimination and related subjects. Their names and institutional affiliations are included in the Appendix.

SUMMARY OF ARGUMENT

The class action device is essential to a well-functioning system of justice because of its ability to balance the values of access to the courts and efficient adjudication of disputes. This was the vision of the drafters of Federal Rule of Civil Procedure 23. This Court can and should interpret Rule 23's text in a way that vindicates these overarching goals.

---

[1] The parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Particularly in an adjudicative class action, the certification motion needs to be understood as a preliminary step that is complimented by motions to dismiss and summary judgment motions. The aim of class certification is not to screen out suits that fail even to allege a claim for relief (that is for motions to dismiss), nor to issue dispositive rulings on the merits (that is the purpose of summary judgment or trial). Instead, it is to determine whether the purposes of the class action rule would be served by proceeding with a collective litigation.

The district court case did not abuse its discretion in concluding that the proposed class met the requirements of Rule 23(a). In fact, the court's attention to the detailed pleadings and the extensive evidence gathered by the parties in assessing whether the named plaintiffs' claims shared common questions of law or fact with claims of absent class members showed a level of rigorous evaluation that went beyond the 23(a) threshold. Classification of the class under 23(b)(2) was also appropriate under the Federal Rules. Petitioner's contrary arguments ignore the text, purpose and history of Rule 23.

ARGUMENT

Access to the courts is a crucial means of enforcing substantive law, and the efficient adjudication of disputes is essential to the success of a well-functioning system of justice. These values of access and efficiency are sometimes couched in opposition to one another, but the class action serves both of these ends. It is an indispensible procedural device because it facilitates access to the courts for large numbers of litigants (particularly those with fairly low-value claims) and avoids costly repetition that would be required in the absence of class litigation. This was the aim of the drafters of Federal Rule of Civil Procedure 23. This Court should interpret Rule 23 in a way that vindicates these overarching goals.

In the context of highly publicized disputes such as this one, it is essential for this Court to step back from the particular facts that have garnered so much attention and to consider how Rule 23 should apply to the run of cases. This case presents several important questions about the interpretation of Rule 23 that will have implications not only in employment discrimination litigation, but more generally for the future vitality of the class action device under the Federal Rules. The Court should use this opportunity to think about the role served by Rule 23 in the full context of federal litigation.

Particularly in an adjudicative class action, in contrast to a settlement class in which litigation of the plaintiffs' claims is not contemplated, the certification motion needs to be understood as a preliminary step that is complimented by motions to dismiss and summary judgment motions. The aim of a class certification determination is not to screen out suits that fail even to allege a claim for relief (that is for motions to dismiss), nor to issue dispositive rulings on the merits (that is the purpose of summary judgment or trial). Instead, it is only to determine whether the purposes of the class action rule would be served by proceeding with a collective litigation.

The district court did not abuse its discretion in concluding that the proposed class met the requirements of Rule 23(a). In fact, the court's attention to both the detailed pleadings and the extensive evidence gathered by the parties in assessing whether the named plaintiffs' claims shared common questions of law or fact with the claims of absent class members showed a level of rigorous evaluation that more than satisfied the 23(a) threshold. Neither did the court's classification of the class under 23(b)(2) run afoul of the Federal Rules of Civil Procedure. Petitioner's contrary arguments ignore the text, purpose and history of Rule 23.

I. THE COURT'S DETERMINATION THAT PLAINTIFFS COULD PROCEED WITH CLASS LITIGATION OF THEIR CLAIMS WAS CONSISTENT WITH THE REQUIREMENTS OF RULE 23(A).

A. The text, purpose, and history of Rule 23 require a district court to make an independent determination that the 23(a) requirements are met, but do not require a full-blown evidentiary hearing.

The role of the 23(a) requirements is to ensure a "threshold" inquiry into the suitability of the particular suit for class treatment. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997). This is made clear by the structure of the Rule, which first lays out the threshold requirements in Rule 23(a)(1)-(4) and then provides for more stringent analysis in other parts of the Rule.

The district court's responsibility is to make a determination that the plaintiff has met each of the four 23(a) requirements. While these determinations must be rigorous, in that conclusory assertions by the moving party are insufficient, they need not be definitive in the sense that they resolve disputed merits issues intended by the Federal Rules to be resolved at summary judgment or trial.

The drafters of Rule 23 envisioned this threshold inquiry as being a rather simple matter.

For example, as Professor Arthur Miller, who was present at many key moments in the drafting process, wrote early in the history of the Rule, the 23(a)(2) commonality requirement is a "simple, low level" requirement that there be either one significant common issue or several common issues. It is a standard that is "relatively easy to satisfy." Arthur R. Miller, *Overview of Class Actions: Past, Present and Future* 25 (1977). Review of the historical materials of the drafting process in the early 1960s reveals that those discussions include very little on the 23(a) requirements because they were seen as obvious and non-controversial. *See* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L.Rev. 356, 387 (1967) (describing requirements of Rule 23(a) as a "well agreed proposition.").

1. The 23(a) determination is not meant to be a mini-trial, and courts have appropriately declined to treat it as one.

In the 45 years since the modern class action rule was adopted, no court has held that 23(a) requires a determination of the merits akin to a summary judgment motion or mini-trial of the sort Petitioner demands here. This uniform interpretation is correct for several reasons.

First, the Federal Rules specifically identify a number of motions through which the parties may litigate the case on the merits and the certification motion is not such a motion. *See* Fed. R. Civ. P. 12(b)(6) (motion to dismiss for failure to state a claim upon which relief can be granted); Fed. R. Civ. P. 12(c) (motion for judgment on the pleadings); Fed. R. Civ. P. 56 (a), (b) (motion for summary judgment may be made at any time until thirty days after the close of discovery). Motions to dismiss, summary judgment motions and trials on the merits are all available in the class context. If defendants believe that plaintiffs' legal theory does not hold water, they can make a motion to dismiss or for judgment on the pleadings either before certification or after. Defendants are also free to move for summary judgment.

The timing of such dispositive motions will vary with particulars of a case. Sometimes a need for more comprehensive understanding of the facts may warrant that dispositive issues be decided on a summary judgment motion, whereas in others a motion to dismiss may be the appropriate moment to make a dispositive ruling. In still other cases, disputed issues of material fact exist that require the case to continue to trial. While the parties and the district court have considerable flexibility about the timing for addressing the merits of the plaintiffs' claims, class certification is never the appropriate time.

The text of Rule 23(c)(1)(A), which states that the certification motion should be considered at "an early practicable time," demonstrates that the court may choose to hear dispositive motions prior to certification. In the previous version of Rule 23, this provision encouraged courts to make the certification determination "as soon as practicable." Fed. R. Civ. P. 23(c)(1)(A) (1966). This 2003 change codified the prevailing practice, which permitted defendants to bring motions to dismiss and even summary judgment motions prior to certification, if appropriate. *See* 7A Charles Alan Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 1785.3 (3d ed. 2010).

Importantly, courts have uniformly held that determinations of fact on certification are not binding on the merits of the litigation. *See, e.g., In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 24 (1st Cir. 2008) ("[Some] circuits' use of the term 'findings' in this context should not be confused with binding findings on the merits. The judge's consideration of merits issues at the class certification stage pertains only to that stage."); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 320 (3d Cir. 2008). Even those courts that have advocated a very strict certification standard agree that the district court's determinations at certification are not "findings" on the merits of the underlying claims, but "finding[s] that each of the requirements of Rule 23 has been met." *Id.*

The structure of Rule 23 itself demonstrates that 23(a) determinations are not intended to be binding. A district court is specifically empowered to alter a certification order at any time during the litigation, *see* 23(c)(1)(C), meaning the court can reevaluate its 23(a) determinations if the course of the litigation suggests that reevaluation is needed. It is inefficient, wasteful and counterproductive to the purpose of class litigation to make a merits inquiry when the findings of fact that result will not be binding on the litigants going forward. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) (noting the potential prejudice of a preliminary determination of the merits "since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials. The court's tentative findings, made in the absence of established safeguards, may color the subsequent proceedings and place an unfair burden on the defendant.").

For these reasons, the role of the district court is best described as making a "determination" akin to the type of determination made on a joinder motion rather than a "finding" as that term is generally used in the Federal Rules of Civil Procedure. The best analogy to the type of determination at issue in a court's 23(a) evaluation is that required under Rule 19, which was revised during the same period that the modern class action rule was written. *See* Kaplan, 81 Harv. L. Rev. at 356 (describing both Rule 19 "parties required to be joined" and Rule 23 class actions under the overarching category "problems of parties"). Like the Rule 23(a) inquiry, Rule 19 does not require merits determinations with respect to the nature of the claims of the party required to be joined. 7 Wright, Miller & Kane, *Fed. Prac. & Proc.* § 1604 (determination on Rule 19 compulsory joinder made on the pleadings).

Of course, on both Rule 19 and Rule 23 motions, district courts are charged with taking a serious look at whether litigation can appropriately proceed in light of the interests of individuals not directly before the court. *See, e.g.*, *Amchem*, 521 U.S. at 628. As this Court has recognized in the Rule 19 context, the district court's determination "must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests." *Republic of Philippines v. Pimentel*, 533 U.S. 851, 863 (2008) (quoting *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 119 (1968)). Given that the certification decision is complex and fact-intensive, like the decision whether to require Rule 19 joinder, a district court's determinations in both contexts are appropriately reviewed for abuse of discretion.

2. *The 23(a) commonality inquiry is analytically distinct from the more exacting requirement that common questions "predominate" in a 23(b)(3) class action.*

The provision of 23(a) most disputed in this case is the 23(a)(2) commonality inquiry. In determining commonality, district courts must ask the following question: If litigated separately, would each case require a court to consider one or more of the same questions of law or fact important to the litigation, such that the effort of different judges would be repeated? If so, the case passes the threshold commonality requirement. This inquiry is analogous to the standard applied to the nearly identical language in Rule 20, governing permissive joinder. *See* 7 Wright, Miller & Kane, *Fed. Prac. & Proc.* § 1653 (common question requirement "read as broadly as possible whenever doing so is likely to promote judicial economy.").

If the allegations in plaintiffs' complaint are sufficiently specific and supported by facts, this determination can be made on the pleadings. Where the pleadings do not provide enough, the parties may present additional facts so that the court can make the appropriate determination. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160 (1982) ("Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiffs' claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.").

Framing the commonality inquiry in this way recognizes that in assessing whether to certify a class, a court ought to consider all of the 23(a) requirements—including commonality—in light of the policy reasons for the class action rule: enforcement of the substantive law and efficient and economical adjudication of multiple, overlapping lawsuits. *See Amchem*, 521 U.S. at 626, n.20. Where facts that may eventually go to the merits of plaintiffs' allegations are also relevant to assessing whether the 23(a) requirements have been met, a court must examine those facts. But that consideration must remain focused on the Rule 23(a) requirements, and not the district court's assessment of the merits of the claims.

Petitioner asks this Court to impose a novel standard of proof on employment discrimination plaintiffs under Rule 23(a). *See infra* Part I.B. There is no basis for imposing this kind of heightened standard to 23(a). As discussed above, district courts' determinations on numerosity, typicality, commonality and adequacy are intended to ensure that the litigation will serve the goals of class litigation and that the interests of absent class members will be protected. These threshold questions screen putative class actions not for their likelihood of success on the merits, but for their appropriateness as aggregate litigation.

To the extent that some courts have ventured to review class certification by a stricter standard, it has uniformly been in evaluating the appropriateness of certifying a class under Rule 23(b)(3). *See, e.g., Hydrogen Peroxide*, 552 F.3d at 320 (applying a "definitive determination" by a "predominance of the evidence" standard to 23(b)(3) predominance requirement); *Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006) (stating that factual findings on the 23(b)(3) predominance inquiry must be based on underlying standard of proof that would be used at trial); *New Motor Vehicles*, 522 F.3d at 26 (requiring factual inquiry and determination of validity of novel legal theory for plaintiff to meet predominance requirement of Rule 23(b)(3)).

To properly interpret Rule 23, this Court and district courts evaluating class certification must maintain the analytical distinction that the Rules themselves draw between 23(a)'s commonality threshold and the predominance inquiry required for certification of a class under 23(b)(3). *See Amchem*, 521 U.S. at 615 (specifying that a "close look" standard only be applied to the 23(b)(3) inquiry). When a district court satisfies itself that each of the requirements of Rule 23 has been met, it must be vigilant that it does not expand the requirements of 23(a) in a premature evaluation of the underlying merits issues and that it does not erroneously import the predominance requirement of 23(b)(3), which is more stringent, into the 23(a) inquiry.

Applying Rule 23(a) as its text, purpose and history demand, the district court in this case properly considered whether the plaintiffs had met each of the Rule's requirements. Although the plaintiffs' complaint itself provided a robust factual basis for a commonality determination, the district court went further, permitting pre-certification discovery and hearing oral argument from the parties before concluding that plaintiffs had satisfied Rule 23(a). As discussed further below, the district court's analysis in this case does not show a lack of rigor, but rather an abundance of caution.

B. The district court did not abuse its discretion in determining that the plaintiffs had made a sufficient showing on the threshold 23(a) requirements.

The district court engaged in a careful review of both the pleadings and the range of evidence gathered during pre-certification discovery in determining that Rule 23(a) had been satisfied. The district court's detailed opinion surveyed the Rule's requirements and weighed the evidence presented by both parties against those requirements. While the court carefully—and correctly—avoided reaching conclusions about the merits of the plaintiffs' underlying claims of discrimination, its certification decision showed a measured evaluation of the appropriateness of litigating those claims in a class proceeding.

1. The district court did not abuse its discretion in evaluating the pleadings and evidence and certifying a class.

When the named plaintiffs filed their complaint in 2001, they alleged that Wal-Mart had engaged in a pattern and practice of gender discrimination in pay and promotion in stores throughout the United States. The complaint alleged that Wal-Mart enforced a uniform corporate culture through a variety of practices that tied the social environment in stores all over the country to the expectations of central management in Bentonville, Arkansas. The complaint went on to allege that this centralized culture, combined with largely unguided discretionary authority for pay and promotion decisions, created a pattern of discrimination against female employees.

Over the course of several years of pre-certification discovery, both plaintiffs and defendant gathered information about Wal-Mart's policies; took depositions of employees and supervisors; and garnered expert reports purporting to validate or call into question the claim that pay and promotion decisions at Wal-Mart were being made in ways that shared common factual or legal issues for employees in stores around the nation.

After nearly three years of pre-certification discovery, the plaintiffs moved for certification of their proposed class. The district court permitted extensive presentation of evidence from both parties. J.A. 164a-65a. The court considered all of this evidence and wrote a lengthy and detailed opinion, explaining why, in its judgment, the proposed class could proceed to litigate the merits of their class as a class. In reaching its decision, the district court considered both plaintiffs' and defendant's expert testimony and other evidence and ultimately concluded that, in light of all of the available information, class litigation was appropriate.

This decision was not an abuse of discretion. Rule 23(a) requires the court to determine that the named plaintiffs' claims share questions of law or fact with the claims of absent class members. As discussed above, this inquiry is a threshold question that does not require that common questions predominate, or that plaintiffs prove they will prevail on the merits as to the common questions presented.

As the district court correctly concluded, the plaintiffs' claims share several common questions of law and fact. First, they share the central common question as to whether a highly discretionary pay and promotion policy permitted gender stereotypes communicated through a strong corporate culture to influence pay and promotion decisions. J.A. 180a, 184a-93a. Second, they share the related question whether Wal-Mart's culture –the "Wal-Mart Way" – was in fact pervaded by stereotypes. J.A. 193a-96a. Third, a common question whether Wal-Mart's pay decisions led to impermissible, unjustifiable gender disparities. And fourth, the common question whether promotion opportunities were in fact distributed in a manner impermissibly tainted with discrimination. The district court correctly determined that each of these questions was common to the class and could be litigated on the merits in a class proceeding. J.A. 173a, 226a.[2]

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[2] In reaching this conclusion, the district court necessarily rejected Petitioner's disaggregated statistical evidence. In its lengthy evaluation of the competing statistical evidence offered by the parties, *see* J.A. 196a-225a, the district repeatedly rejected Wal-Mart's challenges to plaintiffs' statistical showing and explained why it accepted that evidence as sufficient to satisfy commonality. The court also issued a separate decision specifically considering challenges to the statistical expert

Each and every one of the claims of disparate impact advanced on behalf of each class member rests squarely on these common questions. Plaintiffs' claims of disparate treatment also require resolution of these questions, though they may involve other issues as well. If each class member's case were to proceed separately, every court in which an individual case was filed would have to decide each of these common questions. Thus certification of this case not only protects the substantive rights of plaintiffs, but also serves the efficiency and economy goals of Rule 23.

2. *The* Falcon *case did not create a special, heightened certification standard for employment class actions.*

Wal-Mart erroneously seeks to convert part of a single sentence in a footnote of this Court's *Falcon* decision into a novel and stringent standard for certification of Title VII class actions. It does so by omitting significant parts of the Court's language to give what remains a significance it does not, and ought not, have.

At issue in *Falcon* was certification of a class of *applicants* for employment with a class representative whose allegation was that he was denied a *promotion as an already existing employee*.

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testimony. Pet Opp Add 4-15. Petitioner's claim that the court failed to evaluate that evidence is simply incorrect.

Falcon, 457 U.S. at 149. In a footnote, the Court observed that:

> Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes.

Id. at 159 n. 15.

Wal-Mart takes bits of this sentence out of order to alter its meaning entirely, asserting that the *Falcon* Court held "that a plaintiff seeing class treatment in this context must offer 'significant proof that an employer operated under a *general policy of discrimination*' that was implemented 'through *entirely* subjective decisionmaking processes.'" Pet. Br. 8 (quoting *Falcon*, 457 U.S. at 159 n. 15 with its own emphases added). With this acontextual revision, Wal-Mart expands *Falcon's* meaning well beyond what the case held or even suggested about employment discrimination class litigation.

It is well settled that "all questions of law and fact need not be common to satisfy [the commonality] requirement, and the existence of shared legal issues with divergent factual predicates may be adequate." William B. Rubenstein, Alba Conte and Herbert Newberg, 8 *Newberg on Class Actions* §24.20 (4th ed. 2010). *See also Parra v. Bashas', Inc.*, 536 F.3d 975

(9th Cir. 2008); *In re American Medical Systems, Inc.*, 75 F.3d 1069, 1080 (6th Cir. 1996) (holding that there need be only a single issue in common and that additional disparate issues may remain). *Falcon* says nothing different.

The rule challenged in *Falcon* was the Fifth Circuit's so-called "across-the-board" rule, under which "an employee complaining of one employment practice [could] represent another complaining of another practice, if the plaintiff and the members of the class suffer from essentially the same injury." *Falcon v. General Telephone Co. of Southwest*, 626 F.2d 372, 375 (5th Cir. 1980). During these early years of litigation under the modern Rule 23—and particularly in the context of Title VII claims, which were also novel at that time—courts were extremely liberal in certifying classes. *See, e.g.*, Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 Fordham L. Rev. 659, 678-79 (2003) (noting the high-water mark of class certifications under Title VII and the decline in the number of these classes in subsequent decades). A typical across-the-board case was *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969). In that case, a discharged Black employee sought to represent a class of all other Black workers seeking equal employment opportunities. *Id.* at 1123. The district court concluded that the proposed class did not present any common question. *Id.* at 1124. The Fifth Circuit reversed, reasoning that the alleged underlying policy of general racial discrimination was sufficiently common to, and typical of, the claims of all members to permit joinder of all the claims regardless of the specific practices being challenged. *Id.*

It was on this across-the-board theory that the plaintiff in *Falcon* premised his class claims. Mr. Falcon alleged that he had been denied a promotion because of his Mexican national origin. He sought to bring a class action on behalf of other Mexican Americans for discrimination in both promotions and hiring (even though his individual claim did not concern hiring discrimination). The Court held that class certification in *Falcon* was not appropriate under these circumstances for two reasons.

First, the class action device is supposed to promote conservation of judicial resources by allowing litigation of many related claims in one place at one time. The plaintiff in *Falcon* did not present the district court with any evidence that "adjudication of his claim of discrimination in promotion would require the decision of any common question concerning the failure of petitioner to hire more Mexican-Americans." *Falcon*, 457 U.S. at 158. Moreover, the proposed class did not advance economy and efficiency because there were different theories of proof advanced for the promotion claim (disparate treatment) and the hiring class claims (disparate impact). *Id.* at 159. Each claim was also proved by different kinds of evidence, so rather than conserving judicial resources, class litigation would needlessly complicate the action waste judicial resources.

Second, the class in *Falcon* did not meet the commonality requirement, and for the same reason the named plaintiff's discriminatory hiring claim was not typical of the class. The Court held that commonality could not be found on the mere fact that the named plaintiff and the other members of the class were of the same national origin. The limited nature of Falcon's promotion discrimination claim made him ineligible to be the class representative for those with hiring discrimination claims. The *Falcon* Court identified the inherent error in across-the-board cases as a failure to demand that plaintiff's individual claim encompass the claims of the absent class members. *Id.* at 160.

In contrast to the putative class in *Falcon*, whose only common thread was the national origin of the class members, the class here is defined not only by gender, but also the type of claims pursued—pay and promotion—and the fact that plaintiffs all allege both disparate treatment and disparate impact discrimination. Moreover, despite Wal-Mart's repeated suggestion that plaintiffs have not identified any employment practice common to the class, the complaint in fact specifies that the challenged discrimination was the result of 1) a uniform corporate culture that promoted gender stereotyping; 2) an excessive delegation of decision making authority; and 3) a failure to exercise oversight as to the consequences of that delegated authority.

In short, this is not an across-the-board case because the named plaintiffs' claims *do* encompass the claims of the absent class members. The plaintiffs showed how their claims shared common questions of law and fact with the proposed class by offering substantial statistical evidence of gender disparities, anecdotal evidence revealing patterns of discriminatory conduct and expert testimony on social frameworks and their operation in workplace decision making. *See, e.g.*, J.A. 226a. The "across-the-board" theory that *Falcon* appropriately disavowed is simply inapplicable to this case.

In addition to being a misreading of this Court's precedent, the petitioner's proposed "significant proof" standard for certification of employment discrimination class actions inappropriately collapses a merits analysis into a certification determination. Wal-Mart repeatedly criticizes the plaintiffs for failing to prove their claims of discrimination. *See, e.g.*, Pet. Br. at 21 ("Plaintiffs have never offered significant proof that this framework was discriminatory."); *id.* at 25 ("[I]t is *plaintiffs'* burden to produce 'significant proof of a company-wide discriminatory policy"). These criticisms expose the flaw in Petitioner's proposed standard: they are asking the wrong question for this procedural stage of the litigation.

As discussed above, the Federal Rules provide additional, more appropriate opportunities for Wal-Mart to attack plaintiffs' case. For example, if the plaintiffs do not prevail as to the common questions—that is, if the fact finder finds *either* that a discretionary policy combined with a particular corporate culture does not give rise to a claim as a matter of law *or* that Wal-Mart does not have the type of corporate culture alleged in the complaint—then the basis for a class action will be lost. In that case, depending on the circumstances of that finding the district court will have the discretion to either enter a judgment for the defendant or alter the order for certification as permitted under Rule 23(c)(1)(C).

It is merely distracting that much of Wal-Mart's brief is devoted to the validity of plaintiffs' merits theory and the sufficiency of their proof. The district court appropriately did not require the plaintiffs to prove that all members of the class were subject to discrimination. These issues are important ones, but they are not relevant to the issue of whether this class has enough in common to pass the hurdle of Rule 23(a). Rather, the court appropriately concluded that the evidence presented by the plaintiffs fairly raised questions that were common to the class. As the Ninth Circuit correctly stated, "the disagreement *is* the common question, and deciding which side has been more persuasive is an issue for the next phase of the litigation." J.A. 71a. The question of whether plaintiffs' legal theory is in fact valid and can be proved on the facts of this dispute is one for a motion to dismiss under Rule 12 or a summary judgment motion under Rule 56.

II. A CLASS ACTION THAT SEEKS INJUNCTIVE RELIEF, AS THE CLASS CERTIFIED BELOW DOES, MAY BE CERTIFIED UNDER RULE 23(B)(2) EVEN IF IT ALSO SEEKS MONETARY RELIEF.

Wal-Mart argues that the district court erred in certifying the plaintiffs' class action as a 23(b)(2) class because they sought not only injunctive and declaratory relief but also back pay.[3] Pet. Br. 44, 46. The construction of Rule 23 proposed by Petitioner is inconsistent with the text of Rule 23(b)(2) and with the structure and purpose of the Federal Rules. In fact, the district court's certification of this class under 23(b)(2) was well within its discretion given that the plaintiffs, like many civil rights plaintiffs, are seeking injunctive and declaratory relief to remedy an employer's alleged discriminatory policies and practices.

A. The Federal Rules' text, structure, and purpose confirm that monetary relief may be sought in a 23(b)(2) class action.

As long as the requirements of Rule 23(a) are met, Rule 23(b)(2) allows certification when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). This language is not confined to classes that seek *only* injunctive or declaratory relief.

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[3] The plaintiffs also sought punitive damages, but that issue is not properly before this Court since the appropriateness of certifying a class for punitive damages was remanded back to the district court.

Thus, Wal-Mart's question presented—"whether *claims* for monetary relief can be certified under Federal Rule of Civil Procedure 23(b)(2)"—mischaracterizes the inquiry appropriate under Rule 23. Rule 23(b) governs whether a "class *action*" may be certified, *not* whether particular "claims" can be certified. This language choice is intentional. For example, the Rules require a court evaluating 23(a)(3) typicality to consider whether "the *claims* or defenses of the representative parties are typical of the *claims* or defenses of the class." Fed R. Civ. P. 23(a)(3) (emphasis added). And once a court concludes that a "class action may be maintained" under Rule 23(b), it proceeds under 23(c) to designate "the class *claims*, issues, or defenses." Fed. R. Civ. P. 23(c)(1)(B). The 23(b)(2) inquiry, however, does not require the court to carve up the class action on a claim-by-claim basis.[4]

The permissibility of monetary-relief claims in a 23(b)(2) class action is confirmed by the advisory committee notes to Rule 23's 1966 amendments, which state that "subdivision [(b)(2)] does not extend to cases in which the appropriate final relief relates

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[4] There is, of course, no obstacle to joining claims for monetary relief and injunctive relief under the Federal Rules. *See* Fed. R. Civ. P. 18(a).

exclusively or predominantly to money damages." Fed. R. Civ. P. 23, advisory committee notes (1966 amendment, subdivision (b)(2)) (emphasis added). This language plainly contemplates that monetary-relief claims are not categorically forbidden under Rule 23(b)(2). Thus, the advisory committee notes bolster the plain meaning of Rule 23's text: the presence of monetary-relief claims does not automatically preclude certification under 23(b)(2) where, as here, "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

This conclusion is also mandated by Federal Rule 1, which requires that Rule 23 "should be construed and administered to secure the just, speedy, inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. Where a class action seeks monetary relief based on the same "act[s] or refus[als] to act" that justify certification under Rule 23(b)(2), the class action's "just, speedy, inexpensive determination" is only enhanced by allowing class members to pursue their monetary-relief claims as well. At a bare minimum, certification of the class allows common issues to be resolved with respect to the entire class before proceeding to adjudicate any individual issues that might be implicated in claims for monetary relief. This is far more manageable and cost-effective than requiring each class member to independently litigate monetary claims from start to finish. As

Judge Frank Easterbrook observed in *Allen v. International Truck & Engine Corp.*, 358 F.3d 469, 472 (7th Cir. 2004), "a class proceeding for equitable relief . . . is no more complex than individual trials, yet produces benefits compared with the one-person-at-a-time paradigm." Given those benefits, when equitable claims are being pursued on a class-wide basis, "it would be prudent for the district court to reconsider whether at least some of the issues bearing on damages . . . could be treated on a class basis." *Id.*

Requiring monetary claims to be brought in separate lawsuits, on the other hand, may make them economically infeasible where litigation is likely to be costly as compared to individual recoveries. In the case at bar, for example, it is estimated that the average annual wage loss for each class members is barely more than one thousand dollars. *See* Resp. Br. 60; J.A. 475a.

These considerations were keenly on the minds of the drafters of the 1966 amendments to Rule 23, which created the three current categories in Rule 23(b). Professor Benjamin Kaplan, then the reporter for the Civil Rules Committee, wrote that "[t]he entire reconstruction of the Rule bespoke an intention to promote more vigorously than before the dual missions of the class-action device." Benjamin Kaplan, *A Prefatory Note*, 10 B.C. Indus. & Comm. L. Rev. 497, 497 (1969). The first mission was "to reduce units of litigation by bringing under one umbrella what might otherwise be many separate but duplicating actions." *Id.* The second was "to provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all," even though empowering such claims could "increase litigation overall." *Id.* Both of these objectives are best served by allowing injunctive-relief and monetary-relief claims to proceed together under Rule 23(b)(2).

B. The presence of some individualized issues does not foreclose certification under Rule 23(b)(2).

Although monetary-relief claims may require a court to consider the circumstances of individual class members, Wal-Mart's assertion that those claims must be treated as a wholly separate class proceeding under Rule 23(b)(3) rather than Rule 23(b)(2) is incorrect. Pet. Br. 49. The presence of such claims simply means that the district court will have to consider the extent to which the relevant issues should be adjudicated on a class-wide basis or, alternatively, via more individualized proceedings. This inquiry is important, of course, and it is a question that the Federal Rules leave to district court discretion regardless of which subpart of Rule 23(b) is invoked. Even in a Rule 23(b)(1) class action, class members might be required to "present individual claims after the basic class decision." Fed. R. Civ. P. 23, advisory committee notes (1966 amendment, subdivision (d)(2)) (describing need for such proceedings in "limited fund" cases).

For all class actions, therefore, the court must designate "the class claims, issues, or defenses," Fed. R. Civ. P. 23(c)(1)(B), and may decide to adjudicate on a class-wide basis only "particular issues." Fed. R. Civ. P. 23(c)(4). As well, for every class action, the court must make orders that, among other things, "determine the course of proceedings or prescribe measures to prevent undue repetition or complication." Fed. R. Civ. P. 23(d)(1). As Judge Richard Posner has explained:

> Rule 23 allows district courts to devise imaginative solutions to problems created by the presence in a class action litigation of individual damages issues. Those solutions include (1) bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class.

Carnegie v. Household International, Inc., 376 F.3d 656, 661 (7th Cir. 2004) (internal quotation marks omitted). Moreover, in both class-action and non-class-action litigation, the Rules explicitly empower the Court to "adopt[] special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems." Fed. R. Civ. P. 16(c)(2)(L).

These are fundamentally case-management issues, not ones that dictate the propriety of class certification in the first instance or that require class certification to be assessed under Rule 23(b)(3). District courts properly retain discretion to decide how best to manage the litigation in a Rule 23(b)(2) class action. Judge Easterbrook's decision in *Allen v. International Truck & Engine Corp.*, 358 F.3d 469 (7th Cir. 2004), is instructive. In reversing the district court's refusal to certify under Rule 23(b)(2) a class action seeking injunctive relief and compensatory damages, he emphasized the practical advantages of treating on a class-wide basis at least some aspects of the damages claims, given that core liability issues would be adjudicated class-wide with respect to injunctive relief. 358 F.3d at 472. In remanding that question, Judge Easterbrook wrote that "[w]hether full class treatment of damages issues would be manageable ... is too fact-sensitive, and too much of a judgment call, to warrant interlocutory review in this court." *Id.*

This Court and countless appellate courts have confirmed the importance of district-court discretion in certifying and managing class actions. *See, e.g.*, *Califano v. Yamasaki*, 442 U.S. 682, 703 (1979) ("The certification of a nationwide class, like most issues arising under rule 23, is committed in the first instance to the discretion of the district court."); *Sacred Heart Health Sys., Inc. v. Humana*, 601 F.3d 1159, 1169 (11th Cir. 2010) ("The decision to certify is within the broad discretion of the district court, and we review for an abuse of that discretion."). Such discretion makes perfect sense because the district court "generally has a greater familiarity and expertise with the practical and primarily factual problems of administering a lawsuit than does a court of appeals." *Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177, 185 (4th Cir. 1993) (Wilkinson, C.J.) (citations and internal quotation marks omitted).

In the case at bar, the district court showed sensitivity to the practical considerations that ought to inform its exercise of discretion. For example, it limited class treatment of promotion claims to a subset of class members for whom objective applicant data exists. J.A. 267a. The district court's conclusion that class-wide adjudication was otherwise fair and feasible is permissible and entitled to deference.[5]

Courts adjudicating a Rule 23(b)(2) class action also have the authority to order (as the district court did in this case) that class members be notified and given the opportunity to opt out. Wal-

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[5] Although Wal-Mart argues that the district court's plan for adjudicating this case violates Wal-Mart's due process rights, the Rules Enabling Act, and substantive Title VII law, *e.g.*, Pet. Br. 43, this Court specifically declined to grant certiorari on these issues. Further, the district court's proposed approach is consistent with the way numerous federal courts have handled similar Title VII claims. *See, e.g.*, *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 281 (5th Cir. 2008); *Pitre v. W. Elec. Co.*, 843 F.2d 1262, 1274-75 (10th Cir. 1988); *Segar v. Smith*, 738 F.2d 1249, 1291 (D.C. Cir. 1984).

Mart's contention to the contrary, Pet. Br. 47, is incorrect. As for notice, Rule 23 explicitly authorizes the district court to order notice to members of a Rule 23(b)(2) class. Fed. R. Civ. P. 23(c)(2)(A).

As for opt-out rights, Rule 23 is unquestionably flexible enough to empower courts to allow members of a Rule 23(b)(2) class to opt out. *See, e.g.*, *Eubanks v. Billington*, 110 F.3d 87, 94-95 (D.C. Cir. 1997); *Lemon v. International Union*, 216 F.3d 577, 582 (7th Cir. 2000) (noting the district court's authority to "certify the class under Rule 23(b)(2) for both monetary and equitable remedies but exercise its plenary authority . . . to provide all class members with personal notice and opportunity to opt out"). At the very least, Rule 23(c)(1)(C) authorizes the district court to alter or amend the definition of a Rule 23(b)(2) class any time before final judgment; this allows the court to exclude from the class those who opt out. *See also* Manual for Complex Litigation 4th § 21.221 & n.821 ("A court is not precluded from defining a class under Rule 23(b)(1) or (b)(2) to include only those potential class members who do not opt out of the litigation.").[6]

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[6] Accordingly, there is no need for the Court to decide here the extent to which notice and opt-out rights are required for due process. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 & n.3 (1985) (limiting its holding requiring notice and opt-out rights to "class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments" and not to "other types of class actions, such as those seeking equitable relief"). The question left open by *Shutts* is not presented in this case; nor does it need to be answered to resolve the proper scope of Rule 23(b)(2), because

For all these reasons, this Court should not endorse the unnecessary and atextual conclusion that monetary-relief claims *must* be carved away from a Rule 23(b)(2) class action and subjected to a Rule 23(b)(3) inquiry. Indeed, there is a fundamental difference between the circumstances presented here—in which claims for injunctive relief are certainly appropriate for class litigation—and the typical Rule 23(b)(3) class action that seeks only monetary relief.

The 23(b)(3) inquiry requires a court to compare adjudication by means of a class action to adjudication without a class action. *See* Fed. R. Civ. P. 23(b)(3) (is class litigation "superior to other available methods for fairly and efficiently adjudicating the controversy"). Here, however, claims for injunctive relief are already going to proceed as a class action under Rule 23(b)(2). Thus, the proper point of comparison is *not* purely individualized litigation without any class-wide adjudication. Rather, the point of comparison is a situation where a class action already exists that will be adjudicating on a class-wide basis crucial elements of the monetary-relief claims, in particular, whether Wal-Mart's policies and practices comply with Title VII.

In this scenario, forcing monetary-relief claims into the Rule 23(b)(3) box would require courts to make an inquiry that does not match

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Rule 23 empowers courts to comply with whatever due process requires in cases that, like this one, seek both monetary and injunctive relief.

reality. Instead, the Rules properly allow the court to certify the class action under (b)(2), and then to structure the litigation to adjudicate the claims in the most fair and efficient manner given the significance of these overlapping issues. Of course, it bears mentioning that a district court could well, in its discretion, determine that the class or some subset should be certified under 23(b)(3). That determination is one for the district court to make, and is part of the general discretion to manage the litigation.

C. Adjudication of monetary-relief claims in a 23(b)(2) class action should only be categorically forbidden in narrow circumstances not present here.

As set forth above, a class action may be certified under Rule 23(b)(2) even if it contains claims for monetary relief, and the district court did not abuse its discretion in finding this class action appropriate under 23(b)(2). There may, however, be some circumstances where monetary-relief claims should not be adjudicated in a Rule 23(b)(2) class action, and must independently satisfy some other prong of Rule 23(b). No such circumstances are present here, but in the interest of completeness *amici* briefly discuss below two potential limitations on the use of Rule 23(b)(2).

One situation where a Rule 23(b)(2) class action ought not to include monetary-relief claims is if they are based on conduct that is unrelated to conduct underlying the injunctive-relief claims.

Where there is no transactional relationship between the claims, the values of Rule 1 are not likely to be served because the injunctive-relief class action will not be resolving issues that would be relevant to the monetary-relief claims. As a textual matter, the lack of a transactional connection between injunctive-relief and monetary-relief claims might be framed in terms of whether the claims are truly part of one "class action" for purposes of Rule 23(b).

This Court has taken an analogous approach to federal-question jurisdiction. Under *United Mine Workers v. Gibbs*, federal-law and state-law claims comprise a single "case" for purposes of Article III only when they "derive from a common nucleus of operative fact." 383 U.S. 715, 725 (1966). In the case at bar, however, the class plaintiffs' monetary-relief claims are based on the very same "act[s] or refus[als] to act" that warrant 23(b)(2) certification.

It would also be inappropriate to adjudicate monetary-relief claims in a Rule 23(b)(2) class action where reasonable plaintiffs would not be seeking injunctive relief in the absence of a possible monetary recovery, or where the injunctive or declaratory relief sought would not be reasonably necessary and appropriate even if the plaintiffs were to succeed on the merits. *See Robinson v. Metro-North*, 267 F.3d 147, 164 (2d Cir. 2001). *Robinson* reasoned that "[i]nsignificant or sham requests for injunctive relief should not provide cover for (b)(2) certification of claims that are brought essentially for monetary recovery." *Id.* at 164.

Jurisdictional principles provide a useful analogy here as well. In *Bell v. Hood*, this Court recognized that federal-question jurisdiction is not appropriate "where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction, or where the claim is wholly insubstantial and frivolous." 327 U.S. 678, 682-83 (1946). Likewise, an insignificant or sham request for injunctive relief is an inappropriate basis for Rule 23(b)(2) certification. The requests for injunctive relief in the case at bar, however, are certainly not "insignificant" or a "sham." Although Wal-Mart vigorously disputes the merits of plaintiffs' claims, there is no question that injunctive relief is appropriate if Wal-Mart's policies and practices are found to violate Title VII. *See* 42 U.S.C. § 2000e-5(g); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 766 (1976) ("It can hardly be questioned that ordinarily [injunctive-type] relief will be necessary to achieve the 'make-whole' purposes of [Title VII]."). There is also no reason to believe that reasonable plaintiffs in the same position as the plaintiffs below would be seeking only monetary relief. Obtaining the injunctive relief requested is a legitimate and worthwhile objective for plaintiffs aggrieved by Wal-Mart's practices.[7]

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[7] Wal-Mart's argument that any class members who no longer work for Wal-Mart lacks standing to seek injunctive relief (Pet. Br. 52) is erroneous, as is the Ninth Circuit's narrower view that standing is lacking for class members who were not employed by Wal-Mart at the time the complaint was filed. J.A. 100a-101a. First, examining the standing of each absent class

Beyond these potential restrictions, a district court's handling of monetary-relief claims in the context of a Rule 23(b)(2) class action should generally be left to that court's discretion as a matter of case management. *See supra* Part II.B. As long as the injunctive-relief claims are genuine and not merely "cover for . . . claims that are brought essentially for monetary recovery," *Robinson*, 267 F.3d at 164, it should not be said that "the appropriate final relief relates exclusively or predominantly to money damages." Fed. R. Civ. P. 23, advisory committee notes (1966 amendment, subdivision (b)(2)).

The analysis suggested by the Ninth Circuit is consistent with this case-management focused approach. The *en banc* decision directed district courts to consider the "effect of the relief sought on the litigation" in assessing the appropriateness of certification under 23(b)(2) where the plaintiffs seek some monetary relief in addition to injunctive and declaratory relief. J.A. 88a. In this assessment:

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member is contrary to the very idea of representative litigation. It is the named plaintiffs whose standing the court should consider. Second, as other courts have recognized, former employees are often the best (or only) plaintiffs to challenge discriminatory employment policies. *See, e.g., Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239, 247 (3d Cir. 1975). Moreover, experience shows that many former employees of Wal-Mart will someday work for the company again. For any former employee who might one day seek a job with one of the nation's largest employers, eliminating discriminatory practices is of paramount importance.

> Factors such as whether the monetary relief sought determines the key procedures that will be used, whether it introduces new and significant legal and factual issues, whether it requires individualized hearings, and whether its size and nature —as measured by recovery per class member—raise particular due process and manageability concerns would all be relevant, though no single factor would be determinative.

Id. Importantly, this standard does not categorically ban monetary-relief claims in 23(b)(2) class actions. Instead, it offers guidance to district courts exercising their proper discretion in evaluating the best way to handle complex litigation.

Although some lower-court opinions have imposed other categorical obstacles to monetary-relief claims in Rule 23(b)(2) class actions, this Court should not endorse these judicial alterations to Rule 23. For example, there is no textual basis in Rule 23 for forbidding monetary-relief claims that are more than "incidental" or that "depend[] in any significant way on the intangible, subjective differences of each class member's circumstances." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415-16 (5th Cir. 1998). Likewise, courts need not measure, by some uncertain metric, the "positive weight or value of the injunctive or declaratory relief sought" as compared to the monetary relief sought. *Id.* at 430 (Dennis, J., dissenting).[8] Rather than embrace artificial restrictions that lack any support in the text of Rule 23, this Court should endorse the more pragmatic approach urged here, which would allow courts to make optimal use of the class-action device and to best accomplish the purposes underlying Rule 23 and the entire Federal Rules of Civil Procedure.

CONCLUSION

Rule 23 was designed to give district courts discretion to balance the Federal Rules' goals of the just and efficient resolution of disputes. The district court in this case appropriately exercised this discretion in certifying the class. For all of the reasons discussed here, this Court should affirm class certification.

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[8] If this Court were to require such a comparison, *amici* agree with the Ninth Circuit's conclusion that "the amount of monetary damages available *for each plaintiff* ... is far more relevant to establishing predominance that the total size of a potential monetary award for the class as a whole." J.A. 89a.

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IN THE

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WAL-MART STORES, INC.,

Petitioner,

vs.

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, KAREN WILLIAMSON, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, on behalf of themselves and all others similarly situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CONSUMERS UNION OF UNITED STATES, INC., NATIONAL CONSUMER LAW CENTER, AND CENTER FOR CONSTITUTIONAL RIGHTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF CONSUMERS UNION OF UNITED STATES, INC., NATIONAL CONSUMER LAW CENTER, AND CENTER FOR CONSTITUTIONAL RIGHTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST[1]

Consumers Union of United States, Inc., nonprofit publisher of Consumer Reports®, provides consumers with information, education, and counsel about goods, services, health and personal finance. Consumers

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[1] *Amici curiae* certify that no party's counsel authored any part of this brief and that no party or its counsel (aside from *amici curiae*, their members and their counsel) made any monetary contribution toward preparing or submitting this brief. *Amici curiae* further certify that the parties' counsel of record have consented to filing in letters lodged with the Clerk.

Union's publications and services have a combined paid circulation of approximately 8.3 million, and carry articles on its own product testing; on health, product safety, and marketplace economics; and on legislative, judicial, and regulatory actions that affect consumer welfare. Consumers Union's income derives solely from the sale of Consumer Reports®, its other publications and services, fees, noncommercial contributions and grants. Consumers Union's publications and services carry no outside advertising, and it does not accept donations from corporations or corporate foundations. Consumers Union has filed *amicus curiae* briefs in cases like this implicating consumer rights. *See, e.g., Wyeth v. Levine*, 555 U.S. ___, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009); *Cuomo v. The Clearing House Ass'n, L.L.C.*, 557 U.S. ___, 129 S.Ct. 2710, 174 L.Ed.2d 464 (2009).

National Consumer Law Center is a nonprofit advocacy organization with headquarters in Boston, Massachusetts. It seeks to build economic security and family wealth for low-income and other economically disadvantaged Americans. *National Consumer Law Center* promotes access to quality financial services and protects family assets from unfair and exploitive transactions that wipe out resources and undermine self-sufficiency. For over 40 years, the organization has used its expertise to shape the rules of a fair marketplace. *National Consumer Law Center* has participated as *amicus curiae* in cases affecting these interests. *See, e.g., Vallies v. Sky Bank*, 591 F.3d 152 (3d Cir. 2009). Additionally, the Court has cited *National Consumer Law Center* publications. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, ___ U.S. ___, 130 S.Ct. 1605, 1617 n.12, 176 L.Ed.2d 519 (2010).

Center for Constitutional Rights, based in New York City, is dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966 by attorneys who represented civil rights movements in the South, *Center for Constitutional Rights* is a nonprofit legal and educational organization committed to creative use of the law to facilitate social change. *Center for Constitutional Rights* has been a presence as *amicus curiae*, and has represented litigants directly, in cases impacting civil liberties and constitutional freedoms. *See, e.g.*, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) (friend of court); *Wilner v. National Sec. Agency*, 592 F.3d 60 (2d Cir. 2009) (counsel); *United States v. City of New York*, 258 F.R.D. 47, 63 (E.D.N.Y. 2009) (assisting claimants).

These organizations participated as *amici curiae* in the Ninth Circuit Court of Appeals below. J.A. 7a, 19a. Each has an abiding interest in the continuing vitality of Federal Rule of Civil Procedure 23. The class action is an effective device to protect workers and consumers and to vindicate important federal rights.

ISSUES ADDRESSED

When granting certiorari, the Court framed the following question for review: "Whether the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a)." *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S.Ct. 795, 178 L.Ed.2d 530 (2010). *Amici curiae* focus on two aspects of this certified question: (1) whether individual hearings are necessary to calculate the monetary relief owed to class members; and (2) whether the Court should use this case to address the proper role of *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), on a Rule 23 motion seeking class certification.

SUMMARY OF ARGUMENT

First, petitioner Wal-Mart Stores, Inc. ("Wal-Mart") is mistaken that a defendant has the right to individual hearings to determine the monetary relief owed to people adversely affected by a common business practice. This position flouts established law and, if adopted, would gut the class action mechanism along with its intended efficiencies. Wal-Mart disregards widely approved aggregate techniques used to calculate monetary relief in class suits generally, and in employment-discrimination class actions specifically.

Second, the Ninth Circuit was correct that, in light of plaintiffs' experts satisfying *Daubert*, there is no need to address whether *Daubert* applies at the class-certification stage. To the extent the issue is reached at all, Wal-Mart's *amici* fundamentally misconceive the judicial inquiry. Factual determinations on a Rule 23 motion are only preliminary and for a narrow purpose – whether a class shall be certified. Although district courts must engage in a "rigorous analysis" of expert testimony and other proof, this occurs only to ensure the "prerequisites of Rule 23[] have been satisfied." *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982). The inquiry is not governed by the evidentiary requirements that apply to factual determinations on the merits at summary judgment or trial.

ARGUMENT

I. AGGREGATE TECHNIQUES ARE COMMONLY USED TO CALCULATE CLASSWIDE RELIEF IN CLASS ACTIONS

Due process in class actions compels a fair balancing of the plaintiff's interest in obtaining a remedy, avoiding erroneous deprivation of the defendant's property, and "any ancillary interest the [court] may have in providing the procedure or foregoing the added burden of providing greater protections." *Connecticut v. Doehr*, 501 U.S. 1, 11

(1991). Wal-Mart's insistence on individual hearings to determine monetary relief ignores the district court's conscientious balancing given the evidence below. In granting class certification, the judge closest to the case emphasized Wal-Mart's "extraordinarily sophisticated" computerized records enabling accurate determination of female employee losses from unlawful discrimination. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 180 (N.D. Cal. 2004). In addition to conflicting with the record, Wal-Mart's plea for individual hearings is inconsistent with aggregate-calculation techniques often used in class actions.

A. Employment Discrimination

In the employment discrimination realm, a formulaic approach to classwide relief is routinely applied to determine employee backpay.

In *McClain v. Lufkin Industries, Inc.*, 519 F.3d 264 (5th Cir. 2008), for example, the Fifth Circuit held that a formulaic approach to computing backpay is permissible where "the class is large, the promotion or hiring practices are ambiguous, or the illegal practices continued over an extended period of time." *Id.* at 281. Citing the seminal decision in *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260 (5th Cir. 1974), the Fifth Circuit noted that individual hearings would be unnecessarily cumbersome and, further, class members outnumbered promotion vacancies. There was "no practical way to determine through individual hearings which jobs the class members," but for the discrimination, would have obtained. *McClain*, 519 F.3d at 281. The Fifth Circuit thus deferred to the lower court's trial plan calculating aggregate monetary relief. *Id.*

Here, likewise, if relief could not be sought on an aggregate basis, a large group of female Wal-Mart employees would face daunting hurdles. Rule 23 gives them the option to band together in a single suit. "The discretion suggested by Rule 23's 'may' is discretion residing in the plaintiff: He may bring his claim in a class action if he wishes." *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, ___ U.S. ___, 130 S.Ct. 1431, 1438, 176 L.Ed.2d 311 (2010) (plurality). In the words of a state supreme court: "One of the privileges our system of justice confers on every citizen is the ability to assert claims in the form of a class action if the requirements of Rule 23 are met. As a practical matter, this is often essential to the assertion of any claim at all." *Budden v. Board of School Comm'rs*, 698 N.E.2d 1157, 1162 (Ind. 1998).

In this case, a class action is the only viable avenue for the female workers because their average annual wage loss is little more than $1,000. Recently published class action guidelines apply directly to these circumstances. A class action is "particularly appropriate" when the "individual recoveries are small, but involve many thousands or millions of dollars in damages in the aggregate. This is precisely the type of case that encourages compliance with the law and results in substantial benefits to the litigants and the court." *Standards and Guidelines for Litigating and Settling Consumer Class Actions*, 255 F.R.D. 215, 223 (2009) (National Association of Consumer Advocates). The consequences of turning a blind eye are troubling: "Rejecting class actions because individual recoveries are small, while ignoring the aggregate amounts involved, encourages wrongful conduct and largely immunizes entities caught stealing millions in $10 increments." *Id.* at 220.

The Court has consistently embraced this view. A class action "may permit the plaintiffs to pool claims which would be uneconomical to litigate individually." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985). Where each claim is for a modest amount, "most of the plaintiffs would have no realistic day in court if a class action were not available." *Id.* The "realistic alternative" is not numerous "individual suits, but zero individual suits." *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.) (emphasis omitted).

The flip side – the judicial system's interest in efficient administration – is equally compelling. A class action avoids the task of adjudicating hundreds of thousands of individual, but similar, claims. "The more claimants there are, the more likely a class action is to yield substantial economies in litigation." *Id.* In this situation, "the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979).

B. Antitrust

In antitrust class actions, courts also rely on classwide aggregate techniques when calculating monetary relief.

While on the Second Circuit, Justice Sotomayor identified the severe result if, as Wal-Mart appears to invite, aggregate calculation methods were suddenly restricted. "'If defendants' argument (that the requirement of individualized proof on the question of damages is in itself sufficient to preclude class treatment) were uncritically accepted, there would be little if any place for the class action device in the adjudication of antitrust claims.'" *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 140 (2d Cir. 2001) ("*Visa Check*"), *disapproved in part on other grounds by In re Initial Public Offering Sec. Litig.* ("*IPO*"), 471 F.3d 24, 39-40, 42 (2d Cir. 2006) (citation omitted). The same goes for employment claims and other areas of law where classes are often certified.

Notably, Wal-Mart was the lead class plaintiff in *Visa Check*, representing a class of approximately five million merchants. *See Wal-Mart Stores, Inc. v. Visa USA, Inc.*, 396 F.3d 96, 101 (2d Cir. 2005). When Wal-Mart sought classwide relief, it did not object to aggregate techniques. Rejecting Wal-Mart's current stance that some classes are too numerous to apply those methods, the Second Circuit approved a $3 billion settlement – the largest in the history of antitrust law. *Id.*

Visa Check is instructive in another key respect. Defendants Visa and Mastercard contended that merchants such as Wal-Mart could mitigate any damages stemming from higher debit card fees. By this line of argument, Wal-Mart's ability to mitigate supposedly mandated individual hearings and impeded class treatment. *Visa Check*, 280 F.3d at 137-40. Disagreeing with Visa and Mastercard, the Second Circuit noted that the district court could address individual relief issues that might arise later in the litigation. *Id.* at 141. The "management tools" available included bifurcated liability and damage trials, appointing a special master to preside over individual damages proceedings, creating subclasses and, if necessary, altering the class definition. *Id.*; *accord Carnegie*, 376 F.3d at 661 (citing *Visa Check*, 280 F.3d at 141).

These options, which protect both the plaintiff class and the defendant, are meaningful and important. "'The purpose of Rule 23 is to provide flexibility in the management of class actions, with the trial court taking an active role in the conduct of the litigation.'" *Waters v. International Precious Metals Corp.*, 172 F.R.D. 479, 487 (S.D. Fla. 1996) (citation omitted). Contrary to the suggestion of Wal-Mart and its *amici*, this is not "conditional" certification nor "certify now and worry later." It is how class actions are intended to work. Here, class treatment should not be foreclosed based on Wal-Mart's conjecture about individual issues that, should they arise, may be readily managed within the district court's discretion and breadth of authority under Rule 23.

C. Civil Rights

Class actions have especially deep roots in the civil rights domain to remedy racial discrimination – perhaps most famously, in *Brown v. Board of Education*, 347 U.S. 483, 495 (1954). When determining relief in such cases, courts again invoke aggregate techniques.

One useful illustration is *In re Monumental Life Ins. Co.*, 365 F.3d 408 (5th Cir. 2004). The complaint there "challenge[d] defendants' alleged practice of paying lower benefits and charging higher premiums to blacks in the sale of low-value life insurance." *Id.* at 411. Like the Wal-Mart class here, the plaintiffs sought class certification under Rule 23(b)(2). *Id.* They relied on "standardized formulas or restitution grids to calculate individual class members' damages." *Id.* at 419. Denying their motion, the district court stated that "'many and a variety of hearings would be required to determine[ ] personalized harm to each individual plaintiff.'" *Id.* at 418. But the Fifth Circuit reversed, reasoning that the "prevalence of variables common to the class makes damage computation 'virtually a mechanical task.'" *Id.* at 419. The damages, as here, did "not require the manipulation of data kept outside defendants' normal course of business." *Id.* at 420.

Monumental Life also discusses the ease with which backpay, in particular, may be calculated on an aggregate basis. As "compared to compensatory damages," the Fifth Circuit remarked, "'calculation of back pay generally involves less complicated factual determinations and fewer individual issues.'" *Monumental Life*, 365 F.3d at 418 (quoting *Coleman v. General Motors Acceptance Corp.*, 296 F.3d 443, 449 (6th Cir. 2002)).

D. Consumer

Courts have likewise endorsed aggregate techniques to compute classwide monetary relief in consumer class actions.

In *Smilow v. Southwestern Bell Mobile Sys., Inc.*, 323 F.3d 32 (1st Cir. 2003), the plaintiffs alleged that a cellular phone company's practice of charging customers for incoming calls was a breach of contract and violated state and federal statutes. *Id.* at 34-35. The company took issue with the contention that the plaintiffs' losses could be extracted from the defendant's computer system and analyzed through a "mechanical process." *Id.* at 40. Holding class treatment was proper, the First Circuit explained that class certification should not be denied solely due to damage-calculation issues. *Id.* at 40 & n.8.

The principle at the heart is venerable in class-action jurisprudence. "Particularly where damages can be computed according to some formula, statistical analysis, or other easy or essentially mechanical methods, the fact that damages must be calculated on an individual basis is no impediment to class certification." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1259-60 (11th Cir. 2004) (footnotes omitted). Again, "Rule 23 allows district courts to devise imaginative solutions to problems created by . . . individual damages issues." *Carnegie*, 376 F.3d at 661 (seventeen-million-member class action against banks and tax preparers).

Here, Wal-Mart's comprehensive records allow mechanical application of a formula to generate monetary relief. *See Dukes*, 222 F.R.D. at 180. As then-Chief Judge Frank Johnson explained in certifying a class in similar circumstances: "[N]o separate trials will be required on the issue of damages. Damages can be mathematically calculated on the basis of the information presently contained in the [defendant]'s records . . . without the need to further burden the Court with the presentation of evidence in each individual case." *Partain v. First National Bank of Montgomery*, 59 F.R.D. 56, 59 (M.D. Ala. 1973) (footnotes omitted).

By way of comparison, state class-action practice (under similar rules of court) is in accord. Where calculating monetary relief is not "particularly complex or burdensome," as the record showed here, "the overwhelming weight of authority" holds that "'a trial court should not dispose of a class certification solely on the basis of disparate damages.'" *Hamilton v. Ohio Sav. Bank*, 694 N.E.2d 442, 455 (Ohio 1998) (citation omitted); *see also Sav-on Drug Stores, Inc. v. Superior Court*, 17 Cal. Rptr. 3d 906, 918 n.6, 923 n.12 (Cal. 2004) (noting use of aggregate techniques in various class-action settings).

II. *DAUBERT*'S PROPER ROLE AT CLASS CERTIFICATION IS NOT PRESENTED AND, EVEN IF CONSIDERED, THE POSITION OF WAL-MART'S *AMICI* ON *DAUBERT* IS UNPERSUASIVE

Pushing a point Wal-Mart itself barely mentions, the Washington, Atlantic and New England Legal Foundations (collectively, "Foundations") urge the Court to mandate aggressive examination of experts at the class-certification stage. For several reasons, the Foundations' invitation to interject a *Daubert* inquiry should be declined.

A. The Ninth Circuit Did Not Address the Scope of *Daubert* and the Point Would Benefit from Further Legal Development

This Court usually does not resolve a question "in the first instance" that the lower appellate court "did not reach." *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S.Ct. 2527, 2542 n.14, 174 L.Ed.2d 314 (2009). In light of the record, the Ninth Circuit did not decide whether "*Daubert* has exactly the same application at the class certification stage as it does to expert testimony relevant at trial." *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 602 n.22 (9th Cir. 2010) (*en banc*).

Rather, the Ninth Circuit explained that "even assuming" *Daubert* applied, "the district court here was not in error. Thus we need not resolve this issue here." *Id.* The district court properly made "factual determinations regarding evidence as it relates to common questions of fact or law," without delving into "which parties' evidence is ultimately more persuasive as to liability." *Id.* at 602. Within its sound discretion, the district court ruled that Wal-Mart mounted no viable challenge to plaintiffs' experts. *See Dukes v. Wal-Mart, Inc.*, 222 F.R.D. 189 (N.D. Cal. 2004) (separate order addressing evidentiary objections).

Moreover, Wal-Mart's strategic choices below necessarily cabin the issue before this Court. "Wal-Mart did not (and does not) challenge Dr. Bielby's methodology or contend that his findings lack relevance because they 'do [ ] not relate to any issue in the case.'" *Dukes*, 603 F.3d at 602 (quoting *Daubert*, 509 U.S. at 591). Instead, Wal-Mart chose to "challenge[] only whether certain inferences can be persuasively drawn from his data." *Id.* The Ninth Circuit was correct that *Daubert* focuses not on "persuasiveness" – Wal-Mart's focus – but "scientific reliability and relevance." *Id.* (citing *Daubert*, 509 U.S. at 587-92).

Because the Ninth Circuit did not analyze *Daubert*'s role on a Rule 23 motion, the more prudent approach would require the issue to develop first at the circuit level before this Court considers weighing in. Although the Foundations brand the Ninth Circuit an outlier, this characterization is inaccurate. Just one circuit mandates a "full *Daubert* analysis" on class certification. *American Honda Motor Co. v. Allen*, 600 F.3d 813, 816 (7th Cir. 2010) (*per curiam*). And even there, the Seventh Circuit confined its holding to where expert evidence is "critical" to the motion. *Id.* at 815.

Other appellate courts phrase the inquiry slightly differently and, in any event, have not faced the *Daubert* issue the Seventh Circuit addressed only last year. Contrary to what the Foundations imply, most of the leading circuit authorities do not even cite *Daubert* – much less apply it to class-certification motions. *See, e.g.*, *IPO*, 471 F.3d at 42 (2d Cir.) (district court "is to assess all of the relevant evidence admitted at the class certification stage and determine whether each Rule 23 requirement has been met"); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 314-15 & n.13 (3d Cir. 2008) (defense motion relying on *Daubert* was denied and ruling was not appealed); *Unger v. Amedisys Inc.*, 401 F.3d 316, 323 (5th Cir. 2005) (stating that "'it makes sense to consider the admissibility of the testimony of an expert . . . prior to considering class certification'") (citation omitted); *Blades v. Monsanto Co.*, 400 F.3d 562, 575 (8th Cir. 2005) (district court should focus on whether "common evidence could suffice . . . to show classwide injury").

Before the Seventh Circuit's recent opinion, only one published circuit decision, to *amici*'s knowledge, specifically discussed *Daubert*'s relevance to a Rule 23 motion. The Second Circuit instructed that "a motion to strike expert evidence pursuant to *Daubert* . . . involves a[n] inquiry distinct from that for evaluating expert evidence in support of a motion for class certification." *Visa Check*, 280 F.3d at 132 n.4 (Sotomayor, J.); *see also In re NYSE Specialists Sec. Litig.*, 260 F.R.D. 55, 66 (S.D.N.Y. 2009) (following same); *cf. International Union v.*

General Motors Corp., 497 F.3d 615, 636 (6th Cir. 2007) (*Daubert* does not apply to "fairness hearing" on class-wide settlement).

In sum, the appellate precedent on *Daubert's* place in class-action procedure is inconclusive. The settled discord necessary for certiorari jurisdiction simply does not exist. *See* Supreme Court Rule 10. Confirming as much, Wal-Mart has abandoned its initial suggestion that the Ninth Circuit somehow fostered a clash on *Daubert* that should be reviewed. *Compare* Petition for Writ of Certiorari at 24-25 *with* Brief for Petitioner at 30-31.

The narrow scope of Wal-Mart's interlocutory appeal underscores that this case does not really present the abstract legal issue. The Foundations criticize, foremost, the district court's *separate* order discussing *Daubert* and disposing of Wal-Mart's motions to strike plaintiffs' experts. *See Dukes*, 222 F.R.D. at 191-95. The Ninth Circuit, however, limited the appeal to the class certification order alone. J.A. 2a, 14a-15a, 27a-28a. This reflects that Rule 23(f) review does not "extend[] to any other type of order." *McKowan Lowe & Co., Ltd. v. Jasmine, Ltd.*, 295 F.3d 380, 390 (3d Cir. 2002). In this posture, there is actually "no jurisdiction to review the motion[s] to strike." *Visa Check*, 280 F.3d at 132 n.4; *see also Bell v. Ascendant Solutions, Inc.*, 422 F.3d 307, 314 (5th Cir. 2005) (declining to review "exclusion" of "expert report").

B. The *Daubert* Inquiry Does Not Apply to a Class-Certification Order Making Only Preliminary Factual Determinations

In any event, the evidentiary rules that control merits determinations, including the admissibility of expert testimony, do not apply in the same way to a procedural motion to certify a class.

Like statutes, the Rules of Evidence are limited by their "plain language." *Huddleston v. United States*, 485 U.S. 681, 687 (1988). In relevant part, the principal rule at issue specifies: "If scientific, technical, or other specialized knowledge will assist the *trier of fact* to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify thereto . . . ." Fed. R. Evid. 702 (emphasis added). This means the court at trial or on summary judgment, *see Daubert*, 509 U.S. at 596, or the jury, *see Powers v. Ohio*, 499 U.S. 400, 412-13 (1991). The strictures governing expert testimony do not suggest any application to class-certification motions. *See* Fed. R. Evid. 702-705. Nor does this Court's seminal opinion, which "determine[d] the standard for admitting expert scientific testimony in a federal *trial*." *Daubert*, 509 U.S. at 582 (emphasis added). The Court recognized "a gatekeeping role for the judge" even where the function "will prevent the jury from learning of authentic insights and innovations." *Id.* at 597.

As *Daubert*'s progeny illustrate, the gatekeeping role is meant to insulate jurors, not judges. *See, e.g.*, *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149 (1999); *United States v. Scheffer*, 523 U.S. 303, 309 (1998). Lower courts have reached the same conclusion. "The 'gatekeeper' doctrine was designed to protect juries and is largely irrelevant in the context of a bench trial." *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 852 (6th Cir. 2004). "The primary purpose of the *Daubert* filter is to protect juries from being bamboozled by technical evidence of dubious merit . . . ." *SmithKline Beecham Corp. v. Apotex Corp.*, 247 F. Supp. 2d 1011, 1042 (N.D. Ill. 2003) (Posner, J., sitting by designation), *aff'd on other grounds*, 403 F.3d 1331 (Fed. Cir. 2005). As the Advisory Committee stated, the Rules of Evidence "afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day." Fed.

R. Evid. 704, Advisory Committee Notes (1972 proposed rules).

Class certification, by contrast, does not present these concerns. It is decided by the judge, usually early in the litigation, and "is not accompanied by the traditional rules and procedures applicable to civil trials." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). Making factual determinations as necessary to the ruling, the judge decides only "'whether the requirements of Rule 23 are met.'" *Id.* (citation omitted). This presents not a trial of facts in the usual sense, but "a mixed question of fact and law." *IPO*, 471 F.3d at 40.

Class-certification proceedings are therefore ill-suited for a *Daubert* inquiry. With good reason, a "*Daubert* motion is typically not made until later stages in litigation, such as in association with a motion for summary judgment, motion in limine, or at trial, and a district court should not postpone consideration of a motion for class certification for the sake of waiting until a *Daubert* examination is appropriate." *Visa Check*, 280 F.3d at 132 n.4 (Sotomayor, J.). Under the *Daubert* regime, an expert would face complete exclusion at an early stage (with rehabilitation later unlikely, if even attempted). Especially with no jury involved, this makes little sense. As Judge Posner stated in the context of bench trials: "*Daubert* requires a binary choice – admit or exclude – and a judge in a bench trial should have discretion to admit questionable technical evidence, though of course he must not give it more weight than it deserves." *SmithKline Beecham*, 247 F. Supp. 2d at 1042.

In short, evidence on class certification and at trial are two different things. Whether the movant's evidence would qualify to go before a jury is not the right question, since the proof is not offered for that purpose. The law of evidence recognizes that proof appropriately considered in one setting might not be considered in another on a different issue. "Hearsay testimony," for instance, "may be admitted to demonstrate typicality" even though it would not be presented to a jury on the merits. *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 562 n.14 (8th Cir. 1982); *see also Fisher v. Ciba Specialty Chemicals Corp.*, 238 F.R.D. 273, 279 (S.D. Ala. 2006) (collecting cases).

Amici curiae want to be clear on the standard they support. District courts benefit from, and should have discretion to consider, any evidence shedding light on whether Rule 23 is satisfied. "At the class certification stage of the proceedings, 'robust gatekeeping' of expert evidence is not required; rather, the court must assess only whether expert evidence is useful in evaluating whether class certification requirements have been met." *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 264 F.R.D. 603, 616 (N.D. Cal. 2009). The conclusion that "*Daubert* does not control in this context" is bolstered by a "substantial body of case law." *In re Foundry Resins Antitrust Litig.*, 242 F.R.D. 393, 399 n.4 (S.D. Ohio 2007). Other decisions phrase the inquiry essentially the same way. *See, e.g., In re Zurn Pex Plumbing Prods. Liab. Litig.*, 267 F.R.D. 549, 556 (D. Minn. 2010); *Duchardt v. Midland Nat'l Life Ins. Co.*, 265 F.R.D. 436, 441 (S.D. Iowa 2009).

Contrary to what has been suggested, this approach to evidence on class certification comports with a "rigorous analysis." *Falcon*, 457 U.S. at 161. The Foundations posit a false choice between full application of *Daubert* and class treatment grounded on the flimsiest expert testimony imaginable. There is a sensible medium between the two extremes. Put concisely, the judge carefully scrutinizes the evidence while respecting the procedural and provisional nature of class certification. This is no cakewalk for the movant. As the district court below stated, judges do not "uncritically accept all expert evidence that is offered in support of, or against, class certification. Rather, the question is whether the expert evidence is sufficiently probative to be useful in evaluating whether class certification requirements have been met." *Dukes*, 222 F.R.D. at 191.

Different scrutiny of evidence at the preliminary stage of class certification takes into account the nascent state of the record. Class status must be determined at "an early practicable time" when only limited discovery usually has occurred. Fed. R. Civ. P. 23(c)(1)(A). One decision thus rejected a *Daubert* inquiry as "inappropriate" on class certification but left open "revisit[ing] this issue after discovery has been completed and the parties submit the scientific evidence on which they intend to rely for dispositive motions and/or trial." *O'Connor v. Boeing North American, Inc.*, 184 F.R.D. 311, 321 n.7 (C.D. Cal. 1998); *cf. In re Netbank, Inc. Sec. Litig.*, 259 F.R.D. 656, 670 n.8 (N.D. Ga. 2009) (holding *Daubert* motions in abeyance). Lacking "a complete set of data," experts cannot fairly be expected to be trial-ready before, quite often, any merits discovery. *Midwestern Machinery v. Northwest Airlines, Inc.*, 211 F.R.D. 562, 566 (D. Minn. 2001).

As *Eisen* commands, moreover, the preliminary determinations on class certification do not prejudice the defendant. "A court's determination that an expert's opinion is persuasive or unpersuasive on a Rule 23 requirement does not preclude a different view at the merits stage of the case." *Hydrogen Peroxide*, 552 F.3d at 324. It is widely understood that "the determination as to a Rule 23 requirement is made only for purposes of class certification and is not binding on the trier of facts, even if that trier is the class certification judge." *IPO*, 471 F.3d at 41 (citing *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366

(4th Cir. 2004)). The *in terrorem* description of class actions is further undermined by the possibility, as in this case, of immediate review under Rule 23(f) of an order certifying a class.

Finally, even if *Daubert* applied to Rule 23 determinations, plaintiffs have demonstrated that their experts satisfied *Daubert* and its rubric is not as demanding as the Foundations assume. The Rules of Evidence follow a "general approach of relaxing the traditional barriers to 'opinion' testimony." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988). *Daubert* "does not require the most elaborate or sophisticated tests or studies that can be imagined by opposing counsel." *Oddi v. Ford Motor Co.*, 234 F.3d 136, 160 (3d Cir. 2000). Just as the "flexibility" animating Rule 23 "enhances the usefulness of the class-action device," *Falcon*, 457 U.S. at 160, the Court has called *Daubert*, where it does apply, a "'flexible'" framework. *Kumho Tire*, 526 U.S. at 141. Flexibility means adaptation to context based on the considerations discussed above.

The Court should not endorse a tool for mischief that would bog down class-certification procedure with excessive and premature challenges to the movant's experts. As a matter of judicial administration, this would unnecessarily burden district judges. In end result, this would also undermine the "'effective strength'" Rule 23 is meant to provide a group of citizens injured by a common wrong. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (citation omitted).

CONCLUSION

The district court's class certification is legally and factually sound and should be upheld.

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BRIEF

No. 10-277 40

IN THE

Supreme Court of the United States

WAL-MART STORES, INC.,
Petitioner,
v.
BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, KAREN WILLAMSON, DEBORAH GUNTER, CHRISTNE KWAPNOSKI, CLEO PAGE, on behalf of themselves and all others similarly situated,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Eng'g Contractors Ass'n of S. Fla. v. Metro. Dade Cnty.,
122 F.3d 895 (11th Cir. 1997) 11

Furnco Construction Corp. v. Waters,
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General Elec. Co. v. Joiner,
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General Telephone Co. v. Falcon,
457 U.S. 147 (1982) 5, 9, 12

Hnot v. Willis Grp. Holdings Ltd.,
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552 F.3d 305 (3d Cir. 2008) 8

In re Rhone-Poulenc Rorer, Inc.,
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Int'l Bhd. of Teamsters v. United States,
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Marmo v. Tyson Fresh Meats,
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McLaughlin v. Am. Tobacco Co.,
522 F.3d 215 (2d Cir. 2008) 29

Middleton v. City of Flint,
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Molski v. Gleich,
318 F.3d 937 (9th Cir. 2003) 26

Morgan v. UPS,
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TABLE OF AUTHORITIES—Continued

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Paige v. California,
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Price Waterhouse v. Hopkins,
490 U.S. 228 (1989) 25

Robinson v. Metro-North Commuter R.R.
175 F.R.D. 46 (S.D.N.Y. 1997) 23, 24

Thorogood v. Sears, Roebuck & Co.,
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United States v. City of Miami,
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Watson v. Fort Worth Bank & Trust,
487 U.S. 977 (1988) 6, 7, 10, 20

STATUTES

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42 U.S.C. § 2000e-2(j) 6

Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 7

OTHER AUTHORITIES

71 FED. REG. 35,124 (JUNE 16, 2006) 11

FED. R. CIV. P. 23 .... 5, 18, 29

FED. R. CIV. P. 23(a) 3, 4, 8, 18

FED. R. CIV. P. 23(b)(2) .... *passim*

FED. R. CIV. P. 23(b)(3) 27, 28, 29, 30

Sup. Ct. R. 37.6 1

Page(s)

SCHOLARLY AUTHORITIES

Susan T. Fiske & Steven L. Neuberg, *A Continuum of Impression Formation, From Category-Based to Individuating Processes: Influences of Information and Motivation on Attention and Interpretation*, 23 Advances In Experimental Social Psychology 1 (Academic Press, 1990) 18-19

Susan T. Fiske, *Stereotyping, Prejudice and Discrimination*, The Handbook Of Social Psychology 357 (4th ed. 1998) 19, 21, 22

David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, Reference Manual On Scientific Evidence 83 (2d ed. 2000) 11

Daniel S. Klein, *Bridging the Falcon Gap: Do Claims of Subjective Decisionmaking In Employment Discrimination Class Actions Satisfy The Rule 23(a) Commonality and Typicality Requirements?*, 25 Rev. Litig. 131 (2006) 12

Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach To Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161 (1995) 21

Page(s)

Z. Kunda & P. Thagard, *Forming Impressions From Stereotypes, Traits, and Behaviors: A Parallel-Constraint-Satisfaction Theory*, 103 (2) Psychological Rev. 284 (1996) 19

Sam G. McFarland & Zachary Crouch, *A Cognitive Skill Confound on the Implicit Association Test*, 20(6) Social Cognition 483 (2002) 19

Paul Meier, Jerome Sacks & Sandy L. Zabell, *What Happened in Hazelwood: Statistics, Employment Discrimination, and the 80% Rule*, 1984 Am. B. Found. Res. J. 139 (1984) 11

Gregory Mitchell, *Good Causes and Bad Science*, 63 Vand. L. Rev. 133 (2010) 20, 23

John Monahan and Laurens Walker, Social Science In Law: Cases and Materials (4th ed. 1998) 23

John Monahan, Laurens Walker & Gregory Mitchell, *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* 94 Va. L. Rev. 1715 (2008) 23

John Monahan, Laurens Walker & Gregory Mitchell, *The Limits of Social Framework Evidence*, 8 Law, Probability & Risk 307 (2009) 23

Page(s)

Michael Orey, "*White Men Can't Help It*," BUSINESS WEEK ONLINE, May 15, 2006, http://www.Businessweek.com/magazine/content/06_20/b3984081.htm 20

Marios G. Pavildes & Michael D. Perlman, *How Likely Is A Simpson's Paradox?*, 63 AM. STATISTICIAN 226 (2009) 12

Justin Scheck, *Expert Witness Helps Launch Employment Law Industry*, THE RECORDER, Oct. 23, 2004 20

In The

Supreme Court of the United States

No. 10-277

Wal-Mart Stores, Inc.,
Petitioner,
v.
Betty Dukes, Patricia Surgeson, Edith Arana, Karen Willamson, Deborah Gunter, Christne Kwapnoski, Cleo Page, on behalf of themselves and all others similarly situated,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF COSTCO WHOLESALE CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF WAL-MART STORES, INC.

INTEREST OF *AMICUS CURIAE*

Costco Wholesale Corporation is a Fortune 25 company and a Top Five U.S. Retailer.[1] Since 1983, Costco has grown from a single location in Seattle to more than 400 membership warehouses employing more than 100,000 people in eight geographical regions across 40 states. Costco warehouses are major enterprises employing hundreds of employees and selling over 4,000 items of goods and numerous services that generate, on average, more than $130,000,000 in annual revenue. To select warehouse managers, Costco promotes from within, elevating individuals who have proven themselves during many years of experience with the company. Costco relies on local decision-makers to determine whom to promote. They rely in turn on their own extensive information concerning each candidate's job performance and job-related personal qualities, which are not amenable to standardized testing. This promotional process, featuring the exercise of individual managerial judgments, makes Costco a target of class actions that would exploit the lax standards now endorsed, in *Dukes v. Wal-Mart*, by the Ninth Circuit, where Costco has its headquarters and 60% of its warehouses and employees.[2]

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[1] The parties have received timely notice of Costco's intent to file this brief and have consented to its filing by letters filed by Petitioner and Respondent with the Clerk of the Court. Costco advises, under Supreme Court Rule 37.6, that no counsel for a party authored any part of this brief and that no one other than Costco paid any money to prepare or submit this brief.

Other aspects of Costco's operation make it an even more attractive target of class actions that would seek to exploit the permissive approach that the Ninth Circuit has endorsed. First, Costco has an especially strong corporate culture, instilled by founders who still run the company, which promotes concern for Costco shopping members and employees above all else. Second, Costco has centralized EEO policies and has adopted various special employee protections such as those set forth in its comprehensive Employee Agreement. Third, in connection with its longstanding "Rothman Plan," Costco continues to press diversity initiatives to encourage the advancement of women and persons of color. All these benign aspects of Costco's governance promote Title VII compliance, yet the Ninth Circuit has endorsed an approach that would perversely treat each of these aspects as a factor favoring Rule 23(b)(2) certification of employment-discrimination claims. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 600-01 (9th Cir. 2010) (en banc) (citing evidence of "strong corporate culture," common policies on personnel, diversity, and EEO issues, and centralized coordination as factors supporting certification).

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[2] Costco's concern is not merely hypothetical. In *Ellis v. Costco Wholesale Corp.*, 240 F.R.D. 627 (N.D. Cal. 2007)—brought by some of the same lawyers who sue Wal-Mart and involving some of the same plaintiffs' experts—the district court certified a Rule 23(b)(2) class for claims of gender discrimination in promotion seeking backpay, punitive damages, and emotional-distress damages. That case, now on interlocutory appeal, awaits this Court's guidance. *Ellis v. Costco Wholesale Corp.*, No. 07-15838 (9th Cir. Dec. 8, 2010), ECF Docket No. 75 (deferring submission of case pending this Court's decision).

For all the reasons stated above, Costco has a uniquely significant interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In a 6-5 decision with four opinions, the Ninth Circuit in *Dukes* upheld the certification of a nationwide Rule 23(b)(2) class of 500,000 women at 3,400 stores in positions ranging from part-time entry-level hourly employees to salaried managers. Plaintiffs seek billions of dollars in monetary compensation.

Dukes upholds a finding of Rule 23(a) commonality on the basis of "four categories" of evidence: (i) companywide policies that allow subjective decision-making, (ii) a sociological expert opinion that such decision-making is vulnerable to gender stereotyping, (iii) a statistical expert opinion that identifies gender disparities in promotion and pay outcomes when they are aggregated at levels above those where decision-making actually occurs, and (iv) declarations reciting anecdotes of various managers holding or tolerating discriminatory attitudes. *Id.* at 600.

In thus finding commonality despite the absence of any evidence that discriminatory decision-making has affected the class generally, *Dukes* opens the door to Title VII class actions challenging the promotion and pay practices of virtually all large, decentralized employers, who necessarily rely on individual judgments by local decision-makers regarding which candidates to promote into higher management.

Compounding this error regarding Rule 23(a), *Dukes* adopts a novel interpretation of Rule 23(b)(2) to facilitate efforts to seek substantial monetary relief. *Dukes* holds that Rule 23(b)(2) certification can co-exist with monetary demands so long as the "appropriate final relief" does not relate "exclusively or predominantly to money damages." *Dukes* vaguely directs district courts to weigh "relevant" factors on a case-by-case basis, while providing certainty only on the point that backpay, categorically, is "fully compatible" with Rule 23(b)(2) certification. *Id.* at 617-20.

The *Dukes* approach toward Rule 23(a) and Rule 23(b)(2) enables Title VII lawsuits that rely upon statistical aggregation above the actual decision-making level, thereby permitting plaintiffs to gloss over the absence of any widespread discrimination at the level where employment decisions actually occur. *Dukes* not only accepts misleading aggregate statistical proof, but also permits plaintiffs to link that dubious evidence to an employment practice by invoking the sociological opinion that people resort to stereotyping in stranger-on-stranger interactions where they lack the knowledge and incentive to make individuated judgments. *Dukes* glosses over the disconnect between this abstract theory and the actual facts at Wal-Mart, where managers making employment decisions about employees do possess individuated knowledge of the employees and do have incentives to use their personal knowledge of those employees' job-related qualities.

Dukes thus allows class actions to proceed merely on a theory that subjective decision-making could lead to discriminatory outcomes, notwithstanding this Court's directive in *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982) that courts considering class actions challenging subjective decision-making must require "[s]ignificant proof" of a general policy of employment discrimination, *id.* at 159 n.15, and must use a "rigorous analysis" to ensure that the plaintiffs have satisfied the elements of Rule 23, *id.* at 161. *Dukes* impermissibly excuses the plaintiffs from their duty to bridge the "wide gap"[3] between their own claims for discrimination and the existence of a class that has suffered the same injury as a whole. The vague standard that *Dukes* espouses would enable plaintiffs to seek massive monetary damages for a purported class without meeting the

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[3] *See generally Falcon*, 457 U.S. 147 at 157 ("Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims.").

Rule 23(b)(2) requirement to show that the defendant's conduct has affected the class as a whole.

ARGUMENT

I. THE *DUKES* CLASS CERTIFICATION ORDER CONFLICTS WITH RULE 23(A) REQUIREMENTS

A. The Ninth Circuit's Application Of Rule 23(a) And Rule 23(b)(2) Tempts Employers To Impose Quotas Rather Than Face Ruinous Class Claims

Justice O'Connor, in a four-Justice opinion in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 993 (1988), warned that extending disparate-impact analysis to subjective employment practices could "create a Hobson's choice for employers" and thus "lead in practice to perverse results." The results she feared involved a resort to surreptitious quotas by employers who lack any realistic means to "eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces." *Id.* at 992. She observed that quotas are contrary to Title VII, which expressly disclaims any intention to grant "preferential treatment" because of race or gender, or other protected status, "on account of an imbalance" that may exist with respect to any group's comparative presence in the work force. *Id.* (citing 42 U.S.C. § 2000e-2(j)).

To reduce this risk of encouraging surreptitious quotas, Justice O'Connor, while writing an opinion for the Court that extended disparate-impact analysis to subjective promotion decisions, also announced for herself and three other Justices (Chief Justice Rehnquist and Justices White and Scalia) certain "evidentiary standards" to keep that "analysis within its proper bounds." *Id.* at 993-94. Justice O'Connor outlined the following standards for district courts to enforce: require proof of a specific employment practice causing the alleged disparity, require "sufficiently substantial" statistical disparities to raise an inference of causation, and give defendants liberal leave to challenge fallacies and deficiencies in the plaintiff's data with countervailing evidence, while keeping the ultimate burden of proof on the plaintiff. *Id.* at 993-99.[4]

Recognizing that many jobs, particularly at the managerial level, involve "personal qualities that have never been considered amenable to standardized testing," Justice O'Connor cautioned that courts are generally less competent than employers to structure business practices and should not attempt to do so unless mandated by Congress. *Id.* at 999 (quoting *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 578 (1978)).

Although these pronouncements in *Watson* arose in a lawsuit by a single plaintiff, they figure more prominently still in the context of a class action, which greatly magnifies the dangers of unsupported judicial intermeddling with business practices.

Dukes realizes the worst fears expressed in *Watson*. By allowing certification of a nationwide class based on (i) a company's decision to delegate decision-making to local managers and (ii) statistics aggregated above the decision-making level—all without showing that local decisions generally reflect biased outcomes—*Dukes* permits plaintiffs to mask evidence about whether bias generally occurred at the decision-making level in fact. Under *Dukes*, plaintiffs need only assert a superficial theory of "statistical significance" and "causality" to force employers to capitulate on the basis of class certification alone, without the plaintiffs ever proving discrimination with respect to the class generally. *See Thorogood v. Sears, Roebuck & Co.*, 624 F.3d 842, 849-50 (7th Cir. 2010) (noting that even where the merits of claims are "slight," the pressure on a defendant to "settle on terms advantageous to its opponent will mount" if the plaintiff can proceed with ambitious class discovery); *Am. Nat'l Fire Ins. Co. v. York Cnty*, 575 F.3d 112, 114 (1st Cir. 2009) (noting that certification of a class is a serious matter because class litigation, by its very nature, "can alter the usual dynamics of litigation and bring to bear on defendants ... intense pressure to settle"); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310, 320 (3d Cir. 2008) (noting that certification is "pivotal" as it "often bestows upon plaintiffs extraordinary leverage" that can "create unwarranted pressure to settle non-meritorious claims"); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) (ruling that coercive effect of class certification could make certification effectively unreviewable at end of case).

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[4] The Civil Rights Act of 1991 amended some of these standards.

Under the class-certification ritual ordained in *Dukes*, plaintiffs need only offer generalized opinions by a statistician and a sociologist to establish the requisite "commonality" under Rule 23(a), without needing to link those opinions to workplace realities. The statistician's role is simply to demonstrate a statistically significant disparity by aggregating a sufficiently large number of outcomes from independent decision-makers and by analyzing them at the regional or national level instead of at the lower level where employment decisions actually occur. Through this method, plaintiffs can exploit the arithmetic of aggregation to conceal the lack of any statistically significant disparity in the employment decisions of most decision-makers.

With a misleading statistical disparity thus reported, the sociologist can then posit a causal nexus between that disparity and the employer's inevitable business decision to have its employment decisions made by local managers exercising individual discretionary judgments. The sociologist's role is simply to opine that people who evaluate a stranger—without either individuated information or incentives to make correct decisions about the stranger—can unconsciously rely on adverse stereotypes to fill the blanks in their knowledge, and then to opine that all putative class members are vulnerable to those stereotypes. *Dukes* endorses this approach, approving class certification without requiring that the plaintiffs tie their abstract theory to any actual evidence.

The *Dukes* paradigm thus enables plaintiffs to support Rule 23(b)(2) claims for substantial monetary remedies--such as backpay and punitive damages—as well as for injunctive and declaratory relief. By dispensing with the "rigorous analysis" and "significant proof" that this Court required in *Falcon*, *Dukes* leaves employers no means at the certification phase to defeat a weak showing of "commonality," even with evidence that most decision-makers have produced no statistical evidence of discrimination in fact. The *Dukes* paradigm leaves national employers such as Costco, who depend for the success of their businesses on the sound decision-making of local managers in the highly diverse market conditions in which they operate, to face the "Hobson's choice" foreseen in

Watson. Even if most local decision-makers demonstrably exercise informed, job-related judgments, incentivized to eschew discriminatory bias, and create no actual adverse impact, *Dukes* would still make the employer's overall decision-making subject to attack, because the process features not only objective facts but also individual managerial judgments. *Dukes* thus creates the specter of ruinous class actions that can challenge "subjective" decision-making through abstract theorizing, without any proof of disparities occurring at the level where the relevant employment decisions actually occur.

B. *Dukes* Improperly Finds Sufficient "Commonality" Based On Aggregated Statistics And External Labor Market Benchmarks That Mask The Absence Of Bias In Actual Decision-Making

1. Improper Reliance On Statistics Aggregated Above The Decision-Making Level

To test whether a decision-maker has engaged in unconscious cognitive bias, one should examine that decision-maker's record to see if decisional outcomes vary from the expected results. A statistically significant variance might indicate bias by *that* decision-maker. But aggregating the results of decisions by numerous, independent decision-makers would obscure the evidence that the promotion and pay decisions of many, or perhaps most, decision-makers indicate no bias whatsoever. Such an illusory showing of significant disparity would merely be an artifact of the arithmetic of aggregation, and could therefore suggest statistical significance on an aggregate basis even where most of the decisions analyzed separately would fail to indicate bias. This potentially misleading situation, well-known to statisticians, is called Simpson's Paradox. *See, e.g., Eng'g Contractors Ass'n of S. Fla. v. Metro. Dade Cnty.*, 122 F.3d 895, 919 n.4 (11th Cir. 1997) (cited in *Dukes*, 603 F.3d at 638 n.12 (Ikuta, J., dissenting)).[5]

Thus, an aggregate analysis can falsely indicate that all putative class members suffered from the injury of stereotypic decision-making merely by being a member of the class, although that in fact is not at all the case. Wal-Mart pointed out this fatal flaw in plaintiffs' analysis, demonstrating how aggregated statistics could suggest illusory disparities.[6] As Judge Ikuta's dissent in *Dukes* correctly notes,

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[5] *See generally* Paul Meier, Jerome Sacks & Sandy L. Zabell, *What Happened in Hazelwood: Statistics, Employment Discrimination, and the 80% Rule*, 1984 AM. B. FOUND. RES. J. 139, 156 (1984) ("Stratification can occur when different divisions of a firm make hiring decisions independently of one another. Such decisions may appear fair at the divisional level but unfair when viewed in the aggregate."); David H. Kaye & David A. Freedman, *in Reference Guide on Statistics, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 83, 108-10 & n.92 (Fed. Judicial Ctr. ed., 2d ed. 2000) (demonstrating how Simpson's Paradox can distort patterns in aggregated data).

[6] Wal-Mart's expert performed a Chow test to show the illusory effect of aggregation. Although *Dukes* dismisses use of that test, simply because no court has previously required it, 603 F.3d at 608 n.32, the Office of Federal Contract Compliance Programs, alert to the danger of relying on aggregated statistical data to establish discrimination, requires use of the Chow test or a similar statistical device. 71 FED. REG. 35,124 (June 16, 2006). The fallacy of aggregation here is analogous to the pitfalls of false averages. *See, e.g., Abram v. UPS of Am., Inc.*, 200 F.R.D. 424, 431 (E.D. Wis. 2001) (citing, in a similar context, the parable of Bill Gates and nine monks sharing a meal: on average the diners are extremely wealthy, but in reality 90% of them are under a vow of poverty).

"Information about disparities at the regional and national level does not establish the existence of disparities at individual stores, let alone raise the inference that a company-wide policy of discrimination is implemented by discretionary decisions at the store and district level." 603 F.3d at 637 (Ikuta, J. dissenting) (citing Marios G. Pavildes & Michael D. Perlman, *How Likely Is A Simpson's Paradox?*, 63 AM. STATISTICIAN 226, 230 (2009)).[7]

Thus, while "a general policy of discrimination *conceivably* could justify a class ... *if* the discrimination manifested itself in ... *promotion practices in the same general fashion*," *Falcon*, 457 U.S. at 159 n.15 (emphasis added), a practice of local decision-making that reveals no evidence of a statistically significant disparity precludes any genuine finding of a "general manifestation" and disproves the general application of plaintiffs' cognitive bias theory. *See Morgan v. UPS*, 380 F.3d 459, 464 (8th Cir. 2004) ("[D]iscrimination in some districts and not in others tends to defeat the argument that discrimination was [the employer's] nationwide standard operating procedure."). *See generally* Daniel S. Klein, *Bridging the Falcon Gap: Do Claims of Subjective Decisionmaking In Employment Discrimination Class Actions Satisfy The Rule 23(a) Commonality and Typicality Requirements?*, 25 REV. LITIG. 131, 170 (2006) (improper to base class certification on statistics aggregated at a higher level than the decision-making level).

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[7] Whether Wal-Mart's decisions occurred at the store level or the in-store department level, there is nothing to indicate that relevant employment decisions occurred at the regional level, which is the lowest level at which the plaintiffs chose to aggregate the statistics. *Dukes*, 603 F.3d at 604 (noting that plaintiffs' statistician, Dr. Drogin, "analyzed data at a regional level").

The district court below abused its discretion in finding commonality on the basis of plaintiffs' aggregated analysis, and the Ninth Circuit erred in affirming this finding and deferring to a later stage the question of the appropriate level for statistical analysis. Answering this question at the class certification stage is central to determining whether the plaintiffs' statistical analysis supports a finding of commonality and equitable relief for any appropriate class as a whole, and would not be, as *Dukes* contends, 603 F.3d at 607 & n.30, an impermissible evaluation of expert opinions on the merits.

2. Improper Reliance On External Labor Market Benchmarks

Dukes similarly fails to recognize the wide divide between theory and fact in addressing the plaintiffs' attempt to reinforce their aggregate statistics with an expert opinion by Dr. Marc Bendick. The Bendick "benchmark" study contended that women were under-represented within Wal-Mart's management ranks as compared to their presence at certain selected retailers. *Dukes* uncritically accepts this study as supporting class certification, using Dr. Bendick's tenuous logic that " 'if retail chains comparable to Wal-Mart are successfully employing women at some rate, then women are presumably available, interested, and qualified to hold comparable positions at Wal-Mart at a similar rate.' " 603 F.3d at 604 n.27 (quoting Dr. Bendick's testimony).[8]

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[8] Applying a similarly loose standard for class certification, the district court in *Ellis v. Costco* found that "Dr. Bendick's analysis, *while not without its flaws*, presents a sufficient foundation for his conclusion that women are underrepresented at these positions relative to women at comparable companies." 240 F.R.D. at 638 (emphasis added).

The Bendick benchmarks, analyzing Wal-Mart's workforce in light of *external* labor markets, were fundamentally flawed, because where, as here, the defendant employer promotes from within, the relevant pools are *internal* pools, not external pools such as those measured by the Bendick benchmarks. Decisions from several Circuits, including prior rulings of the Ninth Circuit, have recognized this point. *E.g., Paige v. California*, 291 F.3d 1141 (9th Cir. 2002); *Morgan v. UPS*, 380 F.3d 459 (8th Cir. 2004). Thus, just as plaintiffs' aggregate statistics systematically mask the evidence that gender disparities are lacking in individual managers' decisions, the Bendick benchmarks (i) circumvented Wal-Mart's evidence that it promoted women in line with female availability in the internal candidate pool[9] and (ii) "failed to provide information derived from the level at which promotion and pay decisions were actually made." *Dukes*, 603 F.3d at 638 n.13 (Ikuta, J., dissenting).

In *Paige v. California*, California Highway Patrol ("CHP") officers alleging race discrimination in promotions sought to compare the percentage of black CHP officers to the percentage of black law enforcement personnel in the California labor market. 291 F.3d at 1143. The Ninth Circuit rejected this reliance on an external labor pool, instead of an internal candidate pool, to show discrimination in promotions, notwithstanding plaintiffs' argument that the internal pool was tainted by discrimination in hiring. *Id.* at 1145. The Ninth Circuit held that plaintiffs could not rely on the proposed external pool, because the plaintiffs lacked standing to challenge hiring decisions. Rather, the plaintiffs could compare themselves only against an internal pool of incumbent employees who, by definition, were already hired. *Id.* at 1146-47. This reasoning applies here *a fortiori*, where discrimination in hiring is not at issue.

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[9] Bendick Dep. 51:20-52:11, 54:14-25, 196:18-197:3 & Exs. 5, 6; Scott Decl. ¶¶ 11, 14; Haworth Decl. ¶ 314 (chart) (all cited in Wal-Mart's Motion to Strike Declaration of Marc Bendick, Jr. Ph.D., ECF Docket No. 265, at 12:1-7, App. 33a) ("Bendick Motion to Strike"). As to the Haworth Decl., *see also* App. 1557-1558a.

Similarly, the Eighth Circuit in *Morgan v. UPS* rejected the plaintiffs' reliance on external labor markets to challenge failures to promote. The *Morgan* plaintiffs offered expert opinion that the percentage of UPS's black division managers was significantly below the representation of blacks in the general population. The Eighth Circuit rejected this opinion because "[t]he relevant inquiry was whether promotions from center to division manager were racially discriminatory, taking into account the proper pool of available qualified employees." 380 F.3d at 465.

The Bendick benchmarks—focused on *external* labor pools instead of the uniquely relevant *internal* labor pool of Wal-Mart employees available for promotion—is the same sort of overbroad bottom-line statistical comparison rejected in *Paige* and *Morgan*. Two Circuits have specifically rejected Bendick benchmarks for relying upon inapposite labor markets.[10]

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[10] In *United States v. City of Miami*, 115 F.3d 870, 873-74 (11th Cir. 1997), the Eleventh Circuit reversed the lower court's erroneous reliance on Dr. Bendick's "benchmark" analysis to prove promotion discrimination: "Bendick's analysis did not take into account the number of qualified minorities and women interested in promotion at each promotional rank. He declined

Dukes thus erred in accepting as evidence of commonality benchmarks that reveal nothing about the promotion decisions of individual Wal-Mart managers and thus fail to demonstrate commonality or to support injunctive relief with respect to the class as a whole.

C. *Dukes* Improperly Finds Sufficient "Commonality" Based On A Theory That Delegating Decision-Making To Local Managers Created A Conduit For Unconscious Bias

1. No "Rigorous Analysis" Links Plaintiffs' Abstract Causation Theory With The Actual Facts To Justify Finding The Requisite Commonality

Plaintiffs argue that Wal-Mart's practice of delegating pay and promotion decisions to local managers, without adequate bureaucratic oversight, fostered discrimination because "subjective and discretionary" decisions are "vulnerable to gender bias."[11] Reasoning backwards from a conclusion of

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to measure the interest of women in various Department jobs and improperly assumed that all employees would seek promotion upon eligibility at the same rate as their percentage in the general population." *See also Middleton v. City of Flint*, 92 F.3d 396, 406-08 (6th Cir. 1996) (finding that lower court erred in adopting Bendick's labor pool statistics, which were "incomplete" and contained "conclusory assumptions" that had "no basis in the law").

[11] Bielby Decl. ¶ 63: "I have concluded that subjective and discretionary features of the company's personnel policy and practice make decisions about compensation and promotion vulnerable to gender bias. . . . Personnel policy and practice at Wal-Mart as implemented in the field has features *known to be vulnerable* to gender bias. Discretionary and subjective elements of Wal-Mart's personnel system and inadequate oversight and

bias drawn from aggregated statistics—which overlooks the absence of significant disparities in the decision-making by local managers—plaintiffs theorize that Wal-Mart's policy of delegation acts as a "conduit" for diverse, independent local decisions, to establish a harm common to all class members.

But just as plaintiffs' aggregate statistical analysis conceals the absence of evidence that women suffered disproportionately from local decision-making, plaintiffs' sociological theory of causation does not indicate whether subjectivity allowed stereotypic decisions by local decision-makers to harm women in a pervasive manner.

Simply put, a centralized decision to allow decentralized decision-making is, by itself, neither evidence of causation nor a basis for finding commonality. Thus, plaintiffs' expert Dr. Bielby could not determine whether 0.5%, 5%, 50%, or 95% of Wal-Mart's employment decisions resulted from stereotypic thinking.[12] Dr. Bielby could not opine as to "how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart," simply because the limitations of his science do not allow him to connect theory to the facts of the case. His opinion thus leaves "too great an analytical gap between the [facts of the case] and the opinion proffered." *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (Breyer,

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ineffective anti-discrimination efforts *contribute* to disparities between men and women in their compensation and career trajectories at the company." App. 577a (emphasis added).

[12] Bielby Dep. 87:19-88:12, 161:25-162:12, 370:17-371:3 (cited in Wal-Mart's Motion to Strike Declaration, Opinion and Testimony of Plaintiff's Expert William T. Bielby, Ph.D., Ninth Cir. ECF Docket No. 263 at 9, 11-16, App. 33a) ("Bielby Motion to Strike").

J., concurring).[13] *Dukes* errs in affirming the district court's finding of sufficient commonality under Rule 23(a), as a basis for class certification under Rule 23(b)(2).[14]

The generality of Dr. Bielby's opinion—that the subjective elements inherent in managerial decisions make them "vulnerable" to stereotypic thinking adverse to women—does not acknowledge the potentially dispositive facts that, as he elsewhere concedes,[15] would mitigate or entirely "erase" the asserted effects of that kind of thinking. Those facts include (i) the extent to which a Wal-Mart manager possesses accurate "individuating" information about employees,[16]

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[13] *See also Domingo ex rel. Domingo v. T.K.*, 289 F.3d 600, 607 (9th Cir. 2002) (no abuse of discretion to exclude opinion "connected to existing data only by the *ipse dixit* of the expert") (internal citations omitted); *Marmo v. Tyson Fresh Meats*, 457 F.3d 748, 758 (8th Cir. 2006) (excluding expert from testifying on causation based on analytical flaws); *Astra Aktiebolag v. Andrx Pharm.*, 222 F. Supp. 2d 423, 488 (S.D.N.Y. 2002) ("where the proffered testimony is based on a methodology transposed from one area to a completely different context, and there is no independent research supporting the transposition, the 'fit' requirement [in *Daubert*] may not be satisfied").

[14] Costco's point obtains regardless of whether a Rule 23 "rigorous analysis" requires a *Daubert* hearing. While that is the correct view, *e.g.*, *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 815-16 (7th Cir. 2010) ("[T]he district court must perform a full *Daubert* analysis before certifying the class if the situation warrants."), Dr. Bielby's testimony, on its face, simply does not support a finding of commonality.

[15] Bielby Dep. 323:9-20, 328:20-329:1, 340:13-17 (cited in Bielby Motion to Strike at 9:2-10, App. 33a).

[16] Proponents of cognitive bias theory recognize, as they must, that the more "individuating information" a decision-maker has about someone, the weaker is the influence of any stereotype. *E.g.*, Susan T. Fiske & Steven L. Neuberg, *A Continuum of*

(ii) the opportunity the manager has to make a considered judgment, (iii) the incentives the manager has to make the right, job-related decision, and (iv) the diverse abilities, characteristics, or experiences that exist among individual managers that may affect the "automaticity" of their cognitive perceptions.[17] Further, Dr. Bielby shows no interest in knowing whether a statistical analysis of employment decisions by individual store managers would show a pervasive gender disparity. For his purposes that evidence is beside the point. Similarly, the Ninth Circuit and district court, in applying what purported to be a "rigorous analysis," found it unnecessary to consider that evidence.

Accordingly, as long as courts follow *Dukes* in embracing the self-limited theory of stereotypic decision-making, Dr. Bielby's form declaration will supply a ready-made template that, combined with sufficiently aggregated statistics, will facilitate Rule 23(b)(2) class certification in any industry where operations are widely distributed and local decision-

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Impression Formation, From Category-Based to Individuating Processes: Influences of Information and Motivation on Attention and Interpretation, 23 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 1 (Academic Press, 1990); Ziva Kunda & Paul Thagard, *Forming Impressions From Stereotypes, Traits, and Behaviors: A Parallel-Constraint-Satisfaction Theory*, 103(2) PSYCHOL. REV. 284 (1996).

[17] The greater the cognitive ability of the decision-maker, the weaker the influence of possible stereotype. *E.g.*, Susan T. Fiske, *Stereotyping, Prejudice and Discrimination*, THE HANDBOOK OF SOCIAL PSYCHOLOGY 357, 365 (4th ed. 1998) (cited generally in Bielby Decl. ¶¶ 29, 32, App. 539a, 543a); Sam G. McFarland & Zachary Crouch, *A Cognitive Skill Confound on the Implicit Association Test*, 20(6) SOCIAL COGNITION 483 (2002).

making is an essential feature of an effective business model.[18] Because "[i]t is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance," *Watson*, 487 U.S. at 992-93, employers with decentralized business models will have few avenues available to escape a Bielby-enabled certification order, other than resorting to surreptitious quotas to ensure that all decisional outcomes affecting women and minorities fall within 1.96 standard deviations of the mean.

2. Social Framework Analysis Does Not Cure The Disconnect Between Dr. Bielby's Opinion And Facts at Wal-Mart

Dr. Bielby cites case studies that say nothing relevant about the behavior of Wal-Mart managers or about retail managers in general. Dr. Bielby did not perform his own investigations to support his opinion, and cited no experiments conducted in an industrial setting, much less in a workplace comparable to Wal-Mart's.[19] Further, the laboratory experiments he cites merely support a theory of "automatic cognitive bias" as a general trait that causes human beings to take a "cognitive shortcut" in stranger-to-stranger encounters by using stereotypes to fill in the blanks of what they do not know about a stranger.[20] Yet according to the approach now ordained in *Dukes*, Dr. Bielby can apply his theory *a priori*, without any distractions arising from the actual facts present at Wal-Mart. He thus need not search for empirical evidence. Rather, he can simply opine abstractly that subjective decision-making in the Wal-Mart workplace, or in any other workplace, is inherently "vulnerable" to unconscious discrimination, regardless of the actual facts.

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[18] Thus, Dr. Bielby's declaration mirrors reports that he has submitted in dozens of other cases propounding the same theory. *See* Bielby Motion to Strike at 1 n.1, App. 33a, (citing Exhibit D of the Declaration of Neal D. Mollen in Support, comparing Dr. Bielby's report in *Dukes* with his reports in other cases). *See also* Gregory Mitchell, *Good Causes and Bad Science*, 63 VAND. L. REV. 133, 133-46 (2010) ("As of 2004, Dr. Bielby alone had testified in more than fifty cases, offering case-specific opinions similar to those he offered in *Dukes*.") (citing Justin Scheck, *Expert Witness Helps Launch Employment Law Industry*, THE RECORDER, Oct. 23, 2004, at 1); Michael Orey, "White Men Can't Help It," BUSINESS WEEK ONLINE, May 15, 2006, *available at* http://www.Businessweek.com/magazine/content/06_20/b3984081.htm (noting that Dr. Bielby has been a plaintiffs' expert in dozens of major cases, including class actions against Wal-Mart, FedEx, Johnson & Johnson, Cargill, and Morgan Stanley).

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[19] Dr. Bielby admitted that he had not conducted laboratory research of his own (Bielby Dep. 33:20-34:15, cited in Bielby Motion to Strike at 9 n.15, App. 33a) and had not assessed Wal-Mart managers' exercise of their discretion (Bielby Dep. 128:20-25, cited in Bielby Motion to Strike at 9 n.15, App. 33a).

[20] Bielby Decl. ¶ 32. "A large body of research demonstrates that the tendency to invoke gender stereotypes in making judgments about people is spontaneous and automatic. As a result, people are often unaware of how stereotypes affect their perceptions and behavior, and individuals whose personal beliefs are relatively free of prejudice or bias are susceptible to stereotypes in the same ways as people who hold a personal animosity towards a social group." App. 542a-543a. See articles cited in Bielby Decl. ¶¶ 39, 34, App. 539a n.38, 545a n.45; Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, *in* THE HANDBOOK OF SOCIAL PSYCHOLOGY 357, 364-75 (4th ed. 1998); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach To Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1198 (1995) ("In a sense, we can say that human cognitive organization predisposes us to stereotyping.").

This theory of cognitive bias, however, tells only part of the story, as its proponents readily concede. There is no evidence that Wal-Mart promotes on the basis of stranger-to-stranger perceptions. On the contrary, Wal-Mart decision-makers possess current and accurate information about employees in the relevant work environment, including their work histories, skills, abilities, past performance, and interests. The decision-makers may have worked side by side with the same employees for years. As all researchers agree, accurate, current "individuated information" present in a workplace such as Wal-Mart's can reduce or eliminate stereotyping.[21]

If pervasive statistical disparities are not manifest across the decision-makers, viewed individually, then "cognitive bias" theory does not work predicatively in the subject environment, and thus fails to supply the common causative link to support a showing of "commonality." Instead, the evidence here discloses no more than isolated individualized circumstances, not a pervasive harm visited generally on the putative class members. Dr. Bielby's opinion—the lynchpin of plaintiffs' theory of commonality endorsed in *Dukes*—ignores evidence indicating that stereotypic decisions are not pervasive across the decisionmakers.

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[21] Bielby Dep. 198:2-16, 223:23-224:1 ("Q. [B]y providing relevant information [about individual employees], sex bias can be significantly reduced or even eliminated; isn't that right? A. Correct."). *See also* Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, THE HANDBOOK OF SOCIAL PSYCHOLOGY, *supra* note 20, at 391 ("The good news is that people can sometimes control even apparent automatic biases and if appropriately motivated, given the right kind of information and in the right mood.").

Dr. Bielby would credential his methodology by characterizing it as a type of the "social framework analysis" legitimated in SOCIAL SCIENCE IN LAW (4th ed. 1998) by John Monahan and Laurens Walker.[22] But Professors Monahan and Walker themselves have repudiated Dr. Bielby's misuse of their work. They point out that Dr. Bielby has improperly tried to link general principles of social science to the specific facts of a case, with no more scientific basis than his own subjective, selective view of the record.[23] This criticism of Dr. Bielby's suspect methods specifically encompasses his opinions in *Dukes v. Wal-Mart, Inc.*, 222 F.R.D. 137, 151, 153 (N.D. Cal. 2004).[24] A colleague of Professors Monahan and Walker has observed, "given that [Dr. Bielby] reviewed the record using an entirely subjective analytical method after knowing the plaintiffs' statistical evidence of disparities, it is not surprising that Dr. Bielby reached conclusions supporting the plaintiffs' claims."[25]

Courts have also criticized the Bielby method. In *Robinson v. Metro-North Commuter R.R.*, 175 F.R.D. 46 (S.D.N.Y. 1997), *rev'd in part on other grounds*, *Caridad v. Metro-North Commuter RR.*, 191 F.3d 283

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[22] Bielby Decl. ¶ 8, App. 524a & n.1

[23] John Monahan, Laurens Walker & Gregory Mitchell, *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* 94 VA. L. REV. 1715, 1742-48 (2008).

[24] John Monahan, Laurens Walker & Gregory Mitchell, *The Limits of Social Framework Evidence*, 8 LAW, PROBABILITY & RISK 307, 311-14 (2009).

[25] Gregory Mitchell, *Good Causes and Bad Science*, 63 VAND. L. REV. 133, 137 (2010).

(2d Cir. 1999), the district court rejected a Bielby opinion, similar to the opinion offered here, as unscientific conjecture that did not support a Title VII class action:

> As for [Dr. Bielby's] sociological opinion, even if one puts aside reservations one might have as to its ultimate admissibility under [*Daubert*], it consists on its face of little more than rank conclusion and gross speculation. For example, the opinion baldly premises that negative stereotypes result in African Americans being considered "inappropriate for higher level jobs" by defendant's managers. Similarly, the opinion simply presumes that [defendant's] personnel and disciplinary systems are inherently subjective and allow managers to materially circumvent policies that would reduce subjectivity and bias. No meaningful weight can reasonably be attributed, even at this stage of the proceedings, to a report so facially suspect.

175 F.R.D. at 48 (internal citations omitted).[26] *See also EEOC v. Wal-Mart Stores, Inc.*, 2010 WL 583681, at *3-4 (E.D. Ky. Feb. 16, 2010) (excluding Dr. Bielby's testimony, which made clear that gender stereotyping does not even necessarily include intentional discrimination).

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[26] When reversing the *Robinson* decision, the Second Circuit did not question the district court's rejection of Dr. Bielby's testimony. *See* 191 F.3d at 287-88. *See also EEOC v. Bloomberg, LLP*, 2010 U.S. Dist. LEXIS 92511 (S.D.N.Y. Aug. 31, 2010) (rejecting "social framework" testimony by Dr. Eugene Borgida because he did not apply his analysis to facts of workplace at issue).

Nonetheless, *Dukes*, ignoring the suspect nature of Dr. Bielby's approach, uncritically accepts his description of it as "social framework analysis." 603 F.3d at 601. *Dukes* further errs in stating that this Court "considered similar evidence offered by [an] expert social psychologist" in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 255-56 (1989). 603 F.3d at 602. *Dukes* thus badly misapprehends not only "social framework analysis" but also this Court's opinions in *Price Waterhouse*, none of which endorsed the approach of plaintiffs' expert Dr. Susan Fiske. Justice Brennan, writing for the majority, suggested that the Fiske testimony was "merely icing on [the] cake" for which no expert testimony was required, *id.* at 256. Justice O'Connor, concurring, found the Fiske testimony insufficient standing alone to shift the burden of persuasion, *id.* at 277. Justice Kennedy, in dissent, suggested that the Fiske testimony could have been excluded if the defendant had timely objected to it. *Id.* at 294 n.5. Justice Kennedy explicitly cautioned that "[t]oday's opinions cannot be read as requiring factfinders to credit testimony based on [the expert's] type of analysis." *Id.*

Dukes, therefore, in ignoring the point that Dr. Bielby's theory is not "significant proof" that gender disparities resulted from subjectivity and unconscious stereotypes, has failed to insist upon the "rigorous analysis" required. This Court should correct any notion that critically reviewing Dr. Bielby's declaration would have been impermissibly prejudging the merits. Although his dubious use of "social framework analysis" may highlight the need for a *Daubert* inquiry, as the *Dukes* dissent powerfully argues, 603 F.3d at 639 n.15 (Ikuta, J., dissenting), here one need only ask whether Dr. Bielby's prepared testimony furnishes the requisite showing of commonality. Respectfully, it cannot, by its own account.

II. *DUKES* IMPROPERLY ALLOWS RULE 23(B)(2) CERTIFICATION OF CLAIMS FOR DIVERSE MONEY DAMAGES

Dukes circumvents the language of Rule 23(b)(2), which requires that a defendant's conduct "apply generally to the class, so that final injunctive relief ... is appropriate respecting the class as a whole." FED. R. CIV. P. 23(b)(2). As shown above, plaintiffs cannot meet that standard with their aggregated statistics, "benchmark comparisons," and flawed sociological theory of causation. None of this evidence, singly or collectively, shows that the offending conduct—individual managerial decisions—produced gender disparities, generally. Wal-Mart's factual evidence to the contrary went unchallenged.

By nonetheless certifying a Rule 23(b)(2) class, *Dukes* allows money damages where plaintiffs have merely alleged but cannot show that stereotypic decisions affected all class members in a similar way. *Dukes* accomplishes this result with a novel interpretation of Rule 23(b)(2). In repudiating its own previous indefensible Rule 23(b)(2) standard in *Molski v. Gleich*, 318 F.3d 937, 950 (9th Cir. 2003), the Ninth Circuit in *Dukes* has invented one nebulous standard to replace another. The new standard relies on a single sentence in the Advisory Committee Note—that Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." 603 F.3d 571 at 615. *Dukes* exegetes that language by arbitrarily selecting one, among many, dictionary definitions of "predominant"—"superior [in] strength, influence, or authority" (*id.* at 616)—that is simply inapposite in the context of Rule 23(b)(2).

Dukes then erects a multi-factor test that conflates the term "predominantly" found in the Advisory Committee Note with the term "predominate" that appears, in a different context, in Rule 23(b)(3). This test invokes a list of vaguely defined, non-exclusive factors that an enterprising plaintiffs' counsel could easily manipulate: "whether the monetary relief sought determines the key procedures that will be used, whether it introduces new and significant legal and factual issues, whether it requires individualized hearings, and whether its size and nature—as measured by recovery per class member—raise particular due process and manageability concerns." *Id.* at 617. *Dukes* avoids any effort to be more definitive, stating that no one factor is determinative, and that the listed factors are not necessarily exclusive. *Id.* at 617, 622.

Dukes prefers this ill-defined standard for Rule 23(b)(2) certification to the "incidental damages standard" of *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415-16 (5th Cir. 1998), even though most Circuits have adopted the *Allison* test, 603 F.3d at 616 (citations omitted). *Dukes* finds the *Allison* standard too limiting for a plaintiff whose damage claims are more than "incidental" but less than "predominant." *Id.* But the *Dukes* standard has no meaningful limits. Proof of this point is the Ninth Circuit's remarkable conclusion that "the objective effect of the relief sought in [this] litigation"—which includes billions of dollars in heterogeneous damage claims—is no impediment to class certification. *Dukes* thus signals that its ill-defined standard could support Rule 23(b)(2) certification of unbounded monetary claims. A standard this loose would encourage plaintiffs to seek Rule 23(b)(2) certification not only for claims of backpay and punitive damages, but even for inherently individualized claims of emotional distress damages.[27]

In *Dukes* the backpay claims alone arguably would not pass muster under *Allison's* "incidental damages" standard, because each class member would have to show she was available and interested in a promotion but failed to receive the promotion because of stereotypic decision-making by individual Wal-Mart managers. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 368-71 (1977) (holding that the "known prospect of discriminatory rejection" does not show which non-applicants actually wanted the jobs in question or possessed the requisite qualifications for them). Alternatively, plaintiffs would have been obligated to proceed under Rule 23(b)(3); but *Dukes* allows them to circumvent Rule 23(b)(3) requirements by re-conceptualizing huge "backpay" damages as merely "equitable relief" to fit within the language of Rule 23(b)(2). 603 F.3d at 618.

The proper question, however, is not how to label the monetary relief at issue but rather how the trier of fact would determine the damages for each class member. Where, as here, an award of backpay would depend on individualized proof, *Dukes* is wrong to deem that form of monetary relief, categorically, as "fully consistent with the certification of a Rule 23(b)(2) class action." *Id.* at 619.

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[27] *E.g.*, *Ellis*, 240 F.R.D. at 642-43 (finding need for individualized determination no impediment to Rule 23(b)(2) monetary damage claims, including claims for punitive damages and emotional distress); *see also Hnot v. Willis Grp. Holdings Ltd.*, 241 F.R.D. 204, 212 (S.D.N.Y. 2007) (concluding that Rule 23(b)(2) "only require[s] that the Court find that, if plaintiffs succeed at trial, they 'will be entitled to the injunctive and declaratory relief that they seek.'").

It is even more apparent that individual proof would be needed for punitive damages—available only when the employer acted "with malice or with reckless indifference to federally protected rights of an aggrieved individual," 42 U.S.C. § 1981a(b)(1)—because the harm alleged does not affect all class members in a similar way. *See McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231-32 (2d Cir. 2008). Plaintiffs' theory of causation—that individual managers are "vulnerable" to *unconscious* gender-based stereotypic decisions—is itself inconsistent with a uniform showing of malice or reckless indifference to individual rights. Although *Dukes* expresses its own misgivings as to the propriety of certifying a punitive-damages class, because punitive damages introduce new and substantial factual issues and manageability concerns, 603 F.3d at 621-22, *Dukes* errs in concluding that these punitive-damages issues do not require individual determination in a Rule 23 context.

The class certification of heterogeneous damages claims under Rule 23(b)(2) thus allows class treatment for a mandatory, non-opt-out class that might never have met the requirements—and protections—of Rule 23(b)(3). Whereas the cohesiveness of a mandatory, non-opt-out class should be greater under Rule 23(b)(2) than Rule 23(b)(3), *Dukes* countenances a *lesser* threshold for a Rule 23(b)(2) class while allowing plaintiffs to evade Rule 23(b)(3) requirements altogether. If Rule 23(b)(2) certification were appropriate despite the diverse circumstances present here, then it would be difficult to imagine a case where certification of monetary claims would not be allowed under Rule 23(b)(2), eliminating the purpose of Rule 23(b)(3) and exposing employers to escalating class claims upon superficial showings.

Accordingly, the Ninth Circuit's decision to allow certification of monetary damages claims under Rule 23(b)(2) should be reversed.

CONCLUSION

This Court should order the Ninth Circuit to remand to the district court to vacate the Rule 23(b)(2) class certification order and to consider whether a class action would be permissible under the standards of Rule 23(b)(3).

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AMICUS
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BRIEF

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No. 10-277

IN THE
Supreme Court of the United States

WAL-MART STORES, INC.,

Petitioner,

v.

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, KAREN WILLIAMSON, DEBORAH GUNTER, CHRISTINE KWAPKNOSKI, CLEO PAGE, on behalf of themselves and all others similarly situated,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI—the Voice of the Defense Bar is an international organization that includes more than 23,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys, to promote the role of the defense lawyer, to improve the civil justice system, and to preserve the civil jury. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and—where national issues are involved—consistent.

To promote these objectives, DRI participates as *amicus curiae* in cases raising issues of importance to its members, their clients, and the judicial system. This is just such a case. In approving certification of a colossal, sprawling employment class action, the Ninth Circuit disregarded this Court's precedent and distorted Title VII, the Rules Enabling Act, and the Federal Rules of Civil Procedure.

The issues raised here can have considerable, and even dispositive, impact on countless class actions in virtually all contexts, including employment discrimination, products liability, insurance, securities, and antitrust. DRI's members are frequently confronted with the precise issues presented by this case, and the Ninth Circuit's erroneous disposition, if affirmed, would invite hosts of unwarranted class action suits against their clients. The Court should reverse the decision below.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3(a), *amicus curiae* certifies that counsel of record for both petitioner and respondents have consented to this filing in letters on file with the Clerk's office.

INTRODUCTION

The Ninth Circuit affirmed certification of a gargantuan employment class action, allowing over 1.5 million plaintiffs with factually distinct claims to proceed together as a single unit. Under no ordinary construction of Rule 23 could this result have been obtained. Rule 23(a) requires that plaintiffs demonstrate commonality, typicality, and adequacy of their representation; and Rule 23(b)(2) allows certification only if the defendant has acted "on grounds that apply generally to the class."

To satisfy these requirements, the district court applied "rough justice" (to use that court's own term). Pet. App. 254a. The court washed away all of the individualized elements and defenses of a Title VII claim, and then certified a class that would "generat[e] a 'windfall'" for some employees and simultaneously "'undercompensat[e] the genuine victims of discrimination.'" *Id.* The court thus purported to comply with Rule 23 only be redesigning the underlying cause of action. That was improper, and by affirming this feat of judicial engineering, the Ninth Circuit erred.

DRI fully supports petitioner's arguments and will not belabor them here. Instead, DRI submits this brief to emphasize how the Rules Enabling Act, 28 U.S.C. § 2072, prohibits the lower courts' novel manipulation of Rule 23. The Act empowers the Judiciary to adopt rules of "practice and procedure," but expressly provides that no such rule, including Rule 23, may "abridge, enlarge or modify any substantive right." *Id.* § 2072(a), (b). Consistent with the statutory text and legislative history, this Court has emphasized that Rule 23 "must be interpreted with fidelity to the Rules Enabling Act." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 629 (1997). Indeed, as this Court has stressed, particular caution must be exercised in applying Rule 23 because class certification can dramatically impact a lawsuit and parties' rights. *Id.* at 613. This caution ensures that rules of decision do not change just because plaintiffs filed a class action. In the decision below, however, the Ninth Circuit majority abandoned caution and approved a class certification order under Rule 23 that distorts Title VII's requirements in direct violation of the Rules Enabling Act.

The consequences of this approach are troubling and far-reaching. Unless this Court enforces the Rules Enabling Act and Rule 23, plaintiffs will be emboldened to propose increasingly creative methods of generalized proof in order to assemble ever larger classes that should be ineligible for certification. Such class certifications exert enormous hydraulic pressure on defendants to settle cases that lack merit. To prevent these intolerable results, the Court should reverse the Ninth Circuit's decision.

ARGUMENT

I. RULE 23, CONSTRUED IN KEEPING WITH THE RULES ENABLING ACT, DOES NOT PERMIT THE CLASS CERTIFICATION.

The Rules Enabling Act prohibits the lower courts' misconstruction of Rule 23. Because the Federal Rules of Civil Procedure cannot be used to modify substantive rights, class certification was improper.

A. The Rules Enabling Act Prohibits A Construction Of Rule 23 That Modifies Substantive Rights.

1. The Rules Enabling Act empowers the Judiciary only to promulgate "general rules of practice and procedure." 28 U.S.C. § 2072(a). In enacting the statute, Congress made clear that "[s]uch rules shall not abridge, enlarge or modify any substantive right." *Id.* § 2072(b). Thus, to comply with the Rules Enabling Act, a Federal Rule may "affect[ ] only the process of enforcing litigants' rights and not the rights themselves." *Burlington N. R.R.* v. *Woods*, 480 U.S. 1, 8 (1987).

The commands of the Rules Enabling Act track the Constitution's separation of powers. Congress holds "[a]ll legislative Powers," U.S. Const. art. I, § 1, and "the judicial power" is "limited to 'Cases' and 'Controversies.'" *Mistretta* v. *United States*, 488 U.S. 361, 385 (1989) (quoting *Muskrat* v. *United States*, 219 U.S. 346, 356 (1911)); see U.S. Const. art. III, § 2. Congress may delegate rulemaking authority that is "appropriate to the central mission of the Judiciary," only if the rulemaking "do[es] not trench upon the prerogatives of another Branch." *Mistretta*, 488 U.S. at 388. The Rules Enabling Act provides such a limited delegation, authorizing the Court to make rules of "practice and procedure" only. 28 U.S.C. § 2072(a); see *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 9-10 (1941). A broader delegation, which permitted the Court to make or modify "substantive right[s]," 28 U.S.C. § 2072(b), would impermissibly convey legislative authority and violate the Constitution's exclusive "prescription for legislative action," *INS* v. *Chadha*, 462 U.S. 919, 951 (1983).

The Rules Enabling Act's clear jurisdictional limitation and constitutional underpinnings must guide interpretation of the Federal Rules. If a court has any question whether an interpretation of a Federal Rule would stray into the legislative domain by altering substantive rights, it should avoid the potential Rules Enabling Act violation and constitutional infirmity by choosing the alternative, plausible interpretation. See, *e.g.*, *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 503, (2001) (rejecting an interpretation of Fed. R. Civ. P. 41(b) that "would arguably violate the jurisdictional limitation of the Rules Enabling Act"); *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 842 (1999) (adopting a "limiting construction" of Fed. R. Civ. P. 23(b)(1)(B) in order to "minimiz[e] potential conflict with the Rules Enabling Act" and "avoid[] serious constitutional concerns"); cf. *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1441-42 (2010) (if Fed. R. Civ. P. 23 "were susceptible of two meanings," the Court would have to "interpret Rule 23 in a manner that avoids overstepping its authorizing statute"); *id.* at 1452 (Stevens, J. concurring in the judgment) ("When a federal rule appears to abridge, enlarge, or modify a substantive right, federal courts must consider whether the rule can reasonably be interpreted to avoid that impermissible result.").

2. The legislative history of the Rules Enabling Act confirms that Congress intended the Judiciary to adhere strictly to the narrow confines of its delegation. During the 20-year campaign leading to enactment of the Rules Enabling Act, opponents "protested that the judiciary's rulemaking authority would usurp legislative power." Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90

Minn. L. Rev. 1303, 1312 (2006); see S. Rep. No. 69-1174, at 20, 33 (1926). To meet that objection, proponents of the Act added the statement that the Court's rules could not "'abridge, enlarge, nor modify . . . substantive rights.'" Redish & Amuluru, *supra* at 1312; see also Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. Pa. L. Rev. 1015, 1073-80 (1982). The key Senate report explained:

> In view of the express provision inhibiting the court from affecting "the substantive rights of any litigant," any court would be astute to avoid an interpretation which would attribute to the words "practice and procedure" an intention on the part of Congress to delegate a power to deal with such substantive rights and remedies . . . .
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> Where a doubt exists as to the power of a court to make a rule, the doubt will surely be resolved by construing a statutory provision in such a way that it will not have the effect of an attempt to delegate to the courts what is in reality a legislative function.

S. Rep. No. 69-1174, at 11.

Congress thus made clear that the Act did not countenance rules that modified "substantive rights and remedies." *Id.*; see also S. Rep. No. 70-440, at 16 (1928) ("Matters of jurisdiction and of substantive right are clearly within the power of the legislature. These are not to be affected. It cannot be too strongly emphasized that the general rules of court contemplated under this bill will deal only with the details of the operation of the judicial machine."). Pertinent here, Congress expected that, in close cases, "any doubt will surely be resolved" by selecting the construction that would not intrude the legislative domain by modifying substantive rights. S. Rep. No. 69-1174, at 11.

3. Such restraint is especially appropriate when considering Rule 23 class certifications. A class certification "dramatically affects the stakes for defendants." *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996). By aggregating claims, a class certification "makes it more likely that a defendant will be found liable" and "creates insurmountable pressure on defendants to settle." *Id.*; see also *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (observing that class certification puts defendants "under intense pressure to settle" and calling "settlements induced by a small probability of an immense judgment in a class action 'blackmail settlements'") (quoting Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973)).

Class certification also poses potential harms to absent plaintiffs that counsel in favor of restraint. Absent plaintiffs may prefer to assert their claims separately (or not at all), and yet Rule 23(b)(2) certification binds them to the class action's disposition without giving them notice or an opportunity to opt out. See Fed. R. Civ. P. 23(c)(2)(A), (3)(A). Under Rule 23(b)(2), the success or failure of the named plaintiffs becomes the success or failure of every absent plaintiff.

Rule 23's potency and potential harms have led this Court to stress that Rule 23 "must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act." *Amchem*, 521 U.S. at 613; see also *Ortiz*, 527 U.S. at 845. Rule 23 is not an invitation to "judicial inventiveness." *Amchem*, 521 U.S. at 620. Particularly when, as here, "individual stakes are high and disparities among class members [are] great," this Court has "call[ed] for caution." *Id.*

at 625. Regardless of the efficiencies promised by Rule 23, a defendant cannot be subject to liability more easily just because plaintiffs choose to plead a class action. 28 U.S.C. § 2072(b). A class action may proceed only if it "leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assoc.*, 130 S. Ct. at 1443 (plurality).

Of course, if Rule 23 *did* permit certification of a class action that modified substantive rights, those operative provisions of Rule 23 would be invalid. The Enabling Act trumps conflicting Federal Rules, and thus independently bars such a class action. See *Amchem*, 521 U.S. at 629 ("the rulemakers' prescriptions for class actions may be endangered by those who embrace Rule 23 too enthusiastically") (internal quotation marks omitted). As explained below, Rule 23 can be construed in keeping with the Enabling Act to disallow the class certification affirmed below. Regardless of whether reversal is based on Rule 23 or the Enabling Act, however, this much is certain: the class certification order cannot stand.

B. The Class Certification In This Case Violates The Rules Enabling Act By Modifying Substantive Rights Under Title VII.

Despite Congress's clear directive in the Rules Enabling Act, the Ninth Circuit affirmed a class certification order that altered the substantive Title VII cause of action and limited Wal-Mart's substantive defenses. The error warrants reversal. Plaintiffs allege that Wal-Mart engaged in a pattern or practice of intentional discrimination on the basis of sex in violation of 42 U.S.C. § 2000e-2. See Pet. App. 279a. That provision requires proof that an employer took an adverse employment action against the plaintiff "because of" her sex. 42 U.S.C. § 2000e-2. Title VII explicitly forecloses a plaintiff's recovery if the employer acted "for any reason other than discrimination on account of . . . sex." *Id.* § 2000e-5(g)(2)(A); see also *id.* § 2000e-5(g)(2)(B)(ii). To maintain a class action for individual relief, plaintiffs must satisfy a two-stage framework, which requires plaintiffs to demonstrate a "systemwide pattern or practice of" intentional discrimination, and permits defendants to provide individualized defenses. *Int'l Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 336 (1977); *see Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 772 (1976). As explained below, the Ninth Circuit transmogrified this framework, alleviating plaintiffs' burden and depriving Wal-Mart of its right to offer individualized defenses, all in violation of the Rules Enabling Act.

1. The Class Certification Order Lowers Plaintiffs' Burden To Show They Were Victims Of A Pattern Or Practice Of Intentional Discrimination.

In stage one, plaintiffs must prove that the employer engaged in a "systemwide pattern or practice of" intentional discrimination—*i.e.*, that sex "discrimination was the company's standard operating procedure." *Teamsters*, 431 U.S. at 336. A showing of "discrimination against one or two individuals" does not mean the plaintiff can necessarily "prove the existence of a companywide policy, or even a consistent practice within a given department," sufficient to sustain a class action. *Cooper* v. *Fed. Reserve Bank of Richmond*, 467 U.S. 867, 877-78 (1984). Instead, to satisfy Rule 23(a) and Rule 23(b)(2), plaintiffs need to produce "[s]ignificant proof" that the employer pursued a common discriminatory policy or practice in the same manner against the entire class. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U. S. 147, 159 n.15 (1982).

a. As in all class actions, a plaintiff "seeking to maintain a class action under Title VII must meet 'the prerequisites of numerosity, commonality, typicality, and adequacy of representation' specified in Rule 23(a)." *Id.* at 156. The Rule 23(a) criteria cannot be assessed in the abstract. They must be judged in keeping with the Enabling Act's command: The questions of law and fact must be so "common," Fed. R. Civ. P. 23(a)(2), and the class representatives' claims and defenses so "typical," *id.* 23(a)(3), that adjudicating their cases could resolve each class member's case without sacrificing any party's rights. *Falcon*, 457 U.S. at 157 n.13. The adequacy of representation inquiry, Rule 23(a)(4), likewise takes account of whether "the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence."[2] *Id.*

The greater the degree to which the class representatives' claims vary from other class members' claims, the greater the risk that a class action will modify substantive rights. If the claims vary substantially, the absent class members may be entitled to a different judgment from the named plaintiffs. Or, the defendant may have a defense against absent class members' claims that it could not advance against the named plaintiffs. Because the Enabling Act prohibits those results, Rule 23(a)'s factors must be applied to limit class claims to those that are "fairly encompassed by the named plaintiff's claims." *Gen. Tel. Co. of Nw. v. EEOC*, 446 U.S. 318, 330 (1980). In essence, Rule 23(a) requires that the class members "possess the same interest and suffer the same injury." *Falcon*, 457 U.S. at 156 (internal quotation marks omitted).

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[2] Other factors, such as "competency of class counsel and conflicts of interest," may also doom a proposed class action. *Falcon*, 457 U.S. at 157 n.13. Compliance with the Enabling Act is a necessary but not a sufficient condition for class certification.

Plaintiffs plainly cannot satisfy Rule 23(a)'s commonality, typicality, or adequacy requirements. As certified, the class consisted of different types of employment actions (*i.e.*, unequal pay, unequal promotions) allegedly taken against 1.5 million different female employees, in 170 different job classifications, in 53 different departments, at 3,400 different stores, by thousands of different, local decision-makers. Pet. App. 114a, 163a, J.A. 745a-746a; see Pet. App. 59a (acknowledging "the absence of a specific discriminatory practice promulgated by Wal-Mart"). Theirs is a far cry from the prototypical Title VII class action in which plaintiffs identify a discrete discriminatory practice, such as "a biased testing procedure," that affected all class members in the same manner. *Falcon*, 457 U.S. at 160 n.15; see, *e.g.*, *Garcia v. Johanns*, 444 F.3d 625, 631-32 (D.C. Cir. 2006) (requiring a plaintiff to "make a significant showing" that "the class suffered from a common policy of discrimination that pervaded all of the employer's challenged employment decisions") (internal quotation marks omitted). Rather, plaintiffs allege that Wal-Mart fostered a "corporate culture" of "gender stereotyping" and a corporate practice of giving store managers "excessive subjectivity" in multiple types of "personnel decisions." Pet. App. 51a.

On its own terms, this allegation of subjective decisions of varying types, by thousands of independent local store managers across the country, precludes plaintiffs from satisfying Rule 23(a)'s requirements. Indeed, a policy of "leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise *no inference* of discriminatory conduct." *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988) (emphasis added); see, *e.g.*, *Garcia*, 444 F.3d at 632 ("[e]stablishing commonality . . . is particularly difficult where, as here, multiple decisionmakers with significant local autonomy exist"). Thus, individual class members' Title VII claims rise or fall on myriad additional facts specific to their employment situation and the particular decision-makers. In no meaningful sense do plaintiffs "possess the same interest" or have they "suffer[ed] the same injury" from a common discriminatory practice. *Falcon*, 457 U.S. at 156 (internal quotation marks omitted).

The lower courts reached the opposite conclusion only by ignoring the overwhelming differences among putative class members, focusing instead on the few issues plaintiffs claimed to be common—*i.e.*, "excessively subjective decision making in a corporate culture of uniformity and gender stereotyping." Pet. App. 80a. But defining the common practice at that high level of abstraction is meaningless. It mirrors the general claim of a "policy of discrimination" that *Falcon* rejected as insufficient to satisfy Rule 23(a). 457 U.S. at 157-58. Moreover, it fails the fundamental requirement that the class members' claims so overlap that adjudicating the named plaintiffs' claims fairly resolves each class member's claims without modifying any class member's rights or burdens, or depriving the defendant of any defense. 28 U.S.C. § 2072(b).

Those impermissible effects are precisely what the class certification order allows. It opens the door to 1,500,000 class members—who worked in different stores around the country, under different managers—receiving a backpay award without ever having to prove actual discrimination, and merely because a jury finds that a few store managers in California treated individual employees differently under completely separate employment circumstances. See Pet. App. 4a-5a. The order also opens the door to the possibility that the class members will be forever barred from advancing legitimate discrimination claims merely because a jury finds that those particular California store managers did not discriminate against the named plaintiffs. It is hard to imagine a more egregious violation of the Enabling Act.

b. Nor can plaintiffs' claim satisfy Rule 23(b)(2), as properly construed in light of the Enabling Act. Rule 23(b)(2) allows certification if the defendant has acted "on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). The "underlying premise of the (b)(2) class" is that "its members suffer from a common injury properly addressed by class-wide relief." *Allison* v. *Citgo Petroleum Corp.*, 151 F.3d 402, 413 (5th Cir. 1998).

To be certified under (b)(2), the class must be an especially "homogenous and cohesive group." *Id.*; see also, *e.g.* *Barnes* v. *Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998) (collecting cases that recognize the "cohesion" demanded by (b)(2)). Indeed, "even greater cohesiveness generally is required" for a (b)(2) class than for a (b)(3) class, in which common issues must merely "predominate" individual issues. *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1121 (8th Cir. 2005); see also, *e.g.*, *Barnes*, 161 F.3d at 142-43. This heightened need for cohesion stems both from (b)(2)'s text and the fact that (b)(2) certification binds absent class members to the class action's judgment without giving them notice or an opportunity to opt out. *Allison*, 151 F.3d at 413; see Fed. R. Civ. P. 23(c)(2)(A), (3)(A); see also *Amchem*, 521 U.S. at 620 (Rule 23 requires courts to determine whether a class certified for trial "would present intractable management problems").

Where, as here, the named plaintiffs and absent class members lack cohesion and have varying claims, certification under (b)(2) creates a real possibility that absent class members' and the defendant's rights will be modified in violation of the Enabling Act. The absent class members and the defendant will be bound to the judgment obtained for the named plaintiffs based on circumstances not shared by the absent class members, potentially awarding certain members relief they did not merit, and depriving others of relief they deserved. Indeed, the district court candidly acknowledged that its class certification order would "generat[e] a 'windfall'" for some employees who were not "'genuine victims of discrimination,'" and "'undercompensat[e] the genuine victims of discrimination.'" Pet. App. 254a. This admission should have doomed any effort to apply Rule 23(b)(2) here because it flatly contravenes the Rules Enabling Act by modifying Title VII's substantive provisions.

2. The Class Certification Order Abridges Wal-Mart's Right To Present Individualized Defenses.

The class certification order also violates the Rules Enabling Act by modifying the substantive rights at stake in the second stage of the *Teamsters* framework. Plaintiffs who prevail at stage one are entitled only to "prospective relief" to the class, such as "an injunctive order against continuation of the discriminatory practice." 431 U.S. at 361; see *Cooper*, 467 U.S. at 876. If plaintiffs seek "individual relief," as plaintiffs do here, a second stage consisting of individualized proceedings is required. See *Teamsters*, 431 U.S. at 361 ("a district court must usually conduct additional proceedings . . . to determine the scope of individual relief"); see *Cooper*, 467 U.S. at 876.

This requirement of individualized proof follows directly from Title VII's text. The operative provision makes it unlawful for an employer "to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* . . . sex." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). Title VII expressly prohibits granting relief to "an individual" if the evidence shows that the adverse employment action was taken for "any reason other than discrimination on account of . . . sex." *Id.* § 2000e-5(g)(2)(A); see also *id.* § 2000e-5(g)(2)(B)(ii) (court "shall not award damages or issue an order requiring . . . payment" if the employer demonstrates that it "would have taken the same action in the absence of the impermissible motivating factor").

Contrary to the Ninth Circuit majority's view, Pet. App. 104a-105a & n.53, this Court's decisions establish that, in the second stage, the employer is "*entitled* to prove" that individual plaintiffs were not victims of discrimination.[3] *E. Tex. Motor Freight Sys., Inc.* v. *Rodriguez*, 431 U.S. 395, 404 n.9 (1977) (emphasis added); see also *Teamsters*, 431 U.S. at 362 (employer may "demonstrate that the individual applicant was denied an employment opportunity for lawful reasons"); *Franks*, 424 U.S. at 772 (employer may show that "individuals . . . were not in fact victims of previous hiring discrimination"). Thus, "Title VII does not authorize affirmative relief for individuals as to whom, the employer shows, the existence of systemic discrimination had no effect." *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 245 n.10 (1989) (plurality); *id.* at 266 (O'Connor, J., concurring in the judgment) (same).

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[3] This Court's decisions in *Teamsters* and *Franks* hold that the employer has the burden of proof at the second stage because plaintiffs' stage one "proof of the pattern or practice supports an inference that any particular employment decision . . . was made in pursuit of that policy." *Teamsters*, 431 U.S. at 362; *see Franks*, 424 U.S. at 772. However, this Court's subsequent decisions addressing individual disparate treatment claims (as opposed to class action pattern-or-practice disparate treatment claims) have clarified that the plaintiff always retains the ultimate burden to prove intentional discrimination. *See, e.g.*, *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 507 (1993); *U.S. Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 716 (1983). These subsequent cases cast doubt on *Teamsters'* and *Franks'* placement of the burden on defendants. *See Gross* v. *FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2351-52 (2009) (holding that a plaintiff retains the burden under the Age Discrimination in Employment Act and questioning burden shifting under Title VII); *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 267 (1989) (plurality) (O'Connor, J., concurring in the judgment). Regardless of where the burden lies, however, the decision below gives the defendant *no* opportunity to present its defense in violation of the Rules Enabling Act.

The class certification order affirmed in this case, however, dispenses with individualized proof, thus modifying the Title VII cause of action, in violation of the Rules Enabling Act. The district court acknowledged that conducting "individual hearings" in stage two is the "norm," but found that conducting such hearings would be "impractical on its face" and "not feasible." Pet. App. 251a-252a. Given the size of the putative class and plaintiffs' theory of discrimination through "subjective criteria," the court reasoned that "it is virtually impossible" to determine "which class members were the actual victims of the defendant's discriminatory policy." *Id.* at 252a-253a. As the dissent below explained, the district court's findings "compel[ ] the conclusion that it could not certify the class at all." *Id.* at 146a.

Instead, the district court stripped Wal-Mart of its substantive right to mount individualized defenses. Pet. App. 247a-258a; see *id.* at 247a (Wal-Mart "is not, however, entitled to circumvent or defeat the class nature of the proceeding by litigating whether every individual store discriminated against individual class members"). The court proposed to substitute a formula-based approach that would determine individual plaintiffs' relief without considering each of Wal-Mart's defenses to their claims. *Id.* at 251a-276a. The district court would calculate a class-wide, lump-sum backpay award, and then use employment information from Wal-Mart's corporate records to fashion individual awards. *Id.* This approach would preclude Wal-Mart from showing that a non-discriminatory reason not evident in corporate records—such as a plaintiff's inferior pre-Wal-Mart work experience, *id.* at 272a-273a & n.55—actually motivated the lower pay or non-promotion. See *id.* at 272a-276a. Even though plaintiffs allege that discrimination occurred through local store managers' subjective decisions, *id.* at 77a-78a, the defendant's ability to show that any given manager did not act "because of" a plaintiff's sex is sharply limited. This result violates Title VII's express provisions. 42 U.S.C. §§ 2000e-2(a), 2000e-5(g).

The Ninth Circuit majority justified allowing this wayward approach on the ground that, in stage one, "the pattern and practice *has* to be proven on a group basis." Pet. App. 105 n.53. But that truism says nothing about the employer's right to contest individual plaintiffs' claims in stage two.[4] That is the stage when the statutorily created right to present individualized defenses is vindicated. *Teamsters*, 431 U.S. at 362. A court cannot use Rule 23 to abridge that right. 28 U.S.C. § 2072(b).

It is no answer to suggest, as the Ninth Circuit majority did, Pet. App. 110a n.56, that Wal-Mart's rights could be protected by allowing it "to present individual defenses in the randomly selected 'sample cases,' thus revealing the approximate percentage of class members whose unequal pay or non-promotion was due to something *other* than gender discrimination." *Id.* This "'rough justice'" approach — to use the district court's own words, *id.* at 254a— does not accord with the text of Congress's enactment. Congress prohibited affording relief to "an individual" if the evidence shows that the employment action was taken against that individual for a reason other than sex discrimination. 42 U.S.C. § 2000e-5(g)(2)(A); see also *id.* § 2000e-5(g)(2)(B). Congress did not authorize "'approximat[ions]'" of aggregate liability based on "rough" statistical models, which (the district court frankly admitted) would "generat[e] a 'windfall for some employees'" who were not actual victims of discrimination. Pet. App. 254a. Nor did Congress permit district courts, in the name of judicial efficiency, to "'undercompensat[e] the genuine victims of discrimination.'" *Id.* Because the district court's approach would "enlarge" the substantive rights of uninjured plaintiffs and "abridge" the rights of any actual victims, as well as the defendant, it contravenes Title VII and the unmistakable terms of the Rules Enabling Act. 28 U.S.C. § 2072(b).

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[4] On that critical point, the majority principally relied on two inapposite Ninth Circuit decisions to claim that the district court could dispense with individualized hearings. Pet. App. 105a-110a & n.53. The first case actually undermines the majority's conclusion because it properly held that a Title VII defendant could avoiding making backpayment by "proving that the applicant was unqualified or showing some other valid reason why the claimant was not, or would not have been, acceptable." *Domingo* v. *New England Fish Co.*, 727 F.2d 1429, 1445 (9th Cir. 1984) (per curiam). The second decision involved Alien Tort Statute claims, not Title VII claims, and, in any event, was based on the same flaws that plague this case. *Hilao* v. *Estate of Marcos*, 103 F.3d 767, 778 (9th Cir. 1996); *see id.* at 788 (Rymer, J., dissenting) ("If . . . a real prove-up of causation and damages cannot be accomplished because the class is too big or to do so would take too long, then . . . the class is unmanageable and should not have been certified in the first place.").

II. IF AFFIRMED, THE DECISION BELOW WOULD TRIGGER AN EXPLOSION OF MERITLESS CLASS ACTIONS FILED SOLELY TO FORCE SETTLEMENTS.

The harmful consequences of the Ninth Circuit's Rule 23 analysis cannot be overstated. Its impact would not be limited to employment discrimination suits. The analysis would also affect plaintiffs' attempts to obtain class certification in many other contexts, including products liability, securities, and antitrust cases. In each of these areas, plaintiffs assert claims that require proof that a defendant's conduct actually caused some individualized injury. See, *e.g.*, *Castano*, 84 F.3d at 740 (products liability); *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336, 341-42 (2005) (securities fraud); *Associated Gen. Contractors of Cal., Inc.* v. *Cal. State Council of Carpenters*, 459 U.S. 519, 538 (1983) (antitrust). Indeed, a critical part of a defendant's case is often to dispute causation and injury.

Cases that involve varying individual proof of causation and injury generally are not eligible for class certification, as individual issues overwhelm the common issues. Fed. R. Civ. P. 23(a); see, *e.g.*, *Amchem*, 521 U.S. at 620; *Hohider* v. *UPS, Inc.*, 574 F.3d 169, 195-96 (3d Cir. 2009); *McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 224-25 (2d Cir. 2008). The Ninth Circuit's decision, however, invites courts to disregard such individual issues on the theory that litigating them as a class would be "impractical" and "not feasible." Pet. App. 251a-252a. By the Ninth Circuit's logic, issues that would defeat class certification should be ignored precisely because they would defeat class certification. This transforms Rule 23 into a vehicle to aggregate disparate claims and create behemoth classes, such as the one proposed here.

The inevitable result is to intensify the pressure that a class certification order puts on a defendant to settle, making the class action procedure even more attractive for plaintiffs pursuing frivolous claims. In enacting the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, members of Congress expressed considerable concern that, "[b]ecause class actions are such a powerful tool, they can give a class attorney unbounded leverage." S. Rep. No. 109-14, at

20 (2005). "Such leverage can essentially force corporate defendants to pay ransom to class attorneys by settling—rather than litigating—frivolous lawsuits." *Id.* On numerous occasions, DRI's members have represented defendants placed in this precise situation. Needless to say, "when plaintiffs seek hundreds of millions of dollars in damages, basic economics can force a corporation to settle the suit, even if it is meritless and has only a five percent chance of success." *Id.* at 21; see also *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 163-64 (2008) (explaining how the prospect of "extensive discovery" can enable "plaintiffs with weak claims to extort settlements from innocent companies").

Left unchecked, the Ninth Circuit's boundless interpretation of Rule 23 will invite a wave of meritless class action filings. The Enabling Act strictly limits Rule 23 to regulate nothing more than the procedures for disposing of claims. The decision below, however, allows plaintiffs to wield Rule 23 as a substantive weapon. It should be rejected.

CONCLUSION

For these reasons, and those stated by petitioner, the decision of the Ninth Circuit should be reversed.

Respectfully submitted,

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January 27, 2011

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AMICUS
CURIAE
BRIEF

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No. 10-277

IN THE

Supreme Court of the United States

WAL-MART STORES, INC.,
Petitioner,
v.
BETTY DUKES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council ("EEAC") respectfully submits this brief as *amicus curiae*. The brief supports the Petitioner and urges reversal of the decision below.[1]

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council ("EEAC") is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes approximately 300 major U.S. corporations that collectively provide employment to roughly 20 million workers. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e *et seq.*, as amended, and other federal employment-related laws and regulations. Collectively, EEAC's member companies routinely make and implement millions of employment decisions each year, including hires, promotions, transfers, disciplinary actions, terminations, and other employment actions. They devote extensive resources to training, awareness, and compliance programs designed to ensure that all of their employment actions comport with Title VII and other applicable legal requirements.

Nevertheless, each employment transaction is a potential subject of a discrimination charge and/or lawsuit. As large employers, EEAC's members are particularly likely targets for the sort of broad-based class action at issue here. Consequently, EEAC has an ongoing, substantial interest in the issue presented in this case regarding the proper application of Rule 23 of the Federal Rules of Civil Procedure to class actions brought under Title VII that seek substantial monetary damages, in addition to injunctive and declaratory relief.

In a sharply divided decision, the *en banc* court below ruled 6-5 to affirm certification under Rule 23(b)(2) of a class of at least half a million – and as many as 1.5 million – women currently or formerly employed by Petitioner in any one of its several thousand stores throughout the United States. Despite significant differences in each individual's particular circumstance, it determined that the district court did not commit reversible error in concluding that Respondents satisfied all of the requirements of Rule 23(a) and Rule 23(b)(2) of the Federal Rules of Civil Procedure. The decision below raises serious issues likely to impact any large employer defending similar class actions. Accordingly, the issues presented to the Court are extremely important to the nationwide constituency that EEAC represents.

Since 1976, EEAC has participated in numerous cases in this Court raising substantial and procedural issues related to litigation of employment discrimination claims, including those involving questions of damages[2] and/or the proper interpretation of

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[2] *See, e.g., Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982); *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Landgraf v. Usi Film Prods.*, 511 U.S. 244 (1994); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526

Rule 23.[3] Because of its experience in these matters, EEAC is well-situated to brief the Court on the concerns of the business community and the significance of this case to employers.

SUMMARY OF ARGUMENT

This Court has indicated that granting class certification status under Rule 23(b)(2) where monetary damages are sought raises constitutional and due process concerns, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999), strongly suggesting that a "substantial possibility" exists that certification of such claims is never appropriate. *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994). The decision below, which found a massive action brought under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e *et seq.*, on behalf of over one million current and former employees is maintainable under Rule 23 of the Federal Rules of Civil Procedure, magnifies those concerns and establishes a dangerous precedent for employment discrimination class actions. It is plainly inconsistent with the letter and spirit of both the Federal Rules and Title VII, and therefore should be reversed.

On its face, Rule 23(b)(2) permits class certification only where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Although some courts of appeals have interpreted the advisory

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(1999); *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001).

[3] *See, e.g., East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395 (1977).

committee notes accompanying Rule 23 to permit class certification of claims for monetary damages so long as final relief does not relate "exclusively or predominately" to such damages, to the extent that such an interpretation finds no support in the text of Rule 23 itself, it should be rejected by this Court.

Respondents are seeking compensation for lost wages and punitive damages on behalf of the class of as many as 1.5 million women purportedly affected by Petitioner's alleged discriminatory employment practices. Even assuming claims for money damages are maintainable under Rule 23(b)(2) as long as they do not predominate over injunctive relief, that is not the case here. For many members of the class, particularly those who no longer work for Petitioner, the substantial back pay and punitive damages sought necessarily will be of far greater significance than any injunctive relief to which they may be entitled.

Nor is class certification proper under Rule 23(b)(3), which permits class certification only when "the questions of law or fact common to class members predominate over any questions affecting only individual members, and . . . a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Because Title VII requires particularized analysis of the facts and circumstances of each employment action, and of the degree of actual harm to each class member if liability is found, this case presents many individual questions of law and fact that plainly predominate over any issues common to the class as a whole. Furthermore, satisfying Rule 23(a)'s commonality and typicality requirements is virtually impossible in a proposed class of this size, whose members worked in various positions for different supervisors across thousands of Petitioner's stores throughout the U.S.

Permitting Title VII suits seeking billions of dollars in damages to proceed as "super" class actions under Rule 23 significantly undermines Title VII's goal of prompt and speedy resolution of individual claims by encouraging aggregation as a means of pressuring corporate defendants to forgo their statutory right to put forth a defense to each claim, forced instead to settle for strategic reasons.

ARGUMENT

I. THE DECISION BELOW, WHICH AFFIRMED RULE 23 CLASS CERTIFICATION OF TITLE VII CLAIMS BROUGHT ON BEHALF OF OVER ONE MILLION WOMEN CHALLENGING INDIVIDUAL EMPLOYMENT DECISIONS MADE BY A MULTIPLICITY OF MANAGERS UNDER VARIOUS CIRCUMSTANCES, DEPARTS FROM WELL-ESTABLISHED LEGAL PRINCIPLES AND THEREFORE IS ERRONEOUS AND SHOULD BE REVERSED

A. Rule 23(b)(2) Class Certification Is Impermissible In Title VII Actions That Seek Monetary Damages, In Addition To Declaratory And Injunctive Relief

Because Respondents demand substantial monetary damages, which eclipse any ancillary injunctive relief they purport to seek, this action is unsuitable for class certification under Rule 23(b)(2). Therefore, the *en banc* majority's decision below affirming certification of the class is erroneous and should be reversed.

Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e *et seq.*, as amended, prohibits employers from discriminating against individuals because of race, color, religion, sex or national origin. To maintain multiple claims as a class action, including those involving alleged Title VII violations, plaintiffs must satisfy all four prerequisites of Fed. R. Civ. P. 23(a), and the requirements of at least one subsection of Fed. R. Civ. P. 23(b). Fed. R. Civ. P. 23; *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Rule 23(b) criteria generally look at whether conducting the case as a class action would be fair and efficient. In particular, Rule 23(b)(2) provides:

> A class action may be maintained if Rule 23(a) is satisfied, and if:
>
> * * *
>
> the party opposing the class has acted or refused to act on grounds generally applicable to the class, so that *final injunctive relief or corresponding declaratory relief is appropriate* respecting the class as a whole.

Fed. R. Civ. P. 23(b)(2) (emphasis added). Thus, the express language of Rule 23(b)(2) indicates that remedies other than those of an injunctive or declaratory nature are not suitable for class treatment.

The advisory committee notes accompanying Rule 23 provide that 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages." Fed. R. Civ. P. 23 advisory committee's note (Note to Subdivision (b)(2)). Some courts of appeals have read this statement as suggesting that claims for monetary relief may be certified under certain circumstances. To the extent that such an interpretation is inconsistent with the actual text of Rule 23(b)(2), which makes no mention of money damages at all, *amicus* urges this Court to find in this case that "*expressio unius est exclusio alterius*" – "to express or include one thing implies the exclusion of the other, or of the alternative." Black's Law Dictionary 661 (9th ed. 2009).

If this Court determines that a claim for money damages does not automatically preclude Rule 23(b)(2) class certification, it should find, as several courts of appeals have concluded, that certification is available under Rule 23(b)(2) only where claims of monetary relief are merely incidental to the injunctive relief sought. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998); *see also Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639 (6th Cir. 2006); *Cooper v. Southern Co.*, 390 F.3d 695 (11th Cir. 2004), *overruled on other grounds*, *Ash v. Tyson Foods, Inc.*, 546 U.S. 454 (2006); *Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d 894 (7th Cir. 1999). Even under that more permissive standard, Rule 23(b)(2) class certification nevertheless was improperly granted in this case, because monetary relief unquestionably dominates over any injunctive relief being sought.

1. Back pay, even if deemed to be equitable in nature, nevertheless is a form of monetary relief, the request for which weighs heavily against Rule 23(b)(2) class certification

Respondents are seeking compensation for lost wages on behalf of a class of as many as 1.5 million women purportedly affected by Petitioner's alleged discriminatory employment practices. Even assuming each member could only recover $100 in back pay, total class recovery would exceed one hundred million dollars, an amount far from incidental to injunctive relief.

Although Respondents seem to suggest that back pay is a form of equitable relief under Title VII that should not be considered "monetary" for purposes of Rule 23(b)(2) class certification, whether or not back pay is a form of "equitable" as opposed to "legal" restitution is far from clear. Section 706 of Title VII provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.

42 U.S.C. § 2000e-5(g)(1). Interpreting similar language contained in the Employee Retirement Income Security Act ("ERISA"), Pub. L. No. 93-406, 88 Stat. 829 (1974), this Court observed in *Great-West Life & Annuity Ins. Co. v. Knudson* that "for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in

the defendant's possession."[4] 534 U.S. 204, 214 (2002) (footnote omitted). There it held that "respecting Congress's choice to limit the relief available under Section 502(a)(3) to 'equitable relief' requires us to recognize the difference between legal and equitable forms of restitution. Because petitioners seek only the former, their suit is not authorized by § 502(a)(3)." *Id.* at 218 (footnote omitted).

Of particular relevance here, the Court rejected the dissent's argument that "Congress has treated backpay, 'a type of restitution,' . . . as equitable for purposes to Title VII," *id.* at 218 n.4, noting that the cases cited for that proposition "do *not* say that *since* [back pay] is restitutionary, it is *therefore* equitable." *Id.* Indeed, it observed:

> Congress "treated backpay as equitable" in Title VII . . . only in the narrow sense that it allowed backpay to be awarded *together with* equitable relief . . . If the referent of "other equitable relief" [in Title VII] were "back pay," it could be said, in a sense relevant here, that Congress "treated" backpay as equitable relief. In fact, however, the referent is "reinstatement or hiring of employees," which is modified by the phrase "with or without back pay."

Id.

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[4] ERISA Section 502(a)(3) permits plan participants, beneficiaries, or fiduciaries "to enjoin any act or practice which violates any provision of this title or the terms of the plan, or . . . to obtain other appropriate equitable relief . . . to redress such violations or . . . to enforce any provisions" of the plan. 29 U.S.C. § 1132(a)(3).

2. The Civil Rights Act of 1991 expanded considerably the scope of monetary damages available to successful Title VII plaintiffs, thus rendering Rule 23(b)(2) class certification of such claims improper

Prior to 1991, the only statutory remedy available to Title VII litigants was back pay and injunctive and declaratory relief. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 (1975). With the passage of the Civil Rights Act of 1991 ("CRA"), 42 U.S.C. § 1981a, however, Congress greatly expanded the remedies available under Title VII by permitting the award of compensatory and punitive damages in cases of intentional discrimination, in addition to statutory attorney's fees and costs. 42 U.S.C. § 1981a(a)(1).[5] While the CRA places a per-claim statutory cap of $300,000 on the amount of compensatory and punitive damages that may be recovered against any employer with 500 or more employees, the aggregation of such claims, especially in enormous classes such as this one, renders Rule 23(b)(2) class certification particularly inappropriate.

Respondents are seeking punitive damages on behalf of a class of over one million alleged victims of discrimination, which if class certification is allowed conceivably could result in a maximum award of over *three hundred billion* dollars in punitive damages

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[5] In addition, the 1991 amendments greatly increased the individualized nature of proof required for claims seeking monetary relief under Title VII. In particular, the CRA emphasized the need for individual remedies by limiting monetary awards to situations in which the discrimination *actually caused* an adverse employment action. 42 U.S.C. §§ 2000e-2(a), (m); 2000e-5(g)(2)(B).

alone. As they know they must under 23(b)(2), Respondents also assert an ancillary claim for injunctive relief. But since more than half of the class members are former employees, they do not stand to benefit from any programmatic or systemic changes that might be part of such an award.

There can be no doubt that the vast majority of the class members are more interested in the possibility of obtaining windfall monetary damages than they are in whether, and to what extent, Petitioner revises its employment policies. Given that so many members of the class do not stand to benefit from the injunctive relief being sought, coupled with the sheer enormity of the punitive damages award, there can be no question that monetary relief predominates, thus rendering class certification under 23(b)(2) improper.

In addition, the CRA made punitive damages available to Title VII plaintiffs only if they could prove that the defendant intentionally discriminated against them "with malice or with reckless indifference to the federally protected rights *of an aggrieved individual*." 42 U.S.C. § 1981a(b)(1) (emphasis added); *see also Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999). The individualized inquiry required to establish liability for punitive damages is fundamentally inconsistent with the very purpose and utility of class certification under 23(b)(2). "The underlying premise of the (b)(2) class – that its members suffer from a common injury properly addressed by class-wide relief – begins to break down when the class seeks to recover back pay or other forms of monetary relief to be allocated based on individual injuries." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 413 (5th Cir. 1998) (internal quotations, citations and footnote omitted). For that reason, the Fifth Circuit in *Allison* concluded, "monetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory relief." 151 F.3d at 415; *see also Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001); *Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d 894, 898-99 (7th Cir. 1999). It explained, "[b]y incidental, we mean damages that flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief." *Allison* at 415.

Respondents assert that "[b]ecause compensatory damages typically require individualized proof from class members, they present the greatest tension with the presumption of 'cohesiveness' underlying Rule 23(b)(2)." Brief in Opposition of Respondents, at 18 (citation omitted). Remarkably, they contend that "[t]his case does not present that issue, as plaintiffs have not sought compensatory damages." *Id.* (citation omitted). By forgoing a claim for compensatory damages in favor of punitive damages, Respondents appear to be hoping for "a blanket award based on a showing that [Petitioner's] conduct has caused some harm." *Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639 (6th Cir. 2006) (citation omitted). The legal showing required for an award of punitive damages is much greater than that, however. As this Court observed in *Kolstad*:

> The very structure of § 1981a suggests a congressional intent to authorize punitive awards in only a subset of cases involving intentional discrimination. Section 1981a(a)(1) limits compensatory and punitive awards to instances of intentional discrimination, while § 1981a(b)(1) requires plaintiffs to make an additional "demonstration"

> of their eligibility for punitive damages. Congress plainly sought to impose two standards of liability -- one for establishing a right to compensatory damages and another, higher standard that a plaintiff must satisfy to qualify for a punitive award.

527 U.S. at 534.

Here, Respondents, on behalf of the class, have waived a claim for compensatory damages, the entitlement to which under *Kolstad* is a first step to determining entitlement to punitive damages. Accordingly, resolution of individual punitive damages will be that much more complex, further rendering class certification improper.

B. Respondents' Action Is Not Suitable For Class Certification Under Rule 23(b)(3)

Rule 23(b)(3) permits class certification only when "the questions of law or fact common to class members predominate over any questions affecting only individual members, and . . . a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The individualized nature of proof of, and defenses to, each class member's claim prevents common questions of law or fact from predominating in this case.

The Advisory Committee notes interpreting Rule 23 conclusively state that where the "likelihood that significant questions, not only of *damages* but of *liability* and *defenses to liability*, would be present, affecting the individuals in different ways," class action certification under Rule 23(b)(3) is "not appropriate." Advisory Comm. Notes 697, *reprinted in* 39 F.R.D. 69, 103 (1966) (emphasis added). Damage claims under Title VII require the resolution of liability, defenses to liability, and damages all at the individual level, which prevents common issues from predominating in this case. Although many factors affect whether class treatment is superior, the court ultimately must "balance, in terms of fairness and efficiency, the merits of a class action against those of 'alternative available methods' of adjudication." *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 632 (3d Cir. 1996), *aff'd sub nom., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

Permitting certification of a Title VII class, particularly one of this size, in which each member individually is entitled to recover up to $300,000 in punitive damages, plus back pay and attorneys' fees, does not promote judicial efficiency since, as noted above, Title VII damage claims require analysis of the facts and circumstances of each employment action, and of the degree of actual harm to each class member if liability is found. Furthermore, it unfairly deprives defendant employers of their right to assert the defenses to liability available to them under Title VII. Since certification of Respondents' claims would neither be particularly efficient nor fair, they cannot satisfy the requirements of Rule 23(b)(3).

C. The Court Below Improperly Concluded That Respondents Satisfied The Class Certification Requirements Of Rule 23(a)

Rule 23(a) permits class certification only when:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are

> typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

> Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims.

Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 157 (1982) (footnote omitted).

Satisfying Rule 23(a)'s commonality and typicality requirements is virtually impossible in a proposed class of this size under Title VII; this is not a products liability action in which 1.5 million consumers used – and were injured by – the same defective machine in the same way. No two employees are alike in every respect, especially in terms of job performance, skill and ability, important factors in any selection or promotion decision that later may be challenged as discriminatory under Title VII. *See Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 645 (6th Cir. 2006) ("the same general policy of discrimination can affect many different aspects of employment, such as hiring, firing, promoting, giving benefits, providing vacation time, or delegating work assignments").

Here, Respondents have offered the sworn declarations of a number of absent class members claiming to have been discriminated against through common practices. Yet each declarant tells a different story. Some state that they actually were supervised by women in managerial positions. J.A. 645a-649a. Others say that they served in supervisory roles, but quit because they felt their opportunities for advancement were limited. One declarant concedes that, after having been counseled repeatedly regarding properly recording her time, she was discharged for, essentially, falsifying time sheets. J.A. 623a-645a.

Patricia Bebee claims that although she eventually was promoted to a Departmental Manager position, she would have preferred managing a different department; as a result of this asserted denial of equal promotional opportunities, Bebee says she felt compelled to resign her employment. J.A. 632a-639a. Lisa Boudreaux admits that she was offered a department manager position, but declined because she did not wish to relocate, although she eventually accepted a transfer and promotion elsewhere in the company. J.A. 660a-664a. Vivian Calimee suffered a work-related injury in 2000 and, as of February 2002, was still unable to work. J.A. 679a-685a. Thearsa Collier asserts that she was mistreated because of race *and* gender, and that she was retaliated against for complaining. J.A. 686a-694a.

This handful of stories offered by Respondents hardly paints a picture of class commonality and typicality; to the contrary, the highlighted declarations serve only to reinforce the impropriety of the *en banc* majority's decision below, which held despite these differences that Rule 23 had been satisfied. The court below found no error in the district court's conclusion that evidence of Petitioner's "subjective decision-making policies suggests a common legal or factual question regarding whether [Petitioner's] policies or practices are discriminatory," thus satisfying the commonality requirement.

The *en banc* majority also determined that even though individual workers "in different stores with different managers may have received different levels of pay or may have been denied promotion or promoted at different rates, because the discrimination they claim to have suffered occurred through alleged common practices – e.g., excessively subjective decision making in a corporate culture of uniformity and gender stereotyping" . . . , Pet. App. 80a, the district court did not commit reversible error in concluding the claims of the class members also were sufficiently typical to satisfy Rule 23(a).

"Where, as here, class certification was sought by employees working in widely diverse job types, spread throughout different facilities and geographic locations, courts have frequently declined to certify classes." *Cooper v. Southern Co.*, 390 F.3d 695, 715 (11th Cir. 2004), *overruled on other grounds*, *Ash v. Tyson Foods, Inc.*, 546 U.S. 454 (2006). As Chief Judge Kozinski, dissenting from the decision below, observed:

> Maybe there'd be no difference between 500 employees and 500,000 employees if they all had similar jobs, worked at the same half-billion square foot store and were supervised by the same managers. But the half-million members of the majority's approved class held a multitude of jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope

> of supervisors (male and female), subject to a variety of regional policies that all differed depending on each class member's job, location and period of employment. Some thrived while others did poorly. They have little in common but their sex and this lawsuit.

Pet. App. 161a. Because Respondents failed to demonstrate the existence of bona fide questions of law or fact that are common across this sprawling class as a whole, or that their claims are typical of the claims of all the absent class members, class certification was improper.

II. ALLOWING MASSIVE TITLE VII SUITS SEEKING MULTI-BILLION DOLLAR RELIEF TO PROCEED AS RULE 23 CLASS ACTIONS WOULD FRUSTRATE THE FUNDAMENTAL AIMS AND OBJECTIVES OF THE ACT

"[Title VII]'s 'primary objective' [with respect to employment discrimination] is 'a prophylactic one,' . . . aim[ing], chiefly, 'not to provide redress but to avoid harm.'" *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999) (citations omitted). It is designed specifically to encourage resolution of disputes through voluntary means of settlement, conciliation and persuasion in lieu of protracted court litigation. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (purpose of EEOC administrative charge investigation and resolution scheme is to allow agency "to settle disputes through conference, conciliation, and persuasion before the aggrieved party [is] permitted to file a lawsuit"). Allowing substantial monetary damages claims to be pursued on a class-wide basis, particularly in a case as large as this, operates as a serious disincentive to quick and informal workplace dispute resolution, and will only encourage aggregation of such claims as a means of forcing settlements.

Respondents argue that they should be permitted to proceed as a class so as to enable them to obtain broad injunctive relief. They contend, "[h]ere, class litigation may be the only means of obtaining the broad injunctive relief necessary to address the allegedly discriminatory policies challenged," Brief in Opp. of Resp., at 37 (citations omitted), and that "aggregation of claims will be particularly important because the back pay awards will, in most cases, be far too small to justify individual federal lawsuits, especially against a corporate giant like Wal-Mart." *Id.* However, as discussed above, the availability under Title VII of compensatory and punitive damages, as well as statutory attorney's fees and costs, belies that assertion. "Indeed, Title VII after the 1991 amendments appears designed specifically with individual plaintiffs in mind." *Reeb*, 435 F.3d at 651 (6th Cir. 2006).

Furthermore, the U.S. Equal Employment Opportunity Commission ("EEOC") independently may pursue injunctive and other relief on behalf of victims of discrimination, as well as in the broader public interest. Its authority under Title VII includes the right "to bring a civil action against any respondent . . . named in the charge." 42 U.S.C. § 2000e-5(f)(1). Thus, under Title VII, "whenever the EEOC chooses from among the many charges filed each year to bring an enforcement action in a particular case, the agency may be seeking to vindicate a public interest, not simply provide make-whole relief for the employee, even when it pursues entirely victim-specific relief." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 296 (2002).

Also noteworthy is the fact that since 1972, the EEOC has had the authority under Section 706 to institute Title VII pattern or practice suits in the federal courts without having to comply with the class certification requirements of Rule 23.

> Given the clear purpose of Title VII, the EEOC's jurisdiction over enforcement, and the remedies available, the EEOC need look no further than § 706 for its authority to bring suit in its own name for the purpose, among others, of securing relief for a group of aggrieved individuals. Its authority to bring such actions is in no way dependent upon Rule 23, and the Rule has no application to a § 706 suit.

Gen. Tel. Co. of the Northwest, Inc. v. EEOC, 446 U.S. 318, 324 (1980). Therefore, despite Respondents' contentions to the contrary, meaningful efforts to eliminate broad-based discrimination from American workplaces will not come to an end if their action is not permitted to proceed as a class.

It bears repeating that the increasingly exorbitant costs associated with defending a class action create enormous pressure on any corporate defendant to settle. The larger a class, the greater the potential liability and defense costs, which very well could lead to what some courts have called "judicial blackmail." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (footnote omitted). The improper certification below of this class represents an abandonment of the traditional role of the courts to act as gatekeepers in eliminating frivolous claims at the certification stage, and ignores the reality that class certification almost invariably leads to a settlement, even in cases of questionable merit.

CONCLUSION

Accordingly, the *amicus curiae* Equal Employment Advisory Council respectfully requests that the decision of the *en banc* court below be reversed and class certification denied.

Respectfully submitted,

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In The
Supreme Court of the United States

◆

WAL-MART STORES, INC.,

Petitioner,

v.

BETTY DUKES, et al.,

Respondents.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

◆

BRIEF OF AMICUS CURIAE THE INSTITUTE FOR WOMEN'S POLICY RESEARCH IN SUPPORT OF RESPONDENTS

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FEDERAL CASES

Brown v. Trustees of Boston University, 891 F.2d 337 (1st Cir. 1989) 14

Butler v. Dowd, 979 F.2d 661 (8th Cir. 1992) 14

Garrison v. Baker Hughes Oilfield Operations, Inc., 287 F.3d 955 (10th Cir. 2002) 13

Lowery v. Circuit City Stores, Inc., 158 F.3d 742 (4th Cir. 1998) 14

Williams v. Owens, No. 90-5918, 1991 WL 128745 (6th Cir. July 16, 1991) 14

FEDERAL STATUTES & AUTHORITIES

42 U.S.C. § 2000e (1964) 3

29 C.F.R. § 1608.1 (2008) 3

Fed. R. Civ. P. 23(b)(2) 2, 3, 30

H.R. Rep. No. 92-238 (1971), reprinted in 1972 U.S.C.C.A.N. 2137 3

Title VII of the Civil Rights Act 3

BOOKS & PERIODICALS

Claire Armstrong, et al., *The Impact of Diversity and Equality Management on Firm Performance: Beyond High Performance Work Systems*, 49 Human Resource Mgmt. 977 (2010) 27

TABLE OF AUTHORITIES – Continued

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Winfred Arthur, Jr. & Dennis Doverspike, *Achieving Diversity and Reducing Discrimination in the Workplace Through Human Resource Management Practices: Implications of Research and Theory for Staffing, Training and Rewarding Performance, in Discrimination at Work: the Psychological and Organizational Bases* (R.L. Dipboye & A. Colella eds., 2005) 22, 24

James Baron & David Kreps, *Strategic Human Resources: Frameworks for General Managers* 224 (1999) 23, 24

James N. Baron, et al., *In the Company of Women: Gender Inequality and the Logic of Bureaucracy in Start-Up Firms*, 34 Work & Occupations 35 (Feb. 2007)..8

H. J. Bernardin, et al., *Effective Performance Management: A focus on precision, customers and situational constraints, in Performance Appraisal: The State of the Art in Practice* 3-48 (J.W. Smither ed., 1998) 24

Fletcher A. Blanchard, *Effective Affirmative Action Programs, in Affirmative Action in Perspective* (Fletcher A. Blanchard & Faye J. Crosby eds., 1989) 16

Page

Susan Bisom-Rapp, Margaret S. Stockdale & Faye J. Crosby, *A Critical Look at Organizational Responses to and Remedies for Sex Discrimination, in Sex Discrimination in the Workplace* (Faye J. Crosby, et al., eds., 2007) 15, 16, 26

Michael A. Campion, Elliot D. Pursell & Barbara K. Brown, *Structured Interviewing: Raising the Psychometric Properties of the Employment Interview*, 41 Personnel Psychol. 25 (1988) 16

Emillo J. Castilla, *Gender, Race, and Meritocracy in Organizational Careers*, 113 Am. J. Soc. 1479 (2008) 27

Lisa E. Cohen, Joseph P. Broschak & Heather A. Haveman, *And Then There Were More? The Effect of Organizational Sex Composition on the Hiring and Promotion of Managers*, 63 Am. Soc. Rev. 711 (1998) 21, 23

Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and their Behavioral Manifestations*, 17 Soc. Just. Res. 143 (2004) 28

Robert L. Dipboye & Adrienne Colella, *The Dilemmas of Workplace Discrimination, in Discrimination at Work: the Psychological and Organizational Bases* (R.L. Dipboye & A. Colella eds., 2005) 17

Frank Dobbin, et al., *Diversity Management in Corporate America*, 6 Contexts 21 (2007) 19

TABLE OF AUTHORITIES – Continued

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Frank Dobbin, et al., *Someone to Watch over Me: Coupling, Decoupling, and Unintended Consequences in Corporate Equal Opportunity* (2009) 28

Frank Dobbin & Alexandra Kalev, *The Architecture of Inclusion: Evidence from Corporate Diversity Programs*, 30 Harv. J.L. & Gender 279 (2007) 19

John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 Stan. L. Rev. 983 (May 1991) 4

Marta M. Elvira & Mary E. Graham, *Not Just a Formality: Pay System Formalization and Sex Related Earnings Effects*, 13 Org. Sci. 601 (2002) 18, 29

Michele J. Gelfand, et al., *Discrimination in Organizations: An Organizational-Level Systems Perspective, in Discrimination at Work: The Psychological and Organizational Bases* (R.L. Dipboye & A. Colella eds., 2005) 18

Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 Fordham L. Rev. 659 (Dec. 2003) 5, 9, 10

Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 Am. Econ. Rev. 715 (2000) 16

TABLE OF AUTHORITIES – Continued

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Michael T. Hannan & John Freeman, *Structural Inertia and Organizational Change*, 49 Am. Soc. Rev. 149 (Apr. 1984) 8

Heidi Hartmann, et al., *Equal Pay for Working Families: National and State Data on the Pay Gap and its Costs*, IWPR (1991), http://www.iwpr.org/publications/pubs/equal-pay-for-working-families-2 1

Ariane Hegewisch, Cynthia Deitch & Erin V. Murphy, *Ending Sex and Race Discrimination in the Workplace: Legal Interventions that Push the Envelope*, IWPR (publication forthcoming 2011), http://www.iwpr.org/initiatives/ending-sex-and-race-discrimination-in-the-workplace-1/view .... *passim*

Ariane Hegewisch, et al., *Separate and Not Equal? Gender Segregation in the Labor Market and the Gender Wage Gap*, IWPR Briefing Paper (Sept. 2010), http://iwpr.org/pdf/C377.pdf. 9

Madeline Heilman & Michelle Haynes, *Subjectivity in the Appraisal Process: A Facilitator of Gender Bias in Work Settings*, in *Beyond Common Sense: Psychological Science in the Courtroom* (Eugene Borgida & Susan T. Fiske eds., 2008) 16, 19

Madeline Heilman, et al., *Penalties for Success: Reactions to Women Who Succeed at Male Tasks*, 89 J. Applied Psychol. 416 (2004) 20

Page

Madeline Heilman, *Description and Prescription: How Gender Stereotypes Prevent Women's Ascent Up the Organizational Ladder*, 57 J. Soc. Issues 657 (2001) 20

Miles Hewstone, Mark Rubin & Hazel Willis, *Intergroup Bias*, 53 Ann. Rev. Psychol. 575 (2002) 28

C. Elizabeth Hirsh, *Settling for Less? Organizational Determinants of Discrimination-Charge Outcomes*, 42 Law & Soc'y Rev. 239 (2008) 5

Michael A. Hitt & Barbara W. Keats, *Empirical Identification of the Criteria for Effective Affirmative Action Programs*, 20 J. Applied Behav. Sci. 203 (1984) 16

Alexandra Kalev, et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 Am. Soc. Rev. 589 (Aug. 2006) ....*passim*

Alexandra Kalev & Frank Dobbin, *Enforcement of Civil Rights Law in Private Workplaces: The Effects of Compliance Reviews and Lawsuits Over Time*, 31 Law & Soc. Inquiry 855 (2006) 8, 10

Erin L. Kelly & Alexandra Kalev, *Managing Flexible Work Arrangements in US Organizations: Formalized Discretion or "A Right to Ask,"* 4 Socio-Econ. Rev. 379 (2006) 20

Page

Steven Kerr, *On the Folly of Rewarding A, While Hoping for B*, 18 Acad. Mgmt. J. 769 (1975) 16, 26

Alison M. Konrad & Frank Linnehan, *Formalized HRM Structures: Coordinating Equal Employment Opportunity or Concealing Organizational Practices?*, 38 Acad. Mgmt. J. 787 (1995) 16, 26

Jennifer S. Lerner & Phillip E. Tetlock, *Accounting for the Effects of Accountability*, 125 Psychol. Bulletin 255 (1999) 25, 29

Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. Rev. 367 (2008) 5, 6, 7, 12

Karen Lyness & Madeline Heilman, *When Fit is Fundamental: Performance Evaluations and Promotions of Upper-Level Female and Male Managers*, 91 J. Applied Psychol. 777 (2006) 21

Ann M. Morrison, *The New Leaders: Guidelines on Leadership Diversity in America* (1992) 16

Stephan J. Motowidlo, et al., *Studies of the Structured Behavioral Interview*, 77 J. Applied Psychol. 571 (1992) 16

Katherine C. Naff & J. Edward Kellough, *Ensuring Employment Equity: Are Federal Diversity Programs Making a Difference?*, 26 Int'l J. Pub. Admin. 1307 (2003) 19

Page

Laura Beth Nielsen, et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. Empirical Legal Stud. 175 (June 2010) 7, 14

Laura Beth Nielsen, et al., *Contesting Workplace Discrimination in Court: Characteristics and Outcomes of Federal Employment Discrimination Litigation* 1987-2003, Am. Bar Found., 12-13 (Oct. 29, 2008), http://www.americanbarfoundation.org/uploads/cms/documents/nielsen_abf_edl_report_08_final.pdf 4, 5, 11

Raymond A. Noe, *Employee Training and Development* (2002) 28

Christopher A. Parsons, et al., *Strike 3: Discrimination, Incentives and Evaluation* (Feb. 2009), http://jsulaeman.cox.smu.edu/file/Papers/Parsons+Sulaeman+Yates+Hamermesh_Feb2010.pdf 25

Barbara F. Reskin & Debra B. McBrier, *Why Not Ascription? Organizations' Employment of Male and Female Managers*, 65 Am. Soc. Rev. 210 (2000) 22

Barbara F. Reskin & Heide Hartmann, *Women's Work, Men's Work: Sex Segregation on the Job* (1986) 9

Barbara F. Reskin, *Sex Segregation in the Workplace*, 19 Ann. Rev. Soc. 241 (1993) 9

Page

Barbara F. Reskin, et al., *The Determinants and Consequences of Workplace Sex and Race Composition*, 25 Ann. Rev. Soc. 335 (1999) 26

Laurie Rudman, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. Soc. Issues 743 (2001) 20

Gerald R. Salancik & Jeffrey Pfeffer, *Uncertainty, Secrecy, and the Choice of Similar Others*, 41 Soc. Psychol. 246 (1978) 23, 25

Ruth G. Shaeffer & Edith F. Lynton, *Corporate Experience in Improving Women's Job Opportunities*, Report No. 755, The Conference Board (1979) 17

Leslie E. Silverman, *Systemic Task Force Report to the Chair of the Equal Employment Opportunity Commission*, EEOC (Mar. 2006) 11

Lisa Sinclair & Ziva Kunda, *Motivated Stereotyping of Women: She's Fine If She Praised Me But Incompetent If She Criticized Me*, 26 Personality & Soc. Psychol. Bulletin 1329 (2000) 20

Susan Skaggs, *Producing Change or Bagging Opportunity? The Effects of Discrimination Litigation on Women in Supermarket Management*, 113 Am. J. Soc. 1148 (Jan. 2008) 11

Arthur L. Stinchcombe, *Social Structure and Organizations*, *in Handbook of Organizations* (James G. March ed. 1965) 8

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Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458 (Apr. 2001) 6, 10, 11, 30

Phillip E. Tetlock & Jae Il Kim, *Accountability and Judgment Processes in a Personality Prediction Task*, 52 J. Psychol. & Soc. Psychol. 700 (1987) 29

U.S. Department of Labor, Office of Federal Contract Compliance Programs, OFCCP *Glass Ceiling Initiative: Are There Cracks in the Ceiling?* (1997) 29

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Amicus curiae, The Institute for Women's Policy Research (IWPR), is an independent, non-profit research organization that conducts rigorous research and disseminates its findings to address the needs of women, promote public dialogue, and strengthen families, communities, and societies. IWPR focuses on issues of poverty and welfare, employment and earnings, work and family issues, health and safety, and women's civic and political participation. IWPR is particularly concerned with identifying the causes and consequences of the persistent gender wage gap for the welfare and economic prosperity of women and their families. Economic research suggests that discrimination against women in hiring, promotions, and compensation accounts for a significant component of the gender wage gap. The gender wage gap is a major contributing factor to poverty; IWPR research finds that if women's hourly earnings rose to the level of similarly qualified men's, eliminating the gender wage gap, poverty rates among families with working women would be reduced by half. *See* Heidi Hartmann, et al., *Equal Pay for Working Families:*

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from IWPR, its members, and counsel made any monetary contribution towards the preparation and submission of this brief. Letters of consent from the parties to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

National and State Data on the Pay Gap and its Costs, IWPR (1991), http://www.iwpr.org/publications/pubs/equal-pay-for-working-families-2.

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SUMMARY OF ARGUMENT

IWPR submits this brief in support of Respondents who are seeking affirmance of the order of class certification generally, and specifically, certification under Rule 23(b)(2). Title VII is a remedial statute providing "make whole relief," including injunctive relief, to those subjected to discrimination in the workplace. Rule 23(b)(2) allows such relief, and courts, including this one, have long recognized the importance of injunctive relief for remedying systemic employment discrimination. The injunctive relief sought by Respondents will potentially affect the lives of numerous current and future female employees.

This brief reviews social science literature and research, which demonstrates that class actions play a significant societal role in remedying systemic employment discrimination because individual discrimination lawsuits almost never result in meaningful classwide injunctive relief. Meaningful injunctive relief obtained through class action litigation includes comprehensive changes to employment policies and practices that minimize the operation of workplace biases and create a level playing field on which all workers can prosper and advance regardless of their race, sex, or color. Injunctive relief often results in sustained change in policies and practices in companies and throughout industries. To disallow certification under Rule 23(b)(2) would make it difficult, if not impossible, for plaintiffs to obtain the comprehensive injunctive relief that is necessary to remove barriers to equal employment opportunity. It is thus critical that the class certification order in this case be affirmed in order to effectuate the purposes of Title VII.

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ARGUMENT

I. CLASS CASES, WHILE RARE, ARE NECESSARY TO REMOVE BARRIERS TO EQUAL EMPLOYMENT OPPORTUNITY.

The purpose of Title VII of the Civil Rights Act is to provide equal employment opportunities for women and minorities. Recognizing that employment discrimination cannot be eradicated without focusing on the organizational practices that perpetuate gender and racial inequality, Congress has called upon employers "to modify employment practices and systems which constitute [. . .] barriers to equal employment opportunity." 29 C.F.R. § 1608.1 (2008); *see also* 42 U.S.C. § 2000e-2 (1964); H.R. Rep. No. 92-238 (1971), reprinted in 1972 U.S.C.C.A.N. 2137, 2149-50 ("Unrelenting broad-scale action against patterns or practices of discrimination is . . . critical in combating employment discrimination."). Despite this call for employers to create equal opportunities for all individuals, the current litigation landscape suggests that self-initiated organizational intervention is rare, making the class action litigation device a critical driving force for ensuring equal employment opportunities.

A. Class Actions Are an Important Vehicle for Obtaining Significant Injunctive Relief Unavailable in Individual Plaintiff Cases.

Class actions alleging employment discrimination are extremely rare. *See* Laura Beth Nielsen, et al., *Contesting Workplace Discrimination in Court: Characteristics and Outcomes of Federal Employment Discrimination Litigation* 1987-2003, Am. Bar Found., 12-13 (Oct. 29, 2008), http://www.americanbarfoundation.org/uploads/cms/documents/nielsen_abf_edl_report_08_final.pdf. "[T]he class action . . . has withered, with only fifty-one employment discrimination class actions filed in Fiscal Year . . . 1989." John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 Stan. L. Rev. 983, 984, 1019 (May 1991). Requests for class action certification have remained low since then; only three percent of all employment discrimination cases filed from 1988 to 2003 request class certification. *See* Nielsen, *Contesting*, *supra*, at 12-13.

Notwithstanding the relatively small number of employment discrimination class actions that are filed, class actions "are more likely to receive favorable outcomes, non-monetary benefits, monetary relief, and changes in employment policy, all else remaining equal."[2] *Id.* at 269; *see* Nielsen, *Contesting, supra*, at iii (class actions have a 50% chance of success at trial compared with a 30% chance for individual cases); Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 Fordham L. Rev. 659, 660 (Dec. 2003) ("private class action lawsuits" "represent the emergence of an important . . . form of private institutional reform litigation in which plaintiffs seek organizational change that will reduce the incidence of discrimination by individuals and groups in the workplace by altering the context in which decisions are made").

B. Certified Class Actions Achieve Meaningful Class-Wide Injunctive Relief.

Most certified employment discrimination class actions seek injunctive relief to change the organizations' employment practices and policies, and social science research suggests that these changes generate positive results. *See* Green, *supra*, at 659-60, 682-724; Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. Rev. 367, 370 (2008) ("Although the total number of employment discrimination class actions may not be large . . ., their effects on corporate employment practices – even for smaller employers who pattern after the larger shops – can be immense."); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458 (Apr. 2001) (detailing litigation-induced personnel policy changes that effectively solved gender inequities).

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[2] Social science research has found that individual charges of discrimination are less likely to be successful due to employers' advantages in legal experience and resources. C. Elizabeth Hirsh, *Settling for Less? Organizational Determinants of Discrimination-Charge Outcomes*, 42 Law & Soc'y Rev. 239, 248-49 (2008) ("employers enjoy greater resources and exclusive access to key evidence relevant to workplace discrimination claims, as compared to the typical worker").

Certified employment discrimination class actions brought by plaintiffs represented by private law firms typically result in the provision of substantial injunctive relief. *See generally* Ariane Hegewisch, Cynthia Deitch & Erin V. Murphy, *Ending Sex and Race Discrimination in the Workplace: Legal Interventions that Push the Envelope*, IWPR (publication forthcoming 2011), http://www.iwpr.org/initiatives/ending-sex-and-race-discrimination-in-the-workplace-1/view;[3] Levit, *supra*, at 385-405 (detailing changes achieved by consent decrees in several large class actions).

These remedies include requiring employers to post notices of job vacancies; provide job training and mentoring opportunities; establish objective criteria for hiring, assignments, promotions, and terminations; diversify recruitment efforts; and appoint a monitor to ensure compliance with consent decree requirements. Hegewisch, et al., *Ending*, *supra*, at 35-36. These types of policy changes achieved through injunctive relief have been shown to be most effective in remedying long-term issues of workplace discrimination. *Id.*; Levit, *supra*, at 372-73, 414-24 (finding consent decrees that emphasize accountability and transparency are "absolutely critical"); Alexandra Kalev, et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 Am. Soc. Rev. 589, 610-11 (Aug. 2006) (same).

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[3] This report was produced by IWPR at the conclusion of a research project that examined the injunctive relief (changes in employment policies and practices) obtained in sex and race discrimination cases. The report is based on the analysis of over 500 consent decrees that became effective between 2000 and 2008. The report includes an in-depth review of consent decrees resolving four class action sex discrimination cases.

Research shows that class actions are more likely than individual lawsuits to generate each of these types of systemic remedies. *Id.* (whereas 100% of class action consent decrees included some of the above provisions, only 34% of EEOC or DOJ-litigated lawsuits involving 20 or more plaintiffs provided for any such remedial measures); Laura Beth Nielsen, et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. Empirical Legal Stud. 175 (June 2010) (finding that injunctive relief in individual lawsuits is very rare and typically limited to requests for reinstatement or retroactive promotion).

These organization-wide policy changes ensure a fairer work environment for current and future workers who were not actively involved in the underlying litigation. Hegewisch, et al., *Ending*, *supra*, at 7; Alexandra Kalev & Frank Dobbin, *Enforcement of Civil Rights Law in Private Workplaces: The Effects of Compliance Reviews and Lawsuits Over Time*, 31 Law & Soc. Inquiry 855, 890 (2006) (finding "policy interventions that stimulate change in organizational routines appear to have significant and lasting effects on workforce diversity"). Thus, social science research has shown that systemic injunctive relief obtained in class actions can provide meaningful long term changes to discriminatory personnel practices.

II. WITHOUT CLASS ACTIONS, THERE WILL BE NO EFFECTIVE REMEDY FOR SYSTEMIC DISCRIMINATION.

A. Organizations Are Unlikely to Initiate Change Independently.

Sociologists and organizational researchers have long recognized that inertia prevents organizations from changing voluntarily. *See* Arthur L. Stinchcombe, *Social Structure and Organizations*, *in Handbook of Organizations*, 142 (James G. March ed. 1965); Michael T. Hannan & John Freeman, *Structural Inertia and Organizational Change*, 49 Am. Soc. Rev. 149 (Apr. 1984). Inertia is particularly acute regarding changes to personnel policies and practices. Stinchcombe, *supra*; *see* James N. Baron, et al., *In the Company of Women: Gender Inequality and the Logic of Bureaucracy in Start-Up Firms*, 34 Work & Occupations 35 (Feb. 2007).

Employers' propensity to resist changing personnel policies and practices perpetuates pre-existing corporate cultures and structures. As a result, organizations that had segregated the sexes into different (and unequal) jobs[4] or failed to assign women to managerial roles in the past are unlikely to change without outside pressure. "[B]usiness as usual" in staffing patterns and intransigence of personnel policies and practices allows discriminatory cultures within organizations to endure and results in barriers for equal advancement opportunities. *See* Green, *supra*, at 672 ("employers are unlikely to undertake this task [of devising strategies to counteract discrimination] without some outside incentive to do so").

This tendency for organizations to resist change is exemplified by a study of Silicon Valley male-dominated high-technology start-ups, which found that organizational inertia, when combined with a start-up's male-dominated environment "had enduring negative effects, stifling gender integration." Baron, *supra*, at 54.

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[4] The segregation of the sexes into different jobs is a long standing phenomenon. *See* Barbara F. Reskin & Heide Hartmann, *Women's Work, Men's Work: Sex Segregation on the Job* (1986); Barbara F. Reskin, *Sex Segregation in the Workplace*, 19 Ann. Rev. Soc. 241 (1993); Ariane Hegewisch, et al., *Separate and Not Equal? Gender Segregation in the Labor Market and the Gender Wage Gap*, IWPR Briefing Paper (Sept. 2010), http://iwpr.org/pdf/C377.pdf.

Individual lawsuits are unlikely to create sufficient pressure to have a sustained impact on organizational practices and routines. *See* Kalev, *Enforcement*, *supra* (finding that although individual lawsuits increase managerial diversity, their impact is less sustained and less likely to introduce more systematic changes to organizational routines than are government compliance reviews).

On the other hand, class action litigation can act as a counterweight to the organizational inertia that prevents companies from transitioning to less discriminatory personnel practices. *See* Green, *supra*, at 678 ("The use of the class action device . . . becomes important for privately triggered institutional change; by broadening the number of complainants, the class action triggers inquiry about institutional and organizational sources of harm and encourages development of solutions aimed at systemic reform.").

One example is the class action gender discrimination lawsuit against Home Depot that spurred positive comprehensive changes in personnel policies and practices that ameliorated the discriminatory effects of an excessively subjective hiring and promotions system. Sturm, *supra*, at 511 (quoting plaintiffs' counsel who stated, "Home Depot had brilliant managers, but until [the] lawsuit they ha[d] never put the resources and time into personnel practices . . . .").

In short, class action litigation repeatedly has been shown to serve as a catalyst for positive organizational change. *See generally* Sturm, *supra*; Hegewisch, et al., *Ending*, *supra*; Nielsen, *Contesting*, *supra*; Kalev, *Best Practices*, *supra*; Susan Skaggs, *Producing Change or Bagging Opportunity? The Effects of Discrimination Litigation on Women in Supermarket Management*, 113 Am. J. Soc. 1148 (Jan. 2008) (investigating the impact of 19 high profile lawsuits on the retail sector).

B. The EEOC Alone Cannot Effectuate Sufficient Injunctive Relief.

The EEOC, hampered by a lack of resources and other issues, is often limited in its powers to be an agent for meaningful structural employment changes. The EEOC's 2006 Systemic Task Force Report found that the "EEOC does not consistently and proactively identify systemic discrimination."[5] Leslie E. Silverman, *Systemic Task Force Report to the Chair of the Equal Employment Opportunity Commission*, EEOC, 1 (Mar. 2006), http://www.eeoc.gov/eeoc/task_reports/upload/systemic.pdf [hereinafter "EEOC Report"] ("the agency typically focuses on individual allegations raised in charges").

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[5] The EEOC defines "systemic discrimination" as "pattern or practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic location." EEOC Report at 1.

The EEOC's ability to litigate class cases is severely limited by budgetary constraints, which are controlled by Congress. Hegewisch, et al., *Ending*, *supra*, at 18. For example, between 2000 and 2008, the EEOC's total litigation budget was less than $4 million in each year – less than the fees and costs incurred in many privately-litigated class action suits. *Id.*

Due to budgetary and other constraints, the EEOC does not make a finding, one way or the other, in nearly 77% of all filed complaints of discrimination. Nielsen, *Contesting*, *supra*, at 14. Consequently, the EEOC litigates only a small fraction of all charges of discrimination filed with it. *Id.* at 15 (intervening as plaintiff in just 3% of cases); EEOC Report, *supra*, at 18 ("over 90% of the district offices stated that workload constraints prevented devoting staff time to systemic cases").

Even when the EEOC litigates on a class basis and obtains a consent decree, its consent decrees tend to address fewer issues and deal with smaller employers than consent decrees obtained in private party class action litigation. Hegewisch, et al., *Ending*, *supra*, at 27-30. For example, EEOC consent decrees tend to focus on posting notices of antidiscrimination policies and diversity training, which have been shown to be less effective than other systemic remedies in reducing workplace discrimination. *Id.*; Levit, *supra*, at 373, 420-22 ("accountability matters more than education in generating organizational change"); Kalev, *Best Practices*, *supra*, at 611.

Further, "EEOC decrees are less likely than other [private class action] decrees to mandate an actual revision of EEO policies or new or revised grievance and complaints procedures." Hegewisch, et al., *Ending*, *supra*, at 26.

These differences between EEOC and private party class action consent decrees may stem, in part, from the EEOC's "dual role as both the institution defining good practice and the institution responsible for litigating against bad practice." *Id.* at 30 (quoting an EEOC regional attorney who explained, "Our office's position is that we don't make any recommendations . . . because we don't want to seem to be . . . indemnifying them against any future suits . . . "). *Id.* Private attorneys litigating class actions are under no such constraints, and are therefore able to work with employers to develop robust remedies that effectively change discriminatory personnel practices. *See, e.g.*, *id.* at 68-80 (detailing development and effects of consent decree in *Beck v. Boeing*, a gender discrimination class action).

C. Individual Cases Rarely Include Meaningful Injunctive Relief.

In many circuits, it is not possible to obtain classwide injunctive relief in individual cases. *Garrison v. Baker Hughes Oilfield Operations, Inc.*, 287 F.3d 955, 963 (10th Cir. 2002) (finding injunctive relief inappropriate because "[t]he district court's injunction was based upon evidence of only a single instance of discriminatory behavior"); *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 766 (4th Cir. 1998) (in individual discrimination case, district court "inappropriately grant[ed] what amounts to class-wide relief"); *Butler v. Dowd*, 979 F.2d 661, 674 (8th Cir. 1992) ("This is not a class action. [Plaintiff], therefore, is not entitled to the injunctive relief he requests."); *Williams v. Owens*, No. 90-5918, 1991 WL 128745, at *3 (6th Cir. July 16, 1991) (unpublished) ("the district court abused its discretion in fashioning its injunctive relief to run in favor of nonparties despite the fact that plaintiff did not bring suit as a class representative"); *Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 361 (1st Cir. 1989) ("Ordinarily, classwide relief, such as [an] injunction . . . which prohibits sex discrimination . . . , is appropriate only where there is a properly certified class").

As a result, individual litigants almost always exclusively ask for monetary relief, and any injunctive relief that is sought is typically limited to individual injunctive remedies such as reinstatement, rather than requesting broader systemic changes. *See* Nielsen, *Individual*, *supra*. Given the constraints on relief available in individual lawsuits, class actions are an essential vehicle for organizational change and eradicating systemic discrimination in the workplace.

III. CLASS ACTIONS PROVIDE IMPORTANT INJUNCTIVE RELIEF BY LEADING EMPLOYERS TO ADOPT CORPORATE PERSONNEL PRACTICES THAT AMELIORATE THE EFFECT OF BIAS AGAINST WOMEN.

Decades of sociological, economic, and management research have demonstrated that certain organizational characteristics and practices, such as those identified by Respondents, allow biases to adversely affect workers on the basis of their sex. The injunctive relief obtained through class actions achieves reforms in personnel practices that, according to empirical research, enhances equal opportunity for all workers, regardless of their gender, primarily by reducing the exclusionary effects of biases emanating from subjective decision making. Title VII holds employers accountable for eliminating the use of personnel practices that serve as barriers to equal employment opportunity. In order to remove such barriers, it is particularly important that there be a commitment to equal opportunity initiatives at the very top of the company.

Personnel practices achieved through consent decrees that social science research has demonstrated increase equal access to career opportunities and rewards include: (1) making an individual or entity within the organization responsible for managing equal employment opportunity initiatives;[6] (2) implementing human

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[6] *See* Susan Bisom-Rapp, Margaret S. Stockdale & Faye J. Crosby, *A Critical Look at Organizational Responses to and*

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resource management practices, such as formal job analyses, structured interviews, and validated assessment tools and procedures[7]; and (3) creating accountability structures that include (a) monitoring of personnel decisions to ensure that they are not influenced by irrelevant personal characteristics,[8] and (b) holding decision makers accountable for making

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Remedies for Sex Discrimination, *in Sex Discrimination in the Workplace* 280 (Faye J. Crosby, et al., eds., 2007); Fletcher A. Blanchard, *Effective Affirmative Action Programs*, *in Affirmative Action in Perspective* 193-208 (Fletcher A. Blanchard & Faye J. Crosby eds., 1989); Michael A. Hitt & Barbara W. Keats, *Empirical Identification of the Criteria for Effective Affirmative Action Programs*, 20 J. Applied Behav. Sci. 203 (1984); Kalev, *Best Practices*, *supra*; Alison M. Konrad & Frank Linnehan, *Formalized HRM Structures: Coordinating Equal Employment Opportunity or Concealing Organizational Practices?*, 38 Acad. Mgmt. J. 787 (1995); Ann M. Morrison, *The New Leaders: Guidelines on Leadership Diversity in America* (1992).

[7] These practices reduce the likelihood that subjective decision making processes will allow biases to impact employment decisions. Madeline Heilman & Michelle Haynes, *Subjectivity in the Appraisal Process: A Facilitator of Gender Bias in Work Settings*, *in Beyond Common Sense: Psychological Science in the Courtroom* 128, 135 (Eugene Borgida & Susan T. Fiske eds., 2008); Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 Am. Econ. Rev. 715 (2000); Bisom-Rapp, *supra*, at 281; Michael A. Campion, Elliot D. Pursell & Barbara K. Brown, *Structured Interviewing: Raising the Psychometric Properties of the Employment Interview*, 41 Personnel Psychol. 25 (1988); Stephan J. Motowidlo, et al., *Studies of the Structured Behavioral Interview*, 77 J. Applied Psychol. 57 (1992).

[8] *See* Konrad & Linnehan, *supra*; Steven Kerr, *On the Folly of Rewarding A, While Hoping for B*, 18 Acad. Mgmt. J. 769 (1975); Bisom-Rapp, *supra*, at 281.

unbiased decisions. In sum, social science research has shown that making employers accountable through injunctive relief achieved in class action litigation is vital to creating equal employment opportunities.

A. Successful Equal Employment Opportunity Efforts Must Come from the Highest Levels.

Consent decrees and injunctive relief increase equal employment opportunities by holding employers accountable and requiring them to change their personnel practices. Social scientists and management experts agree that genuine and visible commitment to the organization's diversity efforts by its most senior officer is critical to the success of those efforts; "diversity programs" without substantial commitment from the highest levels are insufficient to effect change. Robert L. Dipboye & Adrienne Colella, *The Dilemmas of Workplace Discrimination*, *in Discrimination at Work: the Psychological and Organizational Bases* 424, 425-62 (R.L. Dipboye & A. Colella eds., 2005); Ruth G. Shaeffer & Edith F. Lynton, *Corporate Experience in Improving Women's Job Opportunities*, Report No. 755, The Conference Board (1979). As social scientists concluded based on a case study of a compensation system, the lack of accountability for decisions, the lack of a normative structure defining appropriate action, and greater the ambiguity in performance criteria, the more likely personnel decisions will be influenced by bias. Leaders must recognize the potential for discrimination in traditional organizational practices and structures and must signal that these are not acceptable. Top leaders can discourage discrimination by implanting systems of accountability that make rewards contingent upon meeting diversity goals. Marta M. Elvira & Mary E. Graham, *Not Just a Formality: Pay System Formalization and Sex Related Earnings Effects*, 13 Org. Sci. 601, 614 (2002); Michele J. Gelfand, et al., *Discrimination in Organizations: An Organizational-Level Systems Perspective*, in *Discrimination at Work: The Psychological and Organizational Bases* 89-116 (R.L. Dipboye & A. Colella eds., 2005).

Top leaders' commitment to equal opportunity for all employees makes a difference because successful diversity efforts depend on top leaders conferring on a high-level manager or task force responsibility for ensuring that women have increased access to managerial jobs. As management experts and corporate leaders have long understood: a company that wants to achieve a goal puts someone in charge of executing a plan and holds him or her responsible for reaching the goal.

Social science research confirms that diversity task forces and senior managers charged with finding ways to increase women's advancement opportunities can be effective when they identify problems, develop remedies, and require accountability. *See* Kalev, *Best*

Practices, *supra*; Frank Dobbin & Alexandra Kalev, *The Architecture of Inclusion: Evidence from Corporate Diversity Programs*, 30 Harv. J.L. & Gender 279, 280 (2007); Frank Dobbin, et al., *Diversity Management in Corporate America*, 6 Contexts 21 (2007); Katherine C. Naff & J. Edward Kellough, *Ensuring Employment Equity: Are Federal Diversity Programs Making a Difference?*, 26 Int'l J. Pub. Admin. 1307, 1327 (2003) (case study of federal agencies successful in promoting and retaining women and African American employees).

B. Consent Decrees Often Include Human Resource Management Practices that Monitor the Potentially Biasing Effects of Subjective Decision Making.

Subjective evaluation and reward practices, similar to the practices Respondents have identified at Wal-Mart, "require[ ] inference because judgments are based primarily on outcomes and criteria that are open to interpretation." Heilman, *Subjectivity*, *supra*, at 128. In situations in which evaluations are subjective, sex stereotypes can result in biased inferences of female workers. *Id.* at 147. This conclusion is reflected in a large body of social science research on the importance of formalization.

For example, "[o]ne of the hallmarks of [Human Resources] systems design is the establishment of objective or formalized criteria for various HR practices, which lead to the elimination of bias . . . in the implementation of HR practices." Gelfand, *supra*, at 100. When establishing formalized personnel practices, care must be taken to ensure that the result is not the formalization of discretion that institutionalizes unequal access to attractive work conditions and opportunities, rather than challenging patterns of inequality. Erin L. Kelly & Alexandra Kalev, *Managing Flexible Work Arrangements in US Organizations: Formalized Discretion or "A Right to Ask,"* 4 Socio-Econ. Rev. 379 (2006).

Completely subjective assessments require the use of inferences that are vulnerable to influence by irrelevant and sex-biased factors, such as whether an employee conforms to prescriptive stereotypes about how women ought to be, whether they "fit" into the work environment, or whether they resemble the decision maker or other workers on characteristics that are irrelevant to job performance.[9] Given that

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[9] Women who engage in "self promotion" come across as less likeable than men, presumably because self promotion violates the female norm of modesty. Laurie Rudman, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. Soc. Issues 743 (2001). Being disliked negatively affects women's performance evaluations, chance of promotion and pay raises. Madeline Heilman, et al., *Penalties for Success: Reactions to Women Who Succeed at Male Tasks*, 89 J. Applied Psychol. 416 (2004); Madeline Heilman, *Description and Prescription: How Gender Stereotypes Prevent Women's Ascent Up the Organizational Ladder*, 57 J. Soc. Issues 657 (2001); Lisa Sinclair & Ziva Kunda, *Motivated Stereotyping of Women: She's Fine If She Praised Me But Incompetent If She Criticized Me*, 26 Personality & Soc. Psychol. Bulletin 1329 (2000). According to several case studies, performance evaluations have a weaker effect on

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biases can infiltrate with unchecked subjective decision making, the implementation of formalized criteria in personnel practices, via class action injunctive relief, can play a valuable role in creating equal employment opportunity.

C. Implementing Nondiscriminatory Human Resources Practices through Injunctive Relief

1. Employee Selection and Promotion Processes Used in Consent Decrees

Consent decrees have helped employers implement nondiscriminatory selection practices, which Respondents have identified as an issue at Wal-Mart, including its lack of a job posting system among other potentially discriminatory selection practices. These practices entail: (1) establishing clear guidelines about how positions are filled, which include specifying job requirements and objectively measurable criteria by which candidates will be assessed and compared; (2) ensuring that qualified candidates are aware of openings; (3) developing selection processes that rely

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promotion for men than for women, suggesting that other criteria are more important for men. Karen Lyness & Madeline Heilman, *When Fit is Fundamental: Performance Evaluations and Promotions of Upper-Level Female and Male Managers*, 91 J. Applied Psychol. 777 (2006). Women have less access to high-level jobs if the previous incumbent was male. Lisa E. Cohen, Joseph P. Broschak & Heather A. Haveman, *And Then There Were More? The Effect of Organizational Sex Composition on the Hiring and Promotion of Managers*, 63 Am. Soc. Rev. 711 (1998).

only on specified criteria; and (4) ensuring that the selection process and outcomes are transparent and monitored, and that those charged with making a selection/reward decision are held accountable to an internal entity that has the authority to sanction decisions that depart from the organizational guidelines.

Such improvements are important because the more widely an employer communicates job openings, the more likely nontraditional employees will learn about the available positions. Conversely, filling jobs through employee networks in gender and racially homogenous organizations or departments replicates the sex and race composition of current employees. Barbara F. Reskin & Debra B. McBrier, *Why Not Ascription? Organizations' Employment of Male and Female Managers*, 65 Am. Soc. Rev. 210 (2000) (adoption of formal sourcing practices, including job postings, leads to more women in management). Two-thirds of the class action settlements studied by IWPR mandated the open posting of job vacancies, whereas fewer than 5% of the settlements addressing discrimination involving fewer than 20 plaintiffs had the same requirement. Hegewisch, et al., *Ending*, *supra*, at 36 (Table 7).

Similarly, structured promotion interviews often implemented via consent decrees are less biased because they minimize discretionary input on the part of the interviewer and reduce the potential for subjective bias to infect the results. Winfred Arthur, Jr. & Dennis Doverspike, *Achieving Diversity and*

Reducing Discrimination in the Workplace Through Human Resource Management Practices: Implications of Research and Theory for Staffing, Training and Rewarding Performance, in *Discrimination at Work: the Psychological and Organizational Bases*, 313 (R.L. Dipboye & A. Colella eds., 2005).

2. Consent Decrees Can Also Help Reduce Bias in Appraising Performance.

Formulation of the performance appraisal process is significant because companies vary on how they evaluate employee performance, ranging from reliance on assessor's subjective impressions to reliance on readily observable performance or a set of uniform, pre-established criteria. An organization's position on this continuum has implications for women's access to jobs.

Evaluating persons for employment, promotions, or pay raises requires accurate, relevant, and complete information. The absence of clear criteria increases the likelihood that decision makers will select persons similar to themselves, thereby maintaining the sex composition of the workforce. Gerald R. Salancik & Jeffrey Pfeffer, *Uncertainty, Secrecy, and the Choice of Similar Others*, 41 Soc. Psychol. 246, 253 (1978); Cohen, et al., *supra*.

Cognitive biases, such as in-group preferences and stereotypes, can distort subjective impressions, especially of persons who differ demographically from the evaluator. James Baron & David Kreps, *Strategic*

Human Resources: Frameworks for General Managers 224 (1999) ("When the workforce is demographically diverse, the potential for bias in subjective evaluations is greater (where the biases run along race, gender, age, and disability lines).").

Consent decrees can help employers to create less discriminatory assessment practices in several ways. Consent decrees can require that employers reduce discrimination in assessing performance by using more than one rater, having raters write justifications for their evaluations, and rewarding supervisors for accurate appraisals. Arthur, *supra*, at 319. Consent decrees can also require "objective measures of performance that may be less biased, as long as [they] are *valid* indicators of performance, whereas subjective assessments are "too susceptible to caprice and bias by the evaluator." Baron, *supra*, at 224.

Additionally, consent decrees can require "[p]erformance management systems that involve explicit performance expectations, clear performance standards, accurate measures, and reliable performance feedback," and the consistent application of these standards across ratees reduces the chances of discriminatory ratings. H. J. Bernardin, et al., *Effective Performance Management: A focus on precision, customers and situational constraints*, in *Performance Appraisal: The State of the Art in Practice* 3-48 (J.W. Smither ed., 1998).

In the IWPR study, over seven out of ten class action consent decrees required the establishment of objective criteria for decisions related to promotions and assignments, whereas fewer than three percent of settlements in DOJ and EEOC-litigated cases of fewer than 20 plaintiffs had similar requirements. Hegwisch, *Ending*, *supra*, at 36 (Table 7).

D. Implementing Equal Employment Opportunity Practices through Injunctive Relief in Consent Decrees

1. Transparency of Decisions

Consent decrees and injunctive relief that require more transparency in personnel decision making can play a valuable role in increasing equal employment opportunities. Decision makers are more prone to use appropriate criteria when they are aware that others will know the nature of the decision and who made it. *See* Jennifer S. Lerner & Phillip E. Tetlock, *Accounting for the Effects of Accountability*, 125 Psychol. Bulletin 255 (1999). Thus, identifying the decision maker reduces reliance on social similarity by the decision maker if he expects the information to be released. Salancik & Pfeffer, *supra*, at 253.

A study of race bias in umpires' calls in minor league baseball illustrates the importance of transparency. In general, umpires showed same-race favoritism in calling strikes, but this bias disappeared when electronic scoreboards displayed where the pitch fell in the strike zone. *See* Christopher A. Parsons, et al., *Strike 3: Discrimination, Incentives* *and Evaluation* (Feb. 2009), http://jsulaeman.cox.smu.edu/file/Papers/Parsons+Sulaeman+Yates+Hamermesh_Feb2010.pdf. Thus, increases in the transparency of decision making can increase the equality of opportunities for all employees.

2. Monitoring

The monitoring required by consent decrees can play a valuable role in reducing discrimination. Organizations that routinely monitor their demographic composition across jobs, job groups, salary bands, and divisions and reward diversity efforts are more likely to improve the status and opportunities of female employees than are those that do not.[10] Without monitoring, organizations' leaders remain ignorant of any existing disparities. Monitoring ensures that a supervisor, her or his next-in-command, and the employer know whether its employment processes generate unwarranted disparities and, if so, why. It also allows employers to hold supervisors accountable for using non-exclusionary evaluation and selection criteria in promotion and pay decisions.[11]

A case study of a corporation illustrates the importance of monitoring. When supervisors' evaluations of their subordinates were monitored at the next higher supervisory level, the evaluations were unrelated to employees' gender, but when a different set of managers whose decisions were not monitored used these evaluations to set raises, they recommended significantly higher raises for men than for women. *See* Emilio J. Castilla, *Gender, Race, and Meritocracy in Organizational Careers*, 113 Am. J. Soc. 1479 (2008).[12]

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[10] See Konrad & Linnehan, *supra*; Kerr, *supra*; Bisom-Rapp, *supra* at 281.

[11] Barbara F. Reskin, et al., *The Determinants and Consequences of Workplace Sex and Race Composition*, 25 Ann. Rev. Soc. 335, 364-65 (1999).

In the IWPR study, almost six out of ten class action consent decrees included requirements for monitoring and analysis of promotion and compensation data, but fewer than 2% of settlements in cases of fewer than 20 plaintiffs had the same requirement. Hegewisch, et al., *Ending*, *supra*, at 36 (Table 7). Class actions, therefore, provide an important mechanism for employer monitoring that guards against discrimination.

3. Accountability

In the absence of guidelines and oversight, managers may have little awareness of and incentive to suppress stereotypes and are more likely to favor persons of their own sex.[13] Tying managers' performance appraisal ratings, raises, and bonuses to nondiscriminatory behavior has been found to increase female representation in nontraditional jobs. *See* Raymond A. Noe, *Employee Training and Development* (2002). Class action consent decrees often do just that.

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[12] According to a survey of 132 large Irish firms, monitoring personnel practices by gender, race-ethnicity, and disability along with other accountability structures was profitable. Firms that implemented these structures were more productive and had lower labor turnover. Claire Armstrong, et al., *The Impact of Diversity and Equality Management on Firm Performance: Beyond High Performance Work Systems*, 49 Human Resource Mgmt. 977, 989 (2010).

A large body of social science research indicates that when people expect that they will have to justify their decisions, they scrutinize their behavior more carefully. Thus, the expectation that one may have to account for one's personnel decisions ("accountability apprehension"), reduces the likelihood that personnel decisions will be biased. Frank Dobbin, et al., *Someone to Watch over Me: Coupling, Decoupling, and Unintended Consequences in Corporate Equal Opportunity*, 34-49 (2009), http://www.wjh.harvard.edu/~dobbin/cv/workingpapers/Someone_to_Watch_Over_Me.pdf.

For example, a case study on how pay was set concluded that "[t]he lack of accountability for decisions, the lack of normative structure defining appropriate action, and the greater the ambiguity in performance criteria, the more likely personnel decisions will be influenced by bias." Elvira, *supra*, at 614. Social psychologists have demonstrated that decision makers make less biased decisions when they know that their assessments and their results will be public.[18] Importantly, research subjects who were told that they would be held accountable for their judgments before they began an assessment engaged in more complex thought and made more accurate predictions of the behavior of those they were judging than subjects who had not been told that they would be held accountable. *See* Phillip E. Tetlock & Jae Il Kim, *Accountability and Judgment Processes in a Personality Prediction Task*, 52 J. Psychol. & Soc. Psychol. 700 (1987).

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[13] *See* Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and their Behavioral Manifestations*, 17 Soc. Just. Res. 143 (2004); Miles Hewstone, Mark Rubin & Hazel Willis, *Intergroup Bias*, 53 Ann. Rev. Psychol. 575 (2002) (reviewing research on bias in favor of in-groups at the expense of out-groups, including measurement and conceptual issues (especially in-group favoritism vs. out-group dynamics), key moderators of bias, reduction in bias, and association between in-group bias and out-group hostility).

Performance goals that are explicitly geared toward enhancing managerial accountability in reducing discrimination are associated with lower levels of discrimination. U.S. Department of Labor, Office of Federal Contract Compliance Programs, *OFCCP Glass Ceiling Initiative: Are There Cracks in the Ceiling?* (1997).

Accountability structures are ineffective, however, unless an employer designates someone to be responsible for regularly assessing managers' practices and decisions and for providing feedback to those managers. In addition, mechanisms must exist to sanction managers who depart from required practices. *See* Kalev, *Best Practices*, *supra*. For example, Home Depot increased its demographic diversity in part by insisting that managers follow its standardized hiring procedures. Sturm, *supra*, at 515-16. Class action consent decrees, like the consent decree in *Home Depot*, therefore can serve as an important mechanism for ensuring organizational accountability for equal employment opportunity.

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[18] For a review, *see* Lerner & Tetlock, *supra*.

In the IWPR study, half of class action consent decrees included specific provisions for holding supervisors accountable (for EEO implementation), but fewer than one in five settlements in discrimination cases of fewer than 20 plaintiffs had a similar requirement. Hegewisch, et al, *Ending*, *supra*, at 36 (Table 7).

◆

CONCLUSION

It is critical that plaintiffs continue to be able to have claims of employment discrimination certified under Rule 23(b)(2) to challenge systemic bias and obtain comprehensive injunctive and equitable relief necessary to change policies and practices. For these reasons, amicus curiae respectfully suggest that the class certification order should be affirmed.

March 1, 2011

Respectfully submitted,

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In the Supreme Court of the United States

WAL-MART STORES, INC.,

Petitioner,

v.

BETTY DUKES, ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF INTEL CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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General Tel. Co. of the Northwest, Inc. v. EEOC,
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General Tel. Co. of the Southwest v. Falcon,
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In re Fibreboard Corp.,
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In re Lorazepam & Clorazepate Antitrust Litig.,
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In re Rhone-Poulenc Rorer, Inc.,
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McLaughlin v. American Tobacco Co.,
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Other Authorities

Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251 (2002) 9, 11

Henry J. Friendly, Federal Jurisdiction: A General View 120 (1973) 7

Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits – The Twenty-Third Annual Antitrust Review*, 71 Colum. L. Rev. 1 (1971) 11

Steven B. Hantler, Victor E. Schwartz & Phil S. Goldberg, *Extending the Privilege to Litigation Communications Specialists in the Age of Trial By Media*, 13 CommLaw Conspectus 7 (2004) 9

TABLE OF AUTHORITIES – cont'd

Page(s)

Sarah Kirk, *Ninth Circuit Discrimination Case Could Change The Ground Rules For Everyone*, 14 Tex. Rev. L. & Pol. 163 (2009) 21

Gary M. Kramer, *No Class: Post-1991 Barriers to Rule 23 Certification of Across-the-Board Employment Discrimination Cases*, 15 Lab. Law. 415 (2000) 8

Bartlett H. McGuire, *The Death Knell for* Eisen: *Why the Class Action Analysis Should Include an Assessment of the Merits*, 168 F.R.D. 366 (1996) 10

Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. Chi. L. Rev. 367 (2009) 8

Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, And CAFA*, 106 Colum. L. Rev. 1872 (2006) 5

Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97 (2009) 22

TABLE OF AUTHORITIES – cont'd

Page(s)

Mark A. Perry & Rachel S. Brass, *Rule 23(b)(2) Certification of Employment Class Actions: A Return to First Principles*, 65 N.Y.U. Ann. Surv. Am. L. 681 (2010) 17

S. Rep. No. 109-14 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3 10

David Segal, *HMOs Latest to Grapple with Threat of Investor-Scaring Mega-Verdicts*, Wash. Post, Nov. 12, 1999, at A1 9

Linda Silberman, *The Vicissitudes of the American Class Action – With a Comparative Eye*, 7 Tul. J. Int'l & Comp. L. 201 (1999) 10

Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 Wm. & Mary L. Rev. 1531 (2000) 5

Roger H. Trangsrud, *James F. Humphreys Complex Litigation Lecture: The Adversary System and Modern Class Action Practice*, 76 Geo. Wash. L. Rev. 181 (2008) 6, 17

TABLE OF AUTHORITIES – cont'd

Page(s)

Thomas E. Willging, et al., Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules (1996) 9

3 Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23 (1997) 16

7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1775 (3d ed. 2005) 17

BRIEF OF INTEL CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

Intel Corporation is the world's largest semiconductor manufacturer and is also a leading manufacturer of computer, networking, and communications hardware and software products. Given its size, Intel frequently is named as a defendant in litigation in which plaintiffs seek class certification, including certification under Federal Rule of Civil Procedure 23(b)(2). At present, there are nearly 100 putative class actions pending against Intel. Indeed, for the past ten years Intel has continuously been named as a defendant in one or more putative class actions.

As a result, Intel has a significant interest in maintaining proper limitations on class-action procedures. Class certification can transform an ordinary lawsuit into "bet-the-company" litigation, even for a company of Intel's size. But companies can seldom afford to make such wagers—no matter how small the odds are of an adverse judgment—so class certification almost always coerces an immediate settlement. "Blackmail settlements," as Judge

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[1] No counsel for a party authored this brief, in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae* or its counsel made a monetary contribution to this brief's preparation or submission. Petitioner and respondents have filed blanket letters of consent to the participation of *amici curiae*.

Friendly aptly termed such results, damage Intel, impose costs on its customers, and ultimately harm its shareholders. Furthermore, as a company headquartered in California, Intel is especially vulnerable to lawsuits filed under the extraordinarily lax standards for class certification that the Ninth Circuit adopted by a 6-5 vote in the decision below. Intel is therefore well positioned to explain why the decision reached by the majority below is deeply flawed.

SUMMARY OF ARGUMENT

Rule 23 establishes limitations and procedural requirements designed to ensure that the class-action device does not alter the parties' underlying substantive rights. In the decision below, the court of appeals jettisoned those essential protections in an attempt to shoehorn 1.5 million plaintiffs from across the country into a single class claiming a "common" employment injury inflicted by literally thousands of different individual supervisors despite the absence of any specific employment policy that tied the plaintiffs' claims together. While Intel takes no position on the merits of the underlying Title VII claims, the court of appeals' willingness to allow this agglomeration of claims to be combined into a single class action was manifestly erroneous.

I.A. Improper class certification imposes onerous and inappropriate settlement pressure on defendants. Even in the best of circumstances—*i.e.*, when a class actually meets all of Rule 23's requirements—certification dramatically raises the stakes of a lawsuit and coerces defendants to settle instead of risking a potentially catastrophic outcome at trial. The possibility that a single error on liability would be multiplied thousands (or, as in this case, 1.5 million) times over is almost always too much for a rational decisionmaker to bear.

B. When a class is certified *without* meeting Rule 23's fundamental requirements for representational litigation—including Rule 23(a)'s threshold conditions and Rule 23(b)(3)'s specific requirements for actions seeking monetary relief—that already coercive settlement pressure is magnified even further. If the named plaintiffs' claims are not truly representative or important individualized inquiries are overlooked, a defendant cannot predict with confidence that any liability determination would truly correspond to the underlying merits of the class members' claims. Rather, it is overwhelmingly likely that named plaintiffs would be selected precisely because they presented the strongest possible claims, concealing the weakness of other class members' claims and vastly increasing the settlement pressure that class certification imposes.

II.A. The plain text of Rule 23(b)(2) does not provide for the certification of class actions seeking monetary relief. The rule's text clearly limits its application to classes seeking injunctive and declaratory relief, and this limitation was expressly intended. The contrary view adopted by the decision below gives rise to a permissive and incoherent standard for certification of (b)(2) classes.

B. To the extent that a class seeking monetary relief may be certified under Rule 23(b)(2) at all, such certification must be limited to monetary relief that is truly incidental to injunctive or declaratory relief. The decision below does not properly limit the reach of certification under Rule 23(b)(2). In doing so, it improperly allows the certification of an action seeking billions of dollars in individualized monetary relief without the corresponding mandatory safeguards imposed by Rule 23(b)(3), which expressly addresses such claims.

ARGUMENT

Class certification has the potential to transform garden-variety lawsuits into a single action with millions of claimants and billions of dollars in claimed damages. For defendants, class certification expands the size of the potential judgment, magnifies the costs of the litigation, and actually increases the likelihood that defendants will, in fact, lose at trial. Those enhanced risks mean that defendants are likely to forgo trial altogether and settle even meritless cases. Because of class certification's dispositive effect in the vast majority of cases, courts must remain especially vigilant in applying Rule 23's requirements before certifying a proposed class.

The class here was improperly certified under Rule 23(b)(2), which authorizes certification of claims seeking only injunctive or declaratory relief. By allowing certification under (b)(2) of a class seeking billions of dollars in backpay, the court below permitted the plaintiffs to circumvent the enhanced procedural requirements that Rule 23(b)*(3)* expressly imposes for class actions seeking monetary relief. At a minimum, if monetary relief can ever be sought in a (b)(2) action, it must be no more than incidental to injunctive or declaratory relief—billions of dollars are not "incidental."

I. Improper Class Certification Puts Inappropriate Settlement Pressure On Defendants

Even a properly certified class action imposes significant—and potentially catastrophic—costs on defendants. Resting thousands or even millions of claims upon a single liability determination transforms ordinary lawsuits into true bet-the-company litigation. See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). Even the smallest probability of losing at trial can be too much of a risk when the potential judgment is in the billions.

For that reason alone, class certification almost always leads defendants to settle. See, *e.g.*, Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, And CAFA*, 106 COLUM. L. REV. 1872, 1875 (2006) ("Whatever their partisan stakes in a given litigation, all sides recognize that the overwhelming majority of actions certified to proceed on a class-wide basis (and not otherwise resolved by dispositive motion) result in settlements."); Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531, 1546 n.74 (2000) ("[T]hat defendants would rather settle large class actions than face the risk, even if it be small, of crushing liability from an adverse judgment on the merits is widely recognized."). The uncertainty of trial and the potentially disastrous consequences of a single adverse result create such pressure almost entirely without regard to the strength of the plaintiffs' case.

But the risk skyrockets—and the actual merits of the case become even less meaningful—when a class is *improperly* certified. Any increase in the size of a class action magnifies the prospect of a coerced settlement. In many instances, improper certification also allows a few named plaintiffs (typically selected for the relative strength of their claims) to "represent" the rest of the class, further increasing the likelihood that the defendants will lose at trial.

Accordingly, it is exceedingly important for class actions to remain within the limits that, with good reason, the framers of Rule 23 placed on representational litigation. If left undisturbed, the permissive example set by the Ninth Circuit will make it far easier for plaintiffs with weak cases to extract massive settlements from defendants.

A. The Prospect Of "Blackmail Settlements" Drives Companies To Settle Even The Weakest Cases

Class certification almost invariably leads to settlement. "[I]f class action certification is granted, defendants are often unwilling to suffer the risks of trial—even in marginal cases—and face enormous pressure to settle the case for a very substantial amount." Roger H. Trangsrud, *James F. Humphreys Complex Litigation Lecture: The Adversary System and Modern Class Action Practice*, 76 GEO. WASH. L. REV. 181, 189 (2008). That is principally because the size of such actions makes the risk of losing (however remote) simply unbearable for most rational decisionmakers. For example, even a 1% possibility of losing hundreds of millions (or, as here, billions) of dollars in a single lawsuit is a wager that few can afford to make. "Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action 'blackmail settlements.'" *Rhone-Poulenc,* 51 F.3d at 1298 (quoting HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973)). Indeed, that possibility is one of the very reasons why Rule 23's drafters elected to permit interlocutory appeals from class certification decisions. Fed. R. Civ. P. 23(f), Advisory Committee's Notes to 1998 Amendments ("An order granting certification * * * may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.").

The ever-present possibility of error in assessing or determining liability exacerbates that pressure. Suppose, for example, that a defendant faces lawsuits by several thousand plaintiffs claiming a combined $5 billion in damages, but the defendant believes those claims are weak and worth no more than $10 million. If the plaintiffs' claims are litigated individually, errors in determining liability would tend to cancel each other out; the defendant would win some and lose some and eventually something approaching the expected aggregate liability would result. See *Thorogood* v. *Sears, Roebuck and Co.*, 624 F.3d 842, 849 (7th Cir. 2010). When the claims are aggregated into a class action, however, the defendant has just one "roll of the dice" to decide the fate of thousands of claims. See *Rhone-Poulenc*, 51 F.3d at 1298. Despite the weakness of the claims, trial outcomes are never perfectly accurate and now the defendant stands to lose $5 billion *at once*. A single error would be so costly that the only rational strategy for defendants is often to settle.

The actual costs of litigating thousands of claims simultaneously also exert pressure on defendants to settle. See, *e.g.*, Gary M. Kramer, *No Class: Post-1991 Barriers to Rule 23 Certification of Across-the-Board Employment Discrimination Cases*, 15 LAB. LAW. 415, 416-17 (2000) (discussing steep costs associated with litigating class action). Pretrial discovery, for example, is especially costly in class actions, and tends to cost defendants far more than plaintiffs. *Thorogood*, 624 F.3d at 850 ("[T]he pressure on [the defendant] to settle on terms advantageous to its opponent will mount up if class counsel's ambitious program of discovery is allowed to continue."). Defendants may settle to avoid facing such a massive outlay all at once.

The effort expended defending the suit can also impose staggering secondary and tertiary costs. For starters, defendants must divert resources away from productive activities, see *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 740-41 (1975), and potentially forgo millions of dollars in missed opportunities, see Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367, 374 (2009). Likewise, a class action threatens to destroy a defendant's reputation completely out of proportion to the merits of the claims. See, *e.g.*, *Abdallah* v. *Coca-Cola*

Co., 186 F.R.D. 672, 676 (N.D. Ga. 1999) (describing negative publicity resulting from class action). A nationwide class action alleging widespread wrongdoing at a major company inevitably makes headlines that corporate decisionmakers are understandably eager to avoid. See Steven B. Hantler, Victor E. Schwartz & Phil S. Goldberg, *Extending the Privilege to Litigation Communications Specialists in the Age of Trial By Media*, 13 COMMLAW CONSPECTUS 7, 10 (2004). Indeed, even the highly publicized *threat* of a "mega-verdict" can cause the defendants' stock price to plummet. See Hantler, *supra*, at 31-32 (describing how an HMO company's stock price fell by 30% when plaintiffs' lawyers met with Wall Street analysts about HMO class actions, citing David Segal, *HMOs Latest to Grapple with Threat of Investor-Scaring Mega-Verdicts*, WASH. POST, Nov. 12, 1999, at A1).

It is universally recognized that these pressures allow opportunistic plaintiffs (and their counsel) to extract undeserved settlements from defendants. "[E]mpirical studies * * * confirm what most class action lawyers know to be true: almost all class actions settle." Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1292 (2002); see also THOMAS E. WILLGING, ET AL., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 60, 179 tbl. 40 (1996) (finding, in a study of four federal districts, that "the percentage of certified class actions terminated by a class settlement ranged from 62% to 100%"). That is so almost entirely without regard to the underlying merits of the suit. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1465 n.3 (2010) (Ginsburg, J., dissenting) ("A court's decision to certify a class * * * places pressure on the defendant to settle even unmeritorious claims."); S. REP. NO. 109-14, at 20 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 21 ("a class attorney * * * can essentially force corporate defendants to pay ransom to class attorneys by settling—rather than litigating—frivolous lawsuits"); Bartlett H. McGuire, *The Death Knell for Eisen: Why the Class Action Analysis Should Include an Assessment of the Merits*, 168 F.R.D. 366, 370-71 (1996) ("[C]lass certification can give plaintiffs tremendous leverage in settlement negotiations, even where the claims are tenuous. * * * [T]enuous claims are hard to dispose of before trial; and jury trials are risky propositions * * *."); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 102 (D.C. Cir. 2002) ("[T]he grant of class status can put substantial pressure on the defendant to settle independent of the merits of the plaintiffs' claims."); see also Linda Silberman, *The Vicissitudes of the American Class Action—With a Comparative Eye*, 7 TUL. J. INT'L & COMP. L. 201, 205 (1999) ("[T]he specter of huge damage awards against defendants in a class action suit and the expense of litigating these large suits in a system without cost-shifting frequently led defendants to settle even marginal cases.").

"Not surprisingly, the ability to exercise unbounded leverage over a defendant corporation and the lure of huge attorneys' fees have led to the filing of many frivolous class actions." S. REP. NO. 109-14, at 21. Regrettably, the prophecy that even a meritless class action will settle if certified tends to be self-fulfilling. Each "blackmail settlement" that is extracted from a deep-pocketed defendant encourages the filing of still more frivolous lawsuits—particularly because it is overwhelmingly likely that the merits of the suit will never be tested. See Bone & Evans, *supra*, DUKE L.J. at 1302. Precisely because the class-certification decision is virtually determinative of liability, courts must remain especially vigilant in enforcing the proper limitations on the class-action device.

B. Classes That Do Not Meet Rule 23's Requirements Exacerbate Improper Settlement Pressure

Judge Friendly and the countless others who have decried the potential for "blackmail settlements" have generally assumed that the classes were, at least, properly certified. See, *e.g.*, Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits – The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 8-9 (1971) (class actions are "legalized blackmail" because they place such burdens on courts and defendants that they are virtually untriable); *Rhone-Poulenc*, 51 F.3d at 1299 (blackmail pressure is created when defendants must "stake their companies on the outcome of a single jury trial"). If a class is certified that does *not*, in fact, meet Rule 23's requirements, the opportunity for coerced settlements skyrockets. That is true with respect to both Rule 23(a)'s threshold criteria for all class actions, and (in particular) Rule 23(b)(3)'s requirements for class actions seeking monetary relief. If those standards are incorrectly applied, defendants lose essential protections afforded by Rule 23 while plaintiffs correspondingly gain settlement leverage.

Rule 23(a) sets out the basic requirements for representational litigation: the class must be so numerous that joinder of all members is impracticable; the class must have questions of law or fact in common; the claims or defenses of the class representatives must be typical; and the class representatives must adequately protect the interests of absent class members. Fed. R. Civ. P. 23(a). By requiring the named plaintiffs to represent the whole class accurately and fairly, those requirements of commonality, typicality, and adequacy of representation help to guarantee that the class-action device does not alter the substantive rights of the plaintiffs or defendants. See *General Tel. Co. of the Southwest* v. *Falcon*, 457 U.S. 147, 156 (1982) ("These [23(a)] requirements effectively 'limit the class claims to those fairly encompassed by the named plaintiff's claims.'") (quoting *General Tel. Co. of the Northwest, Inc.* v. *EEOC*, 446 U.S. 318, 330 (1980)); see also *Taylor* v. *Sturgell*, 553 U.S. 880, 894 (2008) (describing representational relationship in "properly conducted class actions" as being on par with "suits brought by trustees, guardians, and other fiduciaries").

Rule 23(b) places additional limits on the class based on the nature of the relief sought. As explained below (see Part II, *infra*), it explicitly distinguishes between claims governed by Rule 23(b)(3), in which questions in common to the class members "predominate over any questions affecting only individual members" and for which damage claims are appropriate, and other claims, governed by Rule 23(b)(2), for which only injunctive relief is appropriate. This fundamental distinction reflects the fact that classes seeking injunctive or declaratory relief are by definition cohesive and homogeneous. By contrast, classes seeking monetary relief tend to be heterogeneous, and "class-action treatment is not as clearly called for" in such cases. Fed. R. Civ. P. 23 Advisory Committee's Note to 1966 Amendments. Rule 23(b)(3) thus sets forth specific requirements that must be satisfied in order for damage claims to be given class action treatment. These include, among others, the "predominance" requirement, which is necessary to ensure that the heterogeneous individual issues that arise in damage claims do not predominate and, thus, that class-wide litigation is appropriate.

Any improper expansion of the class under either Rule 23(a) or Rule 23(b) only exacerbates the settlement pressures certification generates. As explained above, the sheer size of a class action significantly increases the likelihood that a defendant will settle the action without regard to its merits. The aggregation of claims beyond those authorized for class treatment by Rule 23 only adds to those already substantial pressures.

Worse still, when courts certify classes in which the Rule 23 requirements have been improperly applied, plaintiffs gain even more significant advantages. For one thing, when the named plaintiffs do not truly represent the entire class, plaintiffs' counsel can (and, for obvious reasons, frequently do) cherry-pick the most sympathetic individuals with the strongest possible claims to serve as named plaintiffs. Because the jury sees only the class representatives, absent class members with weaker claims can piggy-back on the disproportionately stronger representatives' claims.

It is worse still when a class seeking monetary relief does not meet Rule 23(b)(3)'s predominance requirement, because individual inquiries relevant to absent class members' claims tend to evaporate. The premise of a class action is that the class representatives serve as proxies for the entire class. If the common issue does not actually predominate over other issues—that is, if questions of fact and law specific to individuals are more important than the common question—then that essential premise fails. In that way, the claims of a few plaintiffs hand picked to serve as class representatives can mask the shortcomings of the absent class members' claims, and absent class members reap rewards from settlement or judgment without the weaknesses in their cases ever seeing the light of day.

Plaintiffs' counsel may also seek to create a fictional "super-plaintiff" that combines the best attributes of the class members by alleging that certain claims run to the "class as a whole" or, as here, that a large and disparate class suffered an improbably singular injury. This pits the defendant against a fictional composite that is not necessarily like any actual member of the class. See *Philip Morris USA Inc.* v. *Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J., in chambers) ("The apparent consequence of the Court of Appeal's holding [that no particular plaintiff must prove the reliance element of the claim] is that individual plaintiffs who could not recover had they sued separately *can* recover only because their claims were aggregated with others' through the procedural device of the class action."); *In re Fibreboard Corp.*, 893 F.2d 706, 711 (5th Cir. 1990) ("The inescapable fact is that the individual claims of 2,990 persons will not be presented. Rather, the claim of a unit of 2,990 persons will be presented. Given the unevenness of the individual claims, this * * * process inevitably restates the dimensions of tort liability.").

Of course, the defendant cannot actually confront this fictional character in the courtroom. Cross-examination cannot fully expose weaknesses in the super-plaintiff's case, and the presentation of defenses that are specific to individual class members likewise suffers. *Broussard* v. *Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998) ("Meineke was often forced to defend against a fictional composite without the benefit of deposing or cross-examining the disparate individuals behind the composite creation.").

Accordingly, class actions that do not meet the representational requirements of Rule 23 tend to be tried, if at all, in a manner that is ultimately prejudicial to the defendant. *McLaughlin* v. *American Tobacco Co.*, 522 F.3d 215, 232 (2d Cir. 2008) (condemning a fluid recovery scheme that treated the plaintiffs as a "class as a whole" as "rais[ing] serious due process concerns"); *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005, 1018 (2d Cir. 1973) (substituting the "class as a whole" for the individual members of the class with a fluid recovery scheme would violate Rule 23 and due process), vacated on other grounds, 417 U.S. 156 (1974); see also 3 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23 at 581-82 (1997) (noting that "for each plaintiff" whose claims may have arisen "in a different period of time, with different facts * * * much of the evidence would not come in [as] to that particular plaintiff"). Faced with the likelihood that they will be unable to present a complete defense, defendants often have no real choice but to settle.

II. A Class Certified Under Rule 23(b)(2) Cannot Seek Monetary Relief

Rule 23(b)(2) authorizes a class action when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final *injunctive* relief or corresponding *declaratory* relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2) (emphasis added). In approving the certification under (b)(2) of a class seeking billions of dollars in monetary relief, the majority below committed an error of the highest order.

A. Class Actions Seeking Monetary Relief Cannot Be Certified Under Rule 23(b)(2)

By its terms, (b)(2) authorizes only those actions for which "injunctive" or "declaratory" relief is sought for "the class as a whole." Fed. R. Civ. P. 23(b)(2). Conspicuously, the rule makes no mention of monetary relief, which is separately addressed by Rule 23(b)(3).

Indeed, "Rule 23(b)(2) was not originally drafted to provide a vehicle for obtaining compensatory damages and other forms of monetary relief." Trangsrud, *supra*, 76 GEO. WASH. L. REV. at 186; see also Mark A. Perry & Rachel S. Brass, *Rule 23(b)(2) Certification of Employment Class Actions: A Return to First Principles*, 65 N.Y.U. ANN. SURV. AM. L. 681, 699 (2010). Rather, the touchstone of (b)(2) "is whether the party's actions would affect all persons similarly situated so that those acts apply generally to the whole class. If they do not, then Rule 23(b)(2) cannot be properly invoked." 7AA CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1775, at 41 (3d ed. 2005) (footnote omitted); see, *e.g.*, *Monreal* v. *Potter*, 367 F.3d 1224, 1236 (10th Cir. 2004) (affirming denial of certification "[b]ecause the variety of claims asserted in the Complaint do not lend themselves to the formulation of appropriate class-wide injunctive or declaratory relief and because it is clear from the pleadings here that the primary relief sought is monetary damages").

In recent years, some plaintiffs' counsel have "seiz[ed] on certain language in the advisory committee notes to the rule" in hopes of persuading courts that the rule permits suits for monetary relief. Trangsrud, *supra*, 76 GEO. WASH. L. REV. at 186. But, "[a]s with a statute, [the Court's] inquiry is complete if * * * the text of [a Federal] Rule [of Civil Procedure is] clear and unambiguous." *Business Guides, Inc.* v. *Chromatic Communications Enters., Inc.*, 498 U.S. 533, 540-41 (1991); accord *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U.S.

120, 123 (1989). "The Advisory Committee's insights into the proper interpretation of a Rule's text * * * have no effect on the Rule's meaning." *Krupski* v. *Costa Crociere S.p.A.*, 130 S. Ct. 2485, 2498-99 (2010) (Scalia, J., concurring in part and concurring in the judgment); see also *Black* v. *United States*, 130 S. Ct. 2963, 2970 (2010) (Scalia, J., joined by Thomas, J., concurring in part and concurring in the judgment) ("The Committee's view is not authoritative."); *Tome* v. *United States*, 513 U.S. 150, 167-68 (1995) (Scalia, J., concurring in part and concurring in the judgment) ("the Notes cannot, by some power inherent in the draftsmen, change the meaning that the Rules would otherwise bear"). It is the plaintiffs' proposed departure from the plain text of the Rule, not the defendant's adherence to the text, that is the more "radical" position in this case. See Brief in Opp. at 17.

The text of Rule 23(b)(2) is targeted for a reason. Because classes certified under (b)(2) can seek *only* injunctive or declaratory relief, the benefits and burdens of the class action properly run to the class as a whole. Rule (b)(2) classes are thus *inherently* suitable for class-wide adjudication and *naturally* protect defendants' and absent class members' rights. Accordingly, 23(b)(2) class actions do not share the extra safeguards of (b)(3) actions—namely, the predominance and superiority requirements, and the notice and opportunity to opt out that must be provided to absent class members. See Fed. R. Civ. P. 23(b)(3) & (c)(2)(B); *Coleman* v. *GMAC*, 296 F.3d 443, 447 (6th Cir. 2002) ("These procedural protections are considered unnecessary for a Rule

23(b)(2) class because its requirements are designed to permit only classes with homogenous interests.").

Allowing plaintiffs to pursue claims for monetary relief under 23(b)(2) is a transparent end-run around the additional requirements and protections Rule 23(b)(3) imposes. See *Parker* v. *Time Warner Entertainment Co.*, 331 F.3d 13, 24 (2d Cir. 2003) (Newman, J., concurring) ("[U]nduly extending (b)(2) * * * strike[s] me as a way of undermining the (b)(3) requirement that 'a class action is superior to other available methods for the fair and efficient adjudication of the controversy.'") (quoting Fed. R. Civ. P. 23(b)(3)). This case illustrates that fact all too well: 1.5 million plaintiffs seeking billions of dollars in monetary relief were assembled into a single class that could never have met (b)(3)'s more onerous certification requirements. As a result, petitioner faces a trial in which it would have no real opportunity to present the thousands of individual defenses to which the law entitles it.

Because of this end-run around 23(b)(3), the defendant faces a potential judgment of billions of dollars in a single action against three hand-chosen plaintiffs, which it will almost certainly feel forced to settle. See Part I, *supra*. But such misuse of (b)(2) actions also harms absent class members, some of whom might have had valid claims that—if the case is (predictably) settled—will be extinguished without the mandatory notice and opt-out protections of (b)(3). Properly applying Rule 23(b)(3) to *all* actions seeking monetary relief avoids both of these results.

B. If Monetary Relief Is Ever Permissible In A (b)(2) Class Action, It Must Be No More Than Incidental To Injunctive Or Declaratory Relief

If courts stray from the plain language of Rule 23(b)(2) and certify classes seeking monetary relief, such relief must be only incidental to injunctive or declaratory relief. As Judge Ikuta recognized in dissent below, "Rule 23(b)(2) was designed for classes seeking class-wide injunctive relief to remedy a common injury to the class as a whole, not for classes seeking individual damages, back pay, or other individual relief." Pet. App. 149a (Ikuta, J., dissenting); see *Thorn* v. *Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 331 (4th Cir. 2006) ("Because Appellants' injunction request is illusory, their prayer for injunctive relief cannot predominate over their prayer for non-injunctive, non-declaratory equitable relief under any reasonable interpretation of Rule 23(b)(2)."); *Allison* v. *Citgo Petroleum Corp.*, 151 F.3d 402, 413 (5th Cir. 1998) ("The underlying premise of the (b)(2) class * * * 'begins to break down when the class seeks to recover back pay or other forms of monetary relief to be allocated based on individual injuries.'") (quoting *Eubanks* v. *Billington*, 110 F.3d 87, 95 (D.C. Cir. 1997)).

The claims for monetary relief in this case are hardly incidental. At least two-thirds of the class members are *former* employees who lack standing even *to pursue* injunctive relief. See *Elizabeth M.* v. *Montenez*, 458 F.3d 779, 784-85 (8th Cir. 2006) (holding that the district court had abused its discretion by certifying a 23(b)(2) class including both past and current mental health facility patients, because the former lacked Article III standing to seek injunctive relief). What is more, the multi-billion-dollar price tag plaintiffs attach to their lawsuit belies any serious contention that injunctive relief is their primary target. See *Reeb* v. *Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 641 (6th Cir. 2006) ("Title VII cases in which plaintiffs seek individual compensatory damages are not appropriately brought as class actions under Rule 23(b)(2) because such individual claims for money damages will always predominate over requested injunctive or declaratory relief."); Sarah Kirk, *Ninth Circuit Discrimination Case Could Change The Ground Rules For Everyone*, 14 TEX. REV. L. & POL. 163, 168 (2009) ("[T]he court erred by certifying, under Rule 23(b)(2), an unmanageable class in which claims for declaratory and injunctive relief plainly do not predominate.").

Moreover, the plaintiffs here seek monetary relief that is necessarily individualized, in clear conflict with the stated premise of Rule 23(b)(2) that relief must run to the "class as a whole." See *Murray* v. *Auslander*, 244 F.3d 807, 812 (11th Cir. 2001) ("'incidental damages will, by definition, be more in the nature of a group remedy, consistent with the forms of relief intended for (b)(2) class actions'") (quoting *Allison*, 151 F.3d at 415); *Eubanks* v. *Billington*, 110 F.3d 87, 95 (D.C. Cir. 1997) ("[T]he underlying premise of (b)(2) certification—that the class members suffer from a common injury that can be addressed by classwide relief—begins to break down when the class seeks to recover back pay or other forms of monetary damages."). The "crux" of Rule 23(b)(2), however, is the "*indivisible* nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful *only* as to all of the class members or as to none of them." Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009) (emphasis added). Indeed, the backpay plaintiffs seek cannot flow to the class as a whole without defying the obligations of Title VII itself. See *Reeb*, 435 F.3d at 651 ("[I]n a Title VII case, whether the discriminatory practice actually was responsible for the individual class member's harm, the applicability of nondiscriminatory reasons for the action, showings of pretext, and any affirmative defense all must be analyzed on an individual basis.").

Finally, even under the misguided standard adopted by the majority below—*i.e.*, that monetary relief is permissible under (b)(2) so long as it does not "predominate," Pet. App. 85a—it is impossible to see how this case could pass muster. A significant majority of the plaintiffs are incapable of benefiting from the requested injunctive relief. Meanwhile, *all* of the class members are presumably eligible to participate in the massive cash award plaintiffs are seeking. Monetary relief could hardly be more important.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In The
Supreme Court of the United States

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WAL-MART STORES, INC.,

Petitioner,

v.

BETTY DUKES, PATRICIA SURGESON,
EDITH ARANA, KAREN WILLIAMSON,
DEBORAH GUNTER, CHRISTINE KWAPNOSKI,
CLEO PAGE, ON BEHALF OF THEMSELVES
AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

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BRIEF OF INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Buschkin, Ilana T., *The Viability of Class Action Lawsuits in a Globalized Economy – Permitting Foreign Claimants to be Members of Class Action Lawsuits in the U.S. Federal Courts*, 90 Cornell L. Rev. 1563 (2007) 1

Collins, James C. & Jerry I. Porros, *Built to Last: Successful Habits of Visionary Companies* (1994) 10

Miller, Frederick A. & Judith H. Katz, *The Inclusion Breakthrough: Unleashing the Real Power of Diversity* (Berrett-Koehler 2002) 8, 9, 10

Miller, Frederick A. & Judith H. Katz, *The Path from Exclusive Club to Inclusive Organization: A Developmental Process* (2007) 8, 9

Mulheron, R., *The Class Action in Common Law Systems* (Hart Publishing: Oxford 2005) 2

Nashi, Roald, *Italy's Class Action Experiment*, 43 Cornell Int'l L.J. 147 (2010) 2, 3

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae International Association of Defense Counsel (IADC) is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost.

The IADC has a particular interest in the fair and efficient administration of class actions, which are increasingly global in reach. Foreign plaintiffs often seek class action relief in federal court for alleged wrongs committed on foreign soil. *See* Ilana T. Buschkin, *The Viability of Class Action Lawsuits in a Globalized Economy – Permitting Foreign Claimants to be Members of Class Action Lawsuits in the U.S. Federal Courts*, 90 Cornell L. Rev. 1563, 1567 (2007)

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[1] This brief was authored by *amicus* and its counsel listed on the front cover, and was not authored in whole or in part by counsel for a party. No one other than *amicus* or its counsel has made any monetary contribution to the preparation or submission of this brief. Pursuant to rule 37 of the Rules of the Supreme Court of the United States, all parties have consented to the filing of this and other *amicus curiae* briefs. Letters indicating the parties' blanket consent have been submitted to the Court.

("Since few other countries have group or representative litigation devices, foreign victims often avail themselves of the class action device in order to bring their claims in U.S. courts. As a result, U.S. federal judges increasingly entertain motions to certify mixed U.S.-foreign claimant classes"). *See also In re Parmalat Sec. Litig.*, 497 F. Supp. 2d 526, 531-32, 540 (S.D.N.Y. 2007) (class of Italian investors alleged fraud against Italian food and dairy company; however, trial court dismissed claims of foreign purchasers because "all of the U.S. conduct was clearly peripheral to the fraud itself").

Moreover, despite longtime skepticism about American class actions, several countries have begun to adopt their own class action procedures. Australia, Canada, Italy, Germany, and Austria now provide some form of class relief. *See* Roald Nashi, *Italy's Class Action Experiment*, 43 Cornell Int'l L.J. 147 (2010) (analyzing Italy's class action regime enacted in 2010) (hereinafter *Italy's Class Action Experiment*); Christopher Smithka, *From Budapest to Berlin: How Implementing Class Action Lawsuits in the European Union Would Increase Competition and Strengthen Consumer Confidence*, 27 Wis. Int'l L.J. 173, 190 (2009-2010) (noting that Germany and Austria have versions of the class-action lawsuit) (hereinafter *From Budapest to Berlin*); R. Mulheron, *The Class Action in Common Law Systems* 5 (Hart Publishing: Oxford 2005) (noting that Australia, British Columbia and Canada all have their own versions of class action procedures); Susan M. Sharko, et al., *Global*

Strategies and Techniques for Defending Class Action Trials: Defending the Global Company in Multinational Litigation, 77 Def. Couns. J. 295 (2010). Other countries routinely look to Rule 23 as a benchmark for developing their own class action mechanisms. *From Budapest to Berlin*, *supra*, 27 Wis. Int'l L.J. at 192 (arguing for the wholesale adoption of Rule 23 by the European Union with the addition of a diversity requirement between plaintiff class members); *Italy's Class Action Experiment*, *supra*, 43 Cornell Int'l L.J. at 157 (comparing Rule 23 requirements with the Italian model). Accordingly, this Court's interpretation of Rule 23 will have a significant impact on IADC members both here and abroad.

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SUMMARY OF ARGUMENT

Petitioner and other *amici* have already argued at length about the flaws in the class certification here, which opens the door to "Title VII lawsuits targeting national and international companies, regardless of size and diversity, based on nothing more than general and conclusory allegations, a handful of anecdotes, and statistical disparities that bear little relation to the alleged discriminatory decisions." Pet. App. 160a (Ikuta, J., dissenting). We do not repeat those arguments.

Rather, we explain why, given the level of organizational and cultural change plaintiffs claim is needed, a class action – or any solution imposed by a source outside Wal-Mart – is unlikely to provide the type of sustained, structural change plaintiffs seek. First, organization-wide change in a company's culture is more likely to take root when the organization's members participate in the change, rather than having it imposed on them from the outside. Second, a "one-size-fits-all" approach to change is even less likely to be effective where, as here, different regions and stores are subject to substantial individual managerial discretion and may be at different stages of inclusiveness. We also describe an alternative to the nationwide class certified here as well as potential individual claims: a series of store-level classes.

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STATEMENT OF THE CASE

Amicus hereby adopts and incorporates by reference the Statement of the Case set forth in the Petitioner's Brief.

◆

ARGUMENT

I. A CLASS ACTION IS UNLIKELY TO CREATE THE KIND OF SUSTAINED ORGANIZATIONAL CHANGE PLAINTIFFS URGE.

A. A Change In Corporate Culture Is More Likely To Take Root When The Change Comes From Within An Organization.

Underlying the certification of this class is the notion that a nationwide class will produce the type of change that is allegedly needed at Wal-Mart. The district court noted, for example, that the broad, prospective relief plaintiffs seek would "achieve very significant long-term relief in the form of fundamental changes to the manner in which Wal-Mart makes its pay and promotions decisions nationwide" and would thereby benefit both current and future female employees. Pet. App. 239a. Such lasting, systemic change at the cultural level of an organization is unlikely to occur in direct response to a court decision, however. To the contrary, social science teaches that system-wide changes to an organization's culture are less likely to occur – and less likely to have staying power – when they are imposed from the outside.

Effective, permanent social change is grounded in participation: if people are active in decisions that impact them, they are more likely to adopt new ways. *See* Bernard Burnes, *Kurt Lewin and the Planned Approach to Change: A Reappraisal, in Organization Change: A Comprehensive Reader* 226-33 (W. Warner Burke et al., eds., Jossey-Bass 2009).

Pioneering behavioral scientist Kurt Lewin, whose particular expertise was resolving social conflict and combating discrimination against minority or disadvantaged groups, viewed the group (composed of individuals who share an "interdependence of fate") as the key to shaping an individual's perceptions, feelings, and actions. *Id.* at 229, 231. Because of the group's importance in shaping individual behaviors, Lewin focused change efforts on group norms, roles, interactions, and socialization. *Id.* at 230, 231.

"[R]outines and patterns of behavior in a group are more than just the outcome of opposing forces in a force field. They have a value in themselves and have a positive role to play in enforcing group norms"; therefore, "for change to be effective, it must take place at the group level, and must be a participative and collaborative process that involves all of those concerned." *Id.* at 232.

A successful change project, according to Lewin, involves three steps: (1) "unfreezing" old behavior and creating motivation to learn by disclaiming the validity of the status quo, inducing guilt or survival, and creating psychological safety to change; (2) the learning process itself, which requires interplay between research, action, and more research; and (3) "refreezing" or reinforcing new behavior so that it does not become short-lived. *Id.* at 234. The "refreezing" phase underscores why successful change must be a group activity: "[U]nless group norms and routines are also transformed, changes to individual behavior will not be sustained. . . . [R]efreezing often requires changes to organizational culture, norms, policies and practices." *Id.*[2] Behavioral scientists after Lewin have

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[2] A study of leading corporate executives who engineered change at their companies revealed similar ingredients for successful change: (1) top management was committed to organization and culture change over the long term, (2) change was built on the unique strengths and core values of the organization, (3) no specific change was imposed from the top (rather, all levels were involved in implementing change), (4) the change was holistic across the company and planned, (5) changes to the

(Continued on following page)

come to view organizational change as an even more fluid, continuous, and open-ended process. *See id.* at 240-41.

Lewin, too, viewed change as unpredictable and contextual. He saw change "not as a predictable or planned move from one stable state to another, but as a complex and iterative learning process where the journey was more important than the destination, where stability was at best quasi-stationary and always fluid, and where, given the complex forces involved, outcomes cannot be predicted but emerge on a trial and error basis." *Id.* at 241.

B. Corporate Diversity And Inclusion Initiatives Must Be Adaptable And Tailored To Each Organization To Be Successful.

Many contemporary diversity and inclusion initiatives are grounded in Lewin's approach to organizational and social change. After all, "[a]chieving a successful, inclusive, diverse organization requires fundamental changes: new styles of leadership, mindsets, engagement, problem solving and strategic planning. It requires new organizational structures,

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core of the organization were made where necessary (including to authority and power relationships), (6) the company took the interests of stakeholders and the external environment into account, and (7) the organization was adaptable and treated the change process as ongoing. W. Warner Burke, *Organization Change: Theory and Practice* 307-08 (3d ed., Sage Publications 2011).

policies, practices, behaviors, values, goals and accountabilities – in short, a complete systemic culture change." Frederick A. Miller & Judith H. Katz, *The Path from Exclusive Club to Inclusive Organization: A Developmental Process* 1 (2007) (unpublished manuscript) (on file with author); *Id.* at 10 (quoting one executive who led an organization toward inclusiveness: "Inclusion changes everything – how we make decisions, who comes to meetings, how we evaluate performance and how we work together").[5] "Every organization is different. A rigid formula for change cannot be applied successfully. . . . The route each organization takes depends on its size, hierarchy, infrastructure, people, leadership, and history." Frederick A. Miller & Judith H. Katz, *The Inclusion Breakthrough: Unleashing the Real Power of Diversity* 177 (Berrett-Koehler 2002). This is so because an organization's culture "strongly influences people's behavior and reactions." *Id.* at 36. *See also Amicus Curiae* Brief of Altria Group, et al., in support of Petition for Writ of Certiorari at 10 (defining "corporate culture").

"Just as every human being must undergo a developmental process to reach adulthood, organizations must experience a series of developmental stages to achieve the enriching benefits of diversity and to create an inclusive culture. . . . Just as children must crawl before they walk, organizations cannot expect to skip directly to inclusiveness." Miller & Katz, *The Path from Exclusive Club to Inclusive Organization*, *supra*, at 1, 2. "[J]ust *having* diversity does not result in *leveraging* diversity." Miller & Katz, *The Inclusion Breakthrough*, *supra*, at 8. To leverage diversity, an organization must reach a true stage of inclusiveness.

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[5] "An organization is inclusive when everyone has a sense of belonging; feels respected, valued and seen for who they are as individuals; and feels a level of supportive energy and commitment from leaders, colleagues and others so that all people – individually and collectively – can do [their] best work." Miller & Katz, *The Path from Exclusive Club to Inclusive Organization*, *supra*, at 2.

Frederick Miller and Judith Katz, who advise Fortune 500 companies about diversity and inclusion strategies, propose a developmental path for organizations; depending on where they fall on the continuum, organizations will choose different methods for achieving their inclusiveness goals. Miller & Katz, *The Path from Exclusive Club to Inclusive Organization*, *supra*, at 4 ("Diagnosing the organization and determining where it is on The Path makes it possible to tailor interventions based on that point, rather than force-fitting the system to the intervention"). Different units, divisions, or groups may be further along than others; in those cases, methods may need to be individually tailored to each division, rather than applied uniformly companywide. *Id.* No matter where an organization is along the developmental path, the answers must come from the organization's own members. *Id.* at 5, 7-10. At one stage, this may mean engaging the ten to fifteen percent of the organization's members who serve as its thought leaders; at another, it may mean valuing and embracing diversity at the local level before expanding beyond each location. *Id.* at 8, 10.

In every case, "[m]anagers and leaders at all levels must be able to translate the organization's business and operational needs for leveraging diversity and inclusion into everyday practice"; "[c]ulture change [cannot] become visible, viable, and believable until managers and leaders at all levels embrace and model the change." Miller & Katz, *The Inclusion Breakthrough*, *supra*, at 212-13.

C. A One-Size-Fits-All Approach To Inclusion In This Case Would Further Ignore Differences Between Wal-Mart's Regions And Stores.

Wal-Mart's founder, too, "valued change, experimentation, and constant improvement." James C. Collins & Jerry I. Porros, *Built to Last: Successful Habits of Visionary Companies* 36 (1994). To foster innovation, he gave department managers the authority and freedom to run each department as if it were their own business. *Ibid.* *See also* *Amicus Curiae* Brief of Altria Group, et al., in support of Petition for Writ of Certiorari at 8-9. As the district court noted, Wal-Mart's current model still incorporates a substantial level of local managerial discretion, overlain with a centralized corporate culture. *See* Pet. App. 180a, 192a. Overarching this localized discretion, and included in the broader company culture, is an established, award-winning, company-wide diversity program implemented through company handbooks, trainings, diversity goals, and performance assessments. Pet. App. 195a.

Nationwide, Wal-Mart's retail operations encompass 7 different divisions broken down into 41 regions (each comprised of 80 to 85 stores); a total of 3,400 stores each employs between 80 and 500 people. Pet. App. 163a, 174a; *see also id.* at 114a (Ikuta, J., dissenting). Led by the store manager, the management team at each store location includes several assistant managers as well as managers of eight specialty departments. Pet. App. 174a, 175a.

Each of those regions and stores may be at different points on the road to inclusiveness, and each may require a different set of strategies to reach its goals. If a one-size-fits-all approach to inclusion were imposed on Wal-Mart, such an approach would necessarily ignore variations between locations and might undermine the company's preexisting programs and efforts. Wal-Mart is in a better position than the courts to determine the best ways to leverage its diversity and sustain and enhance its inclusion gains. *Cf. Byrnie v. Town of Cromwell, Bd. Of Educ.*, 243 F.3d 93, 106 (2d Cir. 2001) (courts should not act as "super-personnel departments").

Even assuming plaintiffs are correct and change is needed at Wal-Mart, the change plaintiffs propose will not be sweeping or lasting unless it is created from inside the organization, in accordance with Wal-Mart's culture. Standing alone, a class action lawsuit such as this – which involves no express policy of discrimination, imposes change from the outside, and does not tailor solutions to Wal-Mart as an organization – will not produce meaningful, long-term cultural change or inclusion.

II. THERE ARE ALTERNATIVES TO CERTIFYING A SINGLE NATIONWIDE CLASS OF PLAINTIFFS IN THIS CASE.

If this Court holds that the nationwide class certified in this case must be vacated, plaintiffs still have a viable method of collectively pursuing their allegations. The only alternative to a nationwide class action may not be, as the Ninth Circuit assumed, "innumerable individual suits." Pet. App. 111a. A number of smaller, more manageable classes also could be certified for each store,[4] provided plaintiffs can establish sufficient commonality.

It is undisputed in this case that there is no "specific discriminatory policy promulgated by Wal-Mart" (Pet. App. 59a) and that "Wal-Mart managers make pay and promotion decisions for in-store employees in a largely subjective manner." Pet. App. 173a. A "policy of leaving promotion decisions to the unchecked discretion of lower level supervisors . . .

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[4] The level at which promotion and pay decisions are made differs between salaried and hourly employees. For salaried employees, employment decisions were made by district and regional managers. Pet. App. 178a. Thus, for salaried employees, a regional class action may be appropriate. For hourly employees who comprise the vast majority of the current class, store managers made employment decisions, so the proper scope of that class would be at the store level. Pet. App. 176a-77a.

itself raise[s] no inference of discriminatory conduct." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988). In other words, without more, a "decision by a company to give managers the discretion to make employment decisions, and the subsequent exercise of that discretion by some managers in a discriminatory manner, is not tantamount to a decision by a company to pursue a systematic, companywide policy of intentional discrimination." *Sperling v. Hoffmann-La Roche, Inc.*, 924 F. Supp. 1346, 1363 (D.N.J. 1996). Without proof that a common policy of distributing discretion was adopted in order to perpetuate or effectuate discrimination, or that such discretion was exercised in a discriminatory fashion as a result of a company's central policies or culture, the requisite commonality for a class action is absent. A plaintiff must provide "[s]ignificant proof that an employer operated under a general policy of discrimination" before a class can be certified. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 159 n.15 (1982).

Plaintiffs rely on anecdotal evidence and statistical data which they claim give rise to an inference of company-wide discrimination. As the Ninth Circuit en banc dissent noted, the anecdotes do not demonstrate companywide discrimination and the requisite commonality for class certification because the "affiants claim discrimination in different forms, at the hands of different people, in different stores, in different parts of the country, at different times, and under a constellation of facts unique to each individual." Pet. App. 127a. (Ikuta, J., dissenting). That leaves the statistical data that "women were underrepresented in management in almost every one of Wal-Mart's 41 regions[ ]" and that "Wal-Mart pays women less than men in comparable hourly positions." Pet. App. 128a. This information also fails to "alone raise the inference that a company-wide policy of discrimination is [being] implemented by discretionary decision at the store and district level." Pet. App. 130a (Ikuta, J., dissenting).

Nonetheless, we will assume that the data does give rise to an inference of systematic discrimination at the store level. Analyzed at the store level, the data shows that "over 90 percent of Wal-Mart's stores [have] no statistical difference in the hourly pay rates between men and women associates with similar work-related characteristics." Pet. App. 130a-31a (Ikuta, J., dissenting). Of the remaining ten percent, only 7.5 percent of stores showed a statistical disparity that favored men, and the remaining 2.5 percent of stores showed a disparity that favored women. *Amicus Curiae* Brief of California Employment Law Council in support of Petition for Writ of Certiorari at 3.

Assuming that ten percent of Wal-Mart's stores would qualify for class treatment, the total number of potential plaintiffs would fall from 1.5 million to 150,000. The ensuing smaller classes would make it easier to separately adjudicate Wal-Mart's individual statutory defenses. *See In re Copley Pharm., Inc.*, 161 F.R.D. 456, 469-70 (D. Wyo. 1995) (bifurcating common issue of drug contamination from individual issues like causation). The data used to demonstrate a pattern or practice would be different for each store since any discrimination would stem from individual store managers exercising discretion. Store-level classes, furthermore, would not run afoul of the Seventh Amendment because any bifurcated issues would be "distinct and separable." *Gasoline Prod. Co. v. Champlin Refinery Co.*, 283 U.S. 494, 500 (1931).[5]

Regional classes such as these are not new in Title VII cases. *See, e.g., Stastny v. S. Bell Tel. & Tel.*

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[5] Courts routinely bifurcate issues amenable to collective adjudication from those requiring individual proof without violating the Seventh Amendment. *See, e.g., Butler v. Home Depot*, No. C-94-4335 SI, 1996 U.S. Dist. LEXIS 3370, at *14-22 (N.D. Cal. Jan. 24, 1996) (certifying class action on the first stage of a pattern or practice case and reserving judgment on certification of the second stage); *Arthur Young & Co. v. United States Dist. Court*, 549 F.2d 686, 696 (9th Cir. 1977) (bifurcating securities fraud class action by ordering separate juries to decide the issues of liability and damages was "well within the scope of a trial court's discretion under Fed. R. Civ. P. 42(b)"); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1194 (6th Cir. 1988) (explaining that the district court had trifurcated common liability issues, causation for the class plaintiffs, and damages for the class plaintiffs, then deferred individualized hearings on causation and damages for other purported class members until after the trial in mass tort class action); *In re Telectronics Pacing Sys., Inc.*, 168 F.R.D. 203, 211 (S.D. Ohio 1996) (certifying class action for determination of common issue of defendant's liability in manufacturing allegedly defective pacemakers, and reserving for separate adjudication individual questions of compensatory damages); *In re Copley Pharm., Inc., supra*, 161 F.R.D. at 469 (ordering common issue of liability to be tried in class adjudication context in products liability suit but leaving individual questions of causation, injury and compensatory damages claims to be tried separately before separate juries).

Co., 628 F.2d 267, 280 n.20 (4th Cir. 1980) (suggesting that classes for each facility at which discretionary employment decisions were made would be more appropriate than a statewide class); *In re FedEx Ground Package Sys., Empl. Practices Litig.*, No. 3:05-MD-527, 2008 U.S. Dist. LEXIS 112104, at *40-41 (N.D. Ind. Mar. 25, 2008) (certifying class of employees from some states but not from others); *Anderson v. Boeing Co.*, 222 F.R.D. 521, 541 (N.D. Okla. 2004) (certifying class of Oklahoma employees).[6] Store-level classes may well provide an alternative here to certifying a nationwide class of members who "held a multitude of jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed depending on each class member's job, location and period of employment." Pet. App. 161a (Kozinski, J., dissenting).

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[6] Regional classes have long been certified in other types of cases as well. *See, e.g.*, *Thompson v. Clear Channel Commc'ns., Inc. (In re Live Concert Antitrust Litig.)*, 247 F.R.D. 98, 154 (C.D. Cal. 2007) (certifying different classes based upon the region in which an alleged antitrust violation occurred); *Pella Corp. v. Saltzman*, 606 F.3d 391, 392 (7th Cir. 2010), *cert. denied*, ___ U.S. ___, 2011 U.S. LEXIS 806 (Jan. 18, 2011) (affirming certification of "six statewide liability classes" in product liability action).

CONCLUSION

For the foregoing reasons, the judgment should be reversed and the case remanded with instructions to decertify the class.

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Supreme Court of the United States

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WAL-MART STORES, INC.,

Petitioner,

v.

BETTY DUKES, et al.,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, in Federal Judicial Center, Reference Manual on Scientific Evidence, 83, 125-126 (2d ed. 2000) 12

Ramona L. Paetzold & Steven L. Willborn, The Statistics of Discrimination: Using Statistical Evidence in Discrimination Cases § 6.13 (2002) 8

Jacob Mincer, Schooling, Experience and Earnings (1974) 15

Joseph G. Altonji & Rebecca M. Blank, *Race and Gender in the Labor Market*, in Handbook of Labor Economics 3143 (Orley C. Ashenfelter & David Card, eds., 1999) 15

INTEREST OF *AMICI CURIAE*

The labor economists and statisticians named below teach, write and testify about discrimination in the workplace. They have spent a considerable amount of time thinking, writing, teaching and testifying about the labor economics and statistical issues before the Court. A partial list of their scholarship concerning these issues appears as an Appendix. Based on this expertise, *amici* argue that Petitioner has not presented a balanced picture concerning the statistical proof offered in support of and in opposition to class certification, and concerning the use of statistical formulas in the second stage of any possible trial to identify persons entitled to awards and the amounts of those awards. *Amici* respectfully submit this brief so as to offer this Court a more balanced presentation of these two issues.[1]

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SUMMARY OF ARGUMENT

Two unrelated issues raised by this case are of interest to labor economists and statisticians.

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[1] All of the parties in this case have consented to the filing of this brief. No counsel for any party to this case authored any part of this brief and, other than *amici* on whose behalf this brief is submitted and their counsel, no person or entity contributed money or services to the preparation and submission of this brief.

The first is the appropriate level of analysis to address whether claims raise questions common to class members as required for class certification by Federal Rule of Civil Procedure 23(a)(2). In this case, each side's expert performed a series of statistical analyses designed to isolate gender disparities in promotions to management positions and in pay for both hourly and salaried employees. Plaintiffs' expert performed the analyses for each of Wal-Mart's 41 regions and ascertained whether the resulting gender coefficients were consistently adverse to women across regions. Wal-Mart contends that this level of analysis does not establish that the claims raise common issues, and instead asserts that separate regressions had to be run for each of Wal-Mart's approximately 3,500 stores because that was the level at which the decisions being challenged supposedly were made.

Wal-Mart's proposed rule that analyses must be at the purported level of the decision-making is wrong for at least four reasons. It would effectively bar many if not most class actions in employment pattern-or-practice cases because the number of decisions made by most managers is insufficient to perform meaningful statistical analyses. Even if analyses could be run, they would have low statistical power, and looking to whether they showed statistically significant disparities would potentially miss patterns that are apparent when viewing the pattern of disparities across larger units of the workforce as a whole. Also because of the low statistical power, such analyses would be easily distorted by variations among individuals producing statistical "noise" that appropriately should be discounted in assessing commonality. Finally, Wal-Mart's rule ignores the effect that higher officers may have on decision-making of their subordinates.

Wal-Mart's proposal also is undercut by the facts of this case. Its own expert did not perform store-by-store regressions for any of the three types of claims: she performed the analyses for one claim at the level of "substores" within stores, and the regressions for the other two claims using units broader than stores. Thus, she did not believe that analyses of whether the claims in this case raise common issues had to be performed store by store. Second, the district court found that Wal-Mart's relevant personnel policies were the same throughout the company and that, under those policies, the challenged pay and promotion decisions were either made or subject to review at the district and region levels.

These considerations suggest that there cannot be a simple rule, either for all pattern-or-practice cases or this case, for determining how to conduct statistical analyses as to whether the claims raise questions common to the class. Discretion is required, both as to the appropriate units for analysis and as to whether the analyses reflect a common pattern. The district court should weigh the evidence and decide on the proper units for analysis and on whether the analyses of those units reflect common results.

In this case, the district court considered the appropriate factors and decided that the analysis of plaintiffs' expert was adequate to show that the claims raised questions common to the class. Wal-Mart has not challenged the district court's fact-finding, just its conclusions. This Court has no basis to alter the facts or, consequently, the conclusions.

The other issue addressed in this brief is whether, if a class is certified and plaintiffs prove a pattern or practice of discrimination at the first stage of trial, a statistical model may be used to identify class members entitled to back pay relief and the amount of that relief. Wal-Mart argues that it is entitled under Title VII, 42 U.S.C. §§ 2000e *et seq.*, to individualized proceedings as to each class member seeking relief and that any attempt to dispense with those proceedings by substituting a statistical formula would elevate procedural convenience over substantive rights in violation of the Rules Enabling Act.

Wal-Mart ignores that Title VII also creates the substantive right to prove that an employer has engaged in a pattern or practice of discrimination and, except in rare circumstances, the right to a back pay award when illegal discrimination is found. Class members will be entitled to backpay awards if Wal-Mart is found liable in this case, not because of the procedural decision to certify a class, but because of Wal-Mart's violation of the substantive provisions of Title VII.

This Court stated almost 35 years ago that individualized relief "usually" will be accorded in pattern-or-practice cases through individualized proceedings. "Usually" does not mean "always." The Court should recognize that computerized data and calculating power have increased the explanatory power of statistical models of personnel decisions tremendously since then, and permit use of those models at the second stage of certain pattern-or-practice cases when doing so would promote the "just, speedy and inexpensive determination" of the lawsuit.

When certain factors exist, a statistical model is likely to produce more just results than would a series of individual adjudications in the second stage of a pattern-or-practice case:

- The claims and remedies sought are such that relevant data will reasonably be in the possession of or readily available to the employer;
- The employer has collected and retained that data;
- The employer has not recorded definitive objective reasons, such as a test result, as to why particular decisions were made;
- The employer has made sufficient decisions for experts to construct a model with strong explanatory power; and

- The proposed relief does not require balancing of the equities between members of the protected group and other persons.

When these factors exist, a statistical model is likely to be more accurate, and produce more consistent results, than will a series of mini-hearings. This is especially true when the mini-hearings will be before numerous different adjudicators, when the hearings will test many-year-old memories of facts and subjective judgments that may not have seemed important to the decision-maker even when they were made, and when the decision-maker may be retired or dead at the time of the mini-hearing. Reliance on a formula will not, as Wal-Mart contends, give awards to undeserving class members: only women who were actually paid less than statistically comparable men will be entitled to awards. Finally, far more than would a series of individual adjudications, a formula will respect the employer's decision-making by faithfully following the weight that the employer itself gave to every factor (other than sex or other basis for the lawsuit) in setting pay.

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ARGUMENT

I. A RIGID RULE CANNOT ESTABLISH THE APPROPRIATE UNIT OF ANALYSIS FOR DETERMINING THE COMMONALITY OF AN EMPLOYER'S DECISIONS, AND THE COURT SHOULD DEFER TO THE DISTRICT COURT'S FACT-FINDING IN THIS CASE

Wal-Mart proposes an overly rigid standard for determining whether statistical evidence supports a conclusion that the commonality requirement of Federal Rule of Civil Procedure 23(a)(2) has been satisfied that would bar class actions in almost all pattern-or-practice employment discrimination cases[2] and is at odds with well-established statistical and labor economics principles. The Court should reject Wal-Mart's mechanistic approach to class certification issues, defer to the district court's fact-finding, and conclude that Plaintiffs have presented statistical evidence that supports the commonality determination in this case.

Expert witnesses for the parties performed regression analyses of pay rates of Wal-Mart's hourly and salaried employees and pools analyses of certain promotion decisions. In its brief, Wal-Mart discusses only the analyses of pay of hourly employees without even acknowledging the other analyses; we follow its lead by focusing, although not exclusively, on the hourly pay analyses.

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[2] The procedure for litigating pattern-or-practice cases is discussed in Part II below.

The two experts – Dr. Richard Drogin for the Plaintiffs and Dr. Joan Haworth for Wal-Mart – used different models that yielded, not surprisingly, somewhat different results. For example, Dr. Haworth controlled for various "tainted variables," *i.e.*, factors that may have been affected by Wal-Mart's alleged sex discrimination, that Dr. Drogin did not include in his model.[3] Yet despite these differences, both experts' analyses reveal that on a company-wide basis female hourly employees are paid less than male counterparts, even after controlling for all variables: Dr. Haworth's model merely reduces the disparities found by Dr. Drogin by about 75%, from about 37 cents per hour in 2001 (JA 514a) to 9 cents per hour (JA 1664a), but, like the disparity found by Dr. Drogin, the disparity found by Dr. Haworth is statistically significant.

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[3] Dr. Haworth controlled for the following factors among others: current department, whether promoted during the past year, current pay group, first pay group, and first pay rate. All of these are classic "tainted variables." *See generally* RAMONA L. PAETZOLD & STEVEN L. WILLBORN, THE STATISTICS OF DISCRIMINATION: USING STATISTICAL EVIDENCE IN DISCRIMINATION CASES § 6.13 (2002) (discussing the issue of "tainted variables"). Her results tell us, not surprisingly, that men and women will have similar pay currently if (a) they were hired at the same pay rate and in the same pay group, (b) are currently in the same pay group, and (c) were (or were not) promoted during the past year. Far from deriving meaningful empirical evidence, she fitted a tautological model.

Wal-Mart seeks to avoid any "question" related to these overall disparities by contending that the pay rate differential is not "common to the class" and therefore that Plaintiffs have not satisfied the commonality requirement of Rule 23(a)(2). Its argument is that different subgroups of the proposed class might experience different patterns of decisions. For example, in 80% of the subgroups, the decisions might have been completely neutral, while in the other 20%, the decisions might be generally adverse to women. The 20% of the subgroups may be completely driving the overall pay disparities. According to Wal-Mart, this variance among subgroups would mean that the decisions were not common.

Whether there is sufficient variance in results among members of a group that the commonality requirement is satisfied is a legal question. Statistical analyses cannot definitively answer the question; they can, however, shed light on the proper answer.

In this case, both experts performed a large number of regression analyses in an attempt to shed light on the question. Wal-Mart focuses on only one of the differences in the models of the two experts, *i.e.*, the level of the organization for which the regressions were performed. Dr. Drogin performed separate regressions for each of Wal-Mart's 41 regions (each with roughly 80 stores) and compared the results. Wal-Mart argues that, instead of regional analyses, a store-by-store analysis is absolutely mandatory because the pay decisions supposedly were "made by individual managers at the store level." (Wal-Mart Br.

at 24.) It contends that Dr. Drogin's region-level analyses constitute improper aggregation of disparities across the stores within each region.[4]

Wal-Mart's argument suffers from the fact that its own expert, Dr. Haworth, did not perform regressions for each of Wal-Mart's approximately 3,500 stores. She analyzed pay decisions for hourly employees for up to three "substores" per store. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 156 (N.D. Cal. 2004).[5] As a result, "Dr. Haworth performed approximately 7,500 separate regression analyses." *Id.* She did not report analyses of pay decisions for most salaried positions, but for those she did, she performed analysis on a company-wide basis because there were insufficient observations to perform them at the district level at which, she asserts, the decisions were made. (JA 1409a-39a.) Most of her promotion analyses were done on a company-wide basis. (JA 1511a-13a.)

Aside from the conflict with its own expert, Wal-Mart's idea that analyses of commonality must be performed at the purported decision making level is flawed for at least four reasons. First, it would doom class actions in many, if not most, pattern-or-practice cases, for an empirical reason that has nothing to do with the commonality of the practices. In many companies, managers of twenty persons or fewer make personnel decisions, which may be subject to the company's policies or practices and/or review by higher level managers. Sophisticated multivariate regression analyses cannot be performed on such small samples. If analysis must be performed at the purported decision-making level, statistically meaningful results could not be shown and a class action could not be supported.

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[4] Actually, Dr. Drogin's analyses are not "aggregated" at all. He simply used broader units of analysis than did Dr. Haworth.

[5] She separately analyzed up to six specialty departments within each store, but aggregated the results of the specialty departments to a single "substore."

Second, even if the groups are large enough for regressions to be run, it is likely that looking at the statistical significance of the results for each of the small groups would miss obvious patterns because of the low statistical power of each separate analysis. For example, consider ten persons who each flip a coin three times and get three heads. The probability that, purely as a result of chance, 30 fair coin flips would yield 30 heads is extremely small, less than one in one billion, creating grave doubt that these are "fair" flips generated by a neutral process. But if, following Dr. Haworth, we consider the flips by each person (or in this case each individual "substore") separately, the probability that three coin flips would yield three heads as a result of chance alone is relatively large (about one out of eight), which in statistical terms would not be "statistically significant." In other words, in each of the 30 "substores," the discrepancy between the actual and expected number of heads is not statistically significant, and there is therefore no basis for believing that the coin in each "substore" is unfair. In this case, Dr. Haworth's splintering of the hourly workforce into about 7,500 substores caused her pay analyses to suffer from low *statistical power*. The statistical power of an analysis is the probability that the test "will declare an effect when there is an effect to declare. This chance depends on the size of the effect and the size of the sample." David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, in FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, 83, 125-26 (2d ed. 2000). Other things being equal, the statistical power of a significance test will be lower when the size of the sample (*i.e.*, the number of observations under consideration) is smaller.[6]

Third, even if the sample size (or the number of employees in each "substore") is large enough for regressions to yield statistically significant results, the smaller the sample size, the more variation, or "noise," is likely to be observed. Even in a company with a practice of discrimination common to all units, some variation in how much women were disadvantaged in different subgroups would occur. For example, even if all Wal-Mart employees were given the identical discriminatory test, there almost certainly would be gender differences in scores among "substores" or stores because of differences among the employees in each unit. The smaller the units, the greater will be the variability. In this case, Dr. Drogin found statistically significant disparities in every region, while Dr. Haworth found much more variability, and a much lower percentage of statistically significant disparities, when analyzing those disparities by substores. The fact of variability should be taken into account not only in determining the units to analyze, but also in interpreting the results.

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[6] Courts recognize that an expert who divides a workforce into many small groups and performs analyses on each without then reaggregating the outcomes is engaged in a "divide and conquer" strategy. As one Court of Appeal stated: "[T]his was an unfair and obvious attempt to disaggregate that data to the point where it was difficult to demonstrate statistical significance. By fragmenting the data into small sample groups, the statistical tests became less probative." *Capaci v. Katz & Besthoff, Inc.*, 711 F.2d 647, 654 (5th Cir. 1983).

Finally, at least in this case Wal-Mart's argument is at odds with organizational theory and the fact-finding of the district court. The district court found that compensation decisions for hourly employees are made by store managers but are subject to review at the district or regional levels, that compensation decisions for salaried employees are made at the district or regional levels, and that all promotion decisions being challenged (except for promotions to one non-salaried position) are made at the district or regional levels. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 146-48 (N.D. Cal. 2004). Even if store manager decisions on the pay of hourly employees were not subject to review, the pay of the store managers themselves is set by regional managers. Through the power to reward and punish store managers, regional managers can set the tone for all of the stores in their regions and may influence the decisions of their store managers. As several courts of appeals have stated, "when a major company executive speaks, 'everybody listens' in the corporate hierarchy." *Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 92 (2d Cir. 2001); *Morse v. Southern Union Co.*, 174 F.3d 917, 922 (8th Cir. 1999); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 355 (6th Cir. 1998); *Ryder v. Westinghouse Elec. Corp.*, 128 F.3d 128, 133 (3d Cir. 1997).

For all of these reasons, there cannot be a simple rule that statistical analyses relevant to the commonality determination must be performed at the decision-making level. Indeed, instead of arguing for variance among members of a proposed class based on decision-making or other organizational units, an employer may argue that subgroups defined by other characteristics, such as facilities, job types, or job levels, must be evaluated for variance.[7]

But assuming, in a particular case, such as here, that the parties analyze variance of results based on organizational units, a court should consider not only the level at which decisions purportedly are made, but also issues such as practicability of analyses at various levels, statistical power of results at different levels, and the potential influence of officials above the decision-makers on the decisions in question. Statistical power considerations suggest that, when there is a legitimate choice between two possible levels of analysis, an expert generally should use the broader level.[*] On the other hand, use of broad units of analysis may be improper if the disparities in the results for men and women vary too much among subunits of the broader unit. In a stab in that direction, Dr. Haworth performed so-called "Chow" tests that tested whether the entire ***set*** of coefficients for ***all*** of the variables in her analysis (not just sex) differed in a statistically significant way among the various substores. This type of test does not say anything about whether the *sex* coefficients in her regressions varied significantly from one unit to the next. Not surprisingly, the courts below rejected Wal-Mart's Chow-test argument, *Dukes I*, 222 F.R.D. at 158; *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 608 n.32 (2010), and Wal-Mart has seemingly abandoned it here.

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[7] The employer should have the burden of identifying the subgroups to be evaluated for variance. If the plaintiffs have the burden to anticipate which types of characteristics the employer will argue must be evaluated to determine if the results are sufficiently similar, their expert may have to perform a very large number of unnecessary analyses on any and all potential subgroups that could be formed.

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[*] Empirical labor economists, who seldom have access to company-specific, let alone store-specific, data, are comfortable with broad analyses. The scholarly literature on labor markets is replete with examples of empirical studies – subjected to careful peer review, and published in eminent scholarly journals – studying general patterns, including sex differences in pay, *without* taking account of the multiplicity of decision-makers and decision processes involved in pay decisions. For example, in studying pay in the labor market as a whole, researchers have often used Census and other survey data concerning employees working at a vast number of different employers that do not differentiate among different employers, decision processes or decision-makers. *See, e.g.*, Jacob Mincer, Schooling, Experience and Earnings (1974) (the seminal work on empirical analysis of earnings data); Joseph G. Altonji & Rebecca M. Blank, *Race and Gender in the Labor Market*, in Handbook of Labor Economics 3143 (Orley C. Ashenfelter & David Card, eds., 1999) (a survey of empirical work on race and sex differences in pay).

In this case, the district court weighed the relevant factors. It considered Wal-Mart's policies, the levels at which decisions were made and reviewed, the levels at which Dr. Drogin and Dr. Haworth performed their analyses, the number of analyses performed by each expert, and the results of the Chow test performed by Dr. Haworth. It concluded that Dr. Drogin's analyses based on the 41 regions had adequately supported the conclusion that the claims raised issues common to the class.

That conclusion was not an abuse of the district court's discretion. Of course, the district court also may not have abused its discretion if it had decided to rely on analyses performed at the district, store, or "substore" level to evaluate whether the claims raised questions common to the class. It is possible that analyses performed at a level other than Wal-Mart's 41 regions would have led the court to conclude that a class should not be approved, even after it accounted for the expected variations in results as smaller units of analysis were used. But the district court's conclusion was consistent with statistical and labor economics theory, and should not be disturbed on the basis of Wal-Mart's arguments.

II. STATISTICAL MODELS MAY BE USED IN THE SECOND STAGE OF PATTERN-OR-PRACTICE CASES TO IDENTIFY CLASS MEMBERS ENTITLED TO AWARDS AND THE AMOUNTS OF THEIR AWARDS

An employer violates Title VII if it engages in a pattern or practice of discrimination. If a pattern or practice of illegal discrimination exists, second stage trial proceedings are required to identify the individuals harmed by the discrimination and the nature of their relief. Title VII does not specify the nature of those second stage proceedings. In appropriate cases, the best procedure is to identify the individuals entitled to relief and the quantum of relief for each of them through a statistical formula. If a pattern or practice of discrimination is found during the first stage, this is a paradigmatic case for use of statistical models instead of a large number of separate adjudications to afford individualized relief during the second stage.

A. Title VII Authorizes Pattern-or-Practice Cases Without Specifying How the Second Stage Should Be Conducted

Congress expressly authorized the Equal Employment Opportunity Commission to bring a civil action if it "has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by [Title VII], and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights [described under Title VII]." 42 U.S.C. § 2000e-6(a). Private parties similarly may claim that an employer is engaging in a pattern or practice of discrimination, and "the elements of a prima facie pattern-or-practice case [brought by the government] are the same in a private class action." *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 876 n.9 (1984).

Title VII does not specify how pattern-or-practice cases are to be tried, and this Court created the framework in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). In the first stage, the plaintiff must establish "by a preponderance of the evidence that [ ] discrimination [is] the company's standard operating procedure — the regular rather than unusual practice." *Id.* at 336, 360. If the plaintiff succeeds, a court "may then conclude that a violation has occurred and determine the appropriate remedy," such as "an injunctive order against continuation of the discriminatory practice." *Id.* at 361. If the plaintiff "seeks individual relief for the victims of the discriminatory practice, a district court must ***usually*** conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief." *Id.* (emphasis added). Under the usual rubric, during those additional, or second stage, proceedings, the plaintiff presents evidence showing that the employer made the type of decision under challenge as to an individual employee (for example, in *Teamsters*, that "the individual discriminatee unsuccessfully applied for a job"), and "the burden then rests on the employer to demonstrate that the individual" was not harmed by the "policy of discriminatory decisionmaking." *Id.* at 362.

By use of the word "usually," this Court indicated that a series of individual adjudications would not necessarily comprise the second stage, just as *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), did not "inflexibl[y]" create "the only means of establishing a prima facie case of individual discrimination." *Teamsters*, 431 U.S. at 358. Whether a series of individual adjudications is the most appropriate procedure in any given case should be determined by whether it is the best procedure "to secure the just, speedy, and inexpensive determination" of the action. Fed. R. Civ. P. 1. Incontestably, use of a formula in a case like this one would make the resolution of the lawsuit far more speedy and far less expensive than would a series of individual adjudications. The overriding question, however, is whether use of a formula also will be likely to produce more just results.

To produce just results, the appropriate procedure should be the one best suited to awarding appropriate back pay to persons injured by a pattern or practice of illegal discrimination while avoiding awards to persons uninjured by the discrimination. "[G]iven a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975). The Court should "avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate." *Washington County v. Gunther*, 452 U.S. 161, 178 (1981).

In some pattern-or-practice cases (the parameters of which are discussed in section B below), a statistical model is more likely than a series of individual adjudications to identify with appropriate accuracy the persons injured by a proven pattern or practice of discrimination and the amounts of their awards. This makes a statistical model a more "just" procedure for the second stage of those pattern-or-practice cases.

Wal-Mart argues in its brief that the class should not have been certified because the size of the class would preclude a series of individual adjudications at the second stage and thereby would alter the requirements of substantive law in violation of the Rules Enabling Act, 28 U.S.C. § 2072(b). Class certification supposedly would do so by freeing plaintiffs of their obligation to prove, individual class member by individual class member, the existence of an unlawful employment practice and Wal-Mart's discriminatory animus and depriving Wal-Mart of its right to put forward its defenses vis-à-vis each individual. (Defs. Br. at 38-44; *see also* Amicus Br. of Cal. Employment Law Council ("CELC"), at 11-12.) But the existence of a claim based on a pattern or practice of discrimination is a matter of substantive, not procedural, law. If a second stage occurs, it will be because Wal-Mart is found to have violated that substantive law by engaging in a pattern or practice of discrimination. Indeed, if the government had brought this case, class certification would not have even been an issue, *see General Tel. Co. of the Northwest, Inc. v. Equal Employment Opportunity Comm'n*, 446 U.S. 318, 325 (1980),[9] and yet the parties would be facing the same question of what are the appropriate second stage proceedings. The Rules Enabling Act is not implicated at all by a decision as to the nature of second stage proceedings in pattern-or-practice cases.

B. In Appropriate Cases, A Statistical Formula Should Identify the Persons Injured by a Pattern or Practice of Discrimination and the Amounts of Their Relief

"Our cases make it unmistakably clear that '(s)tatistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue." *Teamsters*, 431 U.S. at 339 (quoting *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 620 (1974)). Regression analyses frequently are used in employment discrimination cases to derive a formula showing the average relationship between an employment outcome (*e.g.*, pay or promotions) and factors, or independent variables, that may be related to it (*e.g.*, sex, race, years of service, performance ratings, prior work experience, and education). *See, e.g.*, *Bazemore v. Friday*, 478 U.S. 385, 401 (1986) (holding that regression analysis constituted admissible evidence in support of pattern-or-practice claim even though it did not include "all measurable variables thought to have an effect on salary level"); *Thornburg v. Gingles*, 478 U.S. 30, 61-62 (1986) (explaining position of United States and appellants in case challenging legislative redistricting that "only multiple regression analysis, which can take account of other variables which might also explain voters' choices . . . , can prove that race was the primary determinant of voter behavior"). In appropriate pattern-or-practice cases, regression analyses can serve to distinguish persons injured by a pattern or practice of discrimination from those who were not and to calculate the amounts of the awards for the injured persons.

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[9] Private parties face a more difficult burden than the government in litigating pattern-or-practice cases because they also have to show entitlement to proceed under Rule 23.

Five factors, several of which did not exist in *Teamsters* when this Court directed a series of individual adjudications, are relevant to whether regression analyses can serve this role:

- The claims and remedies sought are such that relevant, objective data will reasonably be available, generally because it is in the employer's possession. A claim of illegal discrimination in termination decisions, for example, may require consideration of mitigation evidence post-termination that is not likely to be in the possession of the employer. Similarly, a request for compensatory damages may require consideration of data concerning the impact of the alleged discrimination outside the knowledge of the employer.

- The employer has collected and retained that relevant data. The expert reports in this case suggest that Wal-Mart has computerized data on employees' demographics (*e.g.*, race, age, sex), tenure (*e.g.*, years of service, time in current job, leaves), organizational location (*e.g.* job, department, store, district, region) performance review ratings, and compensation. The record in *Teamsters* does not reveal the types of data that the defendants collected and retained, but very few (if any) employers collected and retained the same quantities of data about their employees in the 1960s and 1970s that large employers collect today.[10]

- There is not a single, non-discriminatory objective reason for the employer's decision, such as a test result, in which case sophisticated statistical analyses would be unnecessary. In this case, as in many pattern-or-practice cases brought over the past twenty years, plaintiffs claim that the employer's practices were excessively subjective. The alternative to a statistical formula is numerous individual adjudications in which witnesses give testimony about subjective decisions made many years before – in this case ten or more years before. Many of the decisions undoubtedly seemed mundane at the time to the decision-makers, who of course may, at the time of the hearing, be retired, ill or even dead.[11]

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[10] In the days before the computer age when *Teamsters* was written, not only would there have been far less data with which to conduct a regression analysis, but computers would have lacked the power to conduct the types of sophisticated multivariate analysis that can be performed today.

- The employer has made sufficient decisions for experts to construct a model with strong explanatory power. In general, the larger the number of decisions, such as pay decisions, that can be analyzed, the more precise or accurate the measurement of the effects of the determinants of the decisions. It is unclear how many decisions were at issue in *Teamsters*, but the company employed under 400 class members, not all of whom expressed desire for line-driving jobs, making the number of decisions many orders of magnitude less than in this case. *Teamsters*, 431 U.S. at 331-32;

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[11] Courts have held that individualized hearings are not required, nor warranted, where the employer's conduct would reduce efforts to reconstruct individually what would have happened in the absence of discrimination to a "quagmire of hypothetical judgments." *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260 (5th Cir. 1974). In such cases, courts have concluded that allocating relief based upon statistical analyses "has more basis in reality . . . than an individual-by-individual approach." *Id.* at 263. Seven circuits have explicitly accepted this approach. *See Shipes v. Trinity Industries*, 987 F.2d 311, 316 (5th Cir. 1993); *Stewart v. Gen. Motors Corp.*, 542 F.2d 445, 452-53 (7th Cir. 1976); *Hameed v. Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers*, 637 F.2d 506, 520 (8th Cir. 1980); *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1444-45 (9th Cir. 1984); *Pitre v. Western Electric Co.*, 843 F.2d 1262, 1274 (10th Cir. 1988); *Pettway v. American Cast Iron Pipe Co.* (*Pettway V*), 681 F.2d 1259, 1266 (11th Cir. 1982); *Segar v. Smith*, 738 F.2d 1249, 1289-91 (D.C. Cir. 1984).

- The proposed relief does not require balancing of the equities between members of the protected group and other persons. In *Teamsters*, the government sought appointment of at least some class members to line driving jobs and improvement of their seniority status relative to other employees. This required the district court to strike an "equitable balance . . . between the statutory rights of victims and the contractual rights of nonvictim employees." *Id.* at 376. This type of balancing is incompatible with use of a statistical formula. Where the injured parties seek only back pay, however, such balancing is unnecessary.

When most or all of these factors exist, identification of injured parties and determination of award amounts through statistical analyses in second stage proceedings are likely to produce more just results than would a series of individual adjudications. As to pay discrimination claims, such as those in this case, those regressions can show not only whether there were statistically significant disparities in the compensation of members of the protected group compared to other employees, but also which employees were paid less than expected by the model and by how much they were underpaid. And as to promotion discrimination claims, those regressions can show which members had the highest likelihood of being promoted to any vacant positions. Such regression formulas – and the pay adjustments resulting from it – would be tailored to the circumstances and characteristics of each individual woman in the litigation.

As a very simple illustrative example,[12] consider an analysis that took account of pay in relation to two factors: years of service and performance evaluation. One possible result for such an analysis would be that pay per month equals \$4500 + (\$75 x years of service) + (\$120 x performance evaluation score). The coefficients, or "weights," placed on the factors in the regression depend entirely on the employer's own pay-setting behavior. In the example, the employer's actual decisions reflect that it places more value on a higher performance score than it does on an extra year of service, regardless of whether that is the employer's stated policy.

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[12] The examples below assume a single regression in which awards are determined based on the amount by which a woman's compensation was below the predicted value. In fact, statistical modeling could be done in multiple ways and the judge would determine which approach was appropriate for any particular case.

Inserting each female employee's years of service and performance evaluation score into the regression formula would yield the predicted pay for each of them. For example, a woman with ten years of service and a performance evaluation score of 4 would have predicted pay of $5,730 (4500 + (75 x 10) + (120 x 4)). Finally, comparing the difference between the pay predicted for this woman with her actual pay would yield the shortfall or excess for her. If the woman's actual pay was $5,000 per month, then the shortfall would be $5,730 – $5,000 = $730, and she would be entitled to back pay; if her actual pay was equal to or greater than $5,730, she would receive no award.[13]

Of course, the example, which considers pay adjustments based on only two characteristics, is for illustrative purposes only. Because Wal-Mart's computerized data and hard-copy files include information on many characteristics, the actual pay adjustments for Wal-Mart's female employees could be based on the entire set of these characteristics.[14]

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[13] There is no need for individualized eligibility hearings in addition to the formula. *See Segar*, 738 F.2d at 1289-91; *EEOC v. O & G Spring & Wire Forms Spec. Co.*, 38 F.3d 880 n.9 (7th Cir. 1994); *Shipes*, 987 F.2d at 316; *Liberles v. County of Cook*, 709 F.2d 1122, 1136 (7th Cir. 1983); *EEOC v. Chicago Miniature Lamp Works*, 640 F. Supp. 1291, 1298-1300 (N.D. Ill. 1986) and 668 F. Supp. 1150, 1151, 1153 n.7 (N.D. Ill. 1987).

[14] The *amicus* brief of the CELC complains (at 7 n.5) that "a female meat cutter with one year of experience, hired at $15 per hour, on the same day that a male meat cutter with 20 years of experience is hired at $16 per hour, will be statistically presumed to be a discrimination victim and entitled to back pay.

(Continued on following page)

Although this procedure would correct the effect of sex on pay as revealed in the data, it would in all other respects faithfully follow the weight that the employer itself gave to every other factor in setting pay.

This procedure is more likely to yield just results when the five factors above exist than would a series of individual adjudications. The results would likely be more accurate and consistent across individuals than would a series of individual adjudications. The second stage formula would be derived only after both sides had an opportunity to present testimony from their experts and other witnesses, and the resulting formula presumably would reflect the best thinking of both sides. It is unlikely that a decision emanating from a mini-hearing – not a full-fledged trial, *see Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. at 175-76 (explaining that second stage proceedings "typically consist of mini-hearings presided over by a special master or the court") – would prove more accurate in

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The potential discriminatees would receive back pay according to formula, with no opportunity for the defendant to prove the absence of discrimination." However, this ignores the fact that, to the extent that information on non-Wal-Mart job experience is not contained in Wal-Mart's electronic database, the parties may use paper personnel records such as job application forms to code information on prior work experience (not only in total, but also by type of occupation and industry) and incorporate this information into the "formula" used for determining back pay. Thus, the defendant has ample opportunity to develop a formula to "prove the absence of discrimination," if no discrimination exists.

evaluating ten year or older memories of subjective decisions. Indeed, to produce just results, the mini-hearing process would require the same type of regression analysis that would underlie a formula. Using the example posited by the CELC, if a male meat cutter was paid more than an otherwise comparable female meat cutter and Wal-Mart's explanation was that he had 19 more years of pre-Wal-Mart experience, it would be necessary to evaluate the data to determine the extent, if any, to which Wal-Mart actually valued pre-company experience, unless the factfinder simply credited the company's testimony about the value placed on pre-company experience.

The use of a formula also would produce more just results than a series of individual adjudications because a large percentage – almost certainly the majority – of persons injured by the pattern or practice of discrimination would hesitate to engage in mini-hearings or full-fledged trials against their employer. Courts recognize that employees often are hesitant to sue their employers even if they have valid claims. *See, e.g.*, *EEOC v. Fed. Exp. Corp.*, 558 F.3d 842, 849 (9th Cir. 2008) (explaining that EEOC "may file a charge when a victim of discrimination is reluctant to file a charge for fear of employer retaliation"); *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 295 (2d Cir. 1999) ("[T]here are many reasons why a victimized employee may be reluctant to report acts of workplace harassment"); *Marshall v. A & M Consol. Indep. Sch. Dist.*, 605 F.2d 186, 190 (5th Cir. 1979) (explaining that Congress allowed

Secretary of Labor to sue for Fair Labor Standards Act violations partly because it "will secure wages for the many employees who are reluctant to sue their employer").

Finally, use of a formula would be fair because it ensures consistency of results. Everyone with the same set of characteristics would be treated in exactly the same way; everyone with different sets of characteristics would be treated differently, to the extent warranted by the regression-derived salary formula.

For these reasons, the district court should be allowed to adopt a formulaic approach to dispensing backpay relief if Wal-Mart is found to have engaged in a pattern or practice of discrimination.

◆

CONCLUSION

Amici do not have a professional interest in whether the Court affirms or reverses the class certification decision. *Amici*, however, urge the Court to (1) reject the argument that regressions had to be performed on a store-by-store basis to establish whether the claims raised issues common to the class, and (2) permit use of a statistical model to identify those class members entitled to receive backpay awards and calculate the amounts of their awards, if Wal-Mart is found liable for engaging in a pattern or practice of sex discrimination.

February 25, 2011

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APPENDIX

Each of the *amici* has served as an expert witness in multiple pattern-or-practice employment discrimination cases. The affiliations and selected scholarship of the *amici* are:

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Department of Economics, Rutgers University

Three Publications on Related Topics

Comparable Worth and Pay Equity: Recent Developments in the United States, CANADIAN PUBLIC POLICY, Vol. 28 (Supplement), 2002, pp. S171-S186

Analyzing Employment Discrimination: From the Seminar Room to the Courtroom, 83 AMERICAN ECONOMIC REVIEW 67-72 (1993)

Heterogeneous Preferences, Compensating Wage Differentials and Comparable Worth, 102 QUARTERLY JOURNAL OF ECONOMICS 727-742 (1987)

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George Quist Chair in Business Ethics
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Three Publications on Related Topics

(with D. Levine and A. Joshi) *Do Birds of a Feather Shop Together? The Effects on*

Performance of Employee's Similarity with One Another and with Customers, 25 JOURNAL OF ORGANIZATIONAL BEHAVIOR 731-54 (2004)

(with T. Kochan, et al.) *The Effects of Diversity on Business Performance: Report of the Diversity Research Network*, 42 HUMAN RESOURCE MANAGEMENT 3-21 (2003)

Wage Disparities and Affirmative Action, AMERICAN ECONOMIC REVIEW, Papers and Proceedings 86 (May 1996)

JANICE F. MADDEN, PH. D.

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Three Publications on Related Topics

MOMMIES AND DADDIES ON THE FAST TRACK (2004)

CHANGES IN INCOME INEQUALITY WITHIN U.S. METROPOLITAN AREAS (2000)

THE ECONOMICS OF SEX DISCRIMINATION (1972)

BERNARD R. SISKIN, PH. D.

Affiliations

Affiliate and Former Director
LECG

Adjunct Professor of Law School
Temple University

Three Publications on Related Topics

(with J. Trippi) *Employment Discrimination Litigation: Behavioral, Quantitative, and Legal Perspectives,"* in STATISTICAL ISSUES IN LITIGATION, ch. 5 (2005)

(with J. Staller) WHAT ARE THE CHANCES? (1989)

Utilizing Statistics in Discrimination Cases, LITIGATION HANDBOOK SERIES (2001)

ALEXANDER VEKKER, PH. D.

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Vice President
Econsult Corporation

Visiting Faculty
Department of Economics,
University of Pennsylvania

Publication on Related Topic

(with Michael Morris) *An Alternative Look at Temporary Workers, Their choices and the Growth in Temporary Employment*, JOURNAL OF LABOR RESEARCH. Vol. 22(2) (Spring 2001)

AMICUS
CURIAE
BRIEF

23

No. 10-277

In The
Supreme Court of the United States

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WAL-MART STORES, INC.,

Petitioner,

v.

BETTY DUKES, et al.,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE*, LAW AND ECONOMICS PROFESSORS IN SUPPORT OF RESPONDENTS

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Kraszewski v. State Farm Gen. Ins. Co., No. C-70-1261 TEH, 1986 WL 11746 (N.D. Cal. July 17, 1986) 18

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Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 14

Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984) 3, 20

United States v. City of Miami, 195 F.3d 1292 (11th Cir. 1999) 3, 20

OTHER AUTHORITIES

Bielby, William T. & Coukos, Pamela, *"Statistical Dueling" with Unconventional Weapons: What Courts Should Know About Experts in Employment Discrimination Class Actions*, 56 EMORY L.J. 1563 (2007) 23

Bone, Robert G. & Evans, David S., *Class Certification and Substantive Merits*, 51 DUKE L.J. 1251 (2002) 10

Davis, Joshua P., Class-Wide Recoveries 18, 19

Fiske, Susan T., *Stereotyping, Prejudice, and Discrimination*, *in* 2 HANDBOOK OF SOCIAL PSYCHOLOGY 357 (Daniel T. Gilbert, S.T. Fiske & Gardner Lindzey eds., 4th ed. 1998) 24

FRIENDLY, HENRY J., FEDERAL JURISDICTION: A GENERAL VIEW (1973) 9

Page

Hay, Bruce & Rosenberg, David, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 Notre Dame L. Rev. 1377 (2000) 11

Howard, John W. & Rothbart, Myron, *Social Categorization and Memory for In-Group and Out-Group Behavior*, 38 J. Personality & Soc. Psychol. 301 (1980) 24

Inst. for Corp. Justice, RAND Inst., Anatomy of an Insurance Class Action (2007) 4

Landers, Jonathan M., *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. Cal. L. Rev. 842 (1974) 9

Lee, III, Emery G. & Willging, Thomas E., Fed. Judicial Ctr., Impact of the Class Action Fairness Act on the Federal Courts: Preliminary Findings from Phase Two's Pre-CAFA Sample of Diversity Class Actions (2008) 5, 6

Lee, III, Emery G. & Willging, Thomas E., Fed. Judicial Ctr., The Impact of the Class Action Fairness Act of 2005 on the Federal Courts: Fourth Interim Report to the Judicial Conference Advisory Committee on Civil Rules (2008) 5, 8

Page

Park, Bernadette & Rothbart, Myron, *Perception of Out-Group Homogeneity and Levels of Social Categorization: Memory for the Subordinate Attributes of In-Group and Out-Group Members*, 42 J. PERSONALITY & SOC. PSYCHOL. 1051 (1982) 24

Silver, Charles, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003) 10, 11

Swim, Janet K. & Sanna, Lawrence J., *He's Skilled, She's Lucky: A Meta-Analysis of Observers' Attributions for Women's and Men's Successes and Failures*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 507 (1998) 25

INTEREST OF *AMICI CURIAE*

The law professors named below teach and write about law and economics, class certification, empirical methods, employment discrimination law, or a combination thereof. They have spent a considerable amount of time thinking, writing, and teaching about the statistical methodologies, civil procedure, and antidiscrimination law issues before the Court. A partial list of their scholarship on these issues appears as an Appendix. Based on this expertise, *amici* argue that Petitioner has not presented a balanced picture concerning the prevalence of so-called "blackmail settlements" through class action filings, the empirical support for which does not adequately exist (Parts I & II, *infra*), and concerning the appropriate role of statistical inference in class action litigation (Part III, *infra*). *Amici* respectfully submit this brief so as to offer this Court a more balanced presentation of these two issues.[1]

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SUMMARY OF ARGUMENT

Petitioner Wal-Mart and its *amici* have called into question the use of class actions in employment discrimination cases. They view class certification as a vehicle for rent-seeking behavior, *i.e.*, extracting surpluses from defendants in the shadow of unmeritorious complaints, and as unnecessary for resolving employment discrimination claims among many commonly affected plaintiffs. The myth of "blackmail settlements" has led to unsubstantiated claims that, as class numerosity and the size of potential judgment awards increase, so too does the likelihood that class action plaintiffs are merely taking advantage of risk-averse defendant corporations. This assertion, however, lacks any strong basis in empirical evidence for class actions in general and, more important for the case at bar, employment discrimination class actions in particular. On the contrary, only a small fraction of classes that moves for certification is in fact certified by the federal courts, and, proposed classes overwhelmingly opt to dismiss their cases voluntarily or have them removed to state court. Combined with the steep discovery costs often needed to prevail at the certification stage, plaintiffs face little financial incentive to pursue certification without a reasonable belief in the claim's merits. The procedural and financial barriers to entry are even higher when, as in the case at bar, Respondents complain about subjective and discriminatory patterns and practices.

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[1] All of the parties in this case have consented to the filing of this brief. No counsel for any party to this case authored any part of this brief and, other than *amici* on whose behalf this brief is submitted and their counsel, no person or entity contributed money or services to the preparation and submission of this brief.

Similarly, Petitioner and its *amici* assert that employment discrimination claims are more accurately and more fairly adjudicated on a smaller, more individualized scale. Class actions, however, offer the courts and litigants several benefits that Petitioner and its *amici* discount or try to refute entirely. First, aggregate resolution of common discrimination claims promote systemic efficiency, *see Blackman v. Dist. of Columbia*, No. 10-7019, 2011 WL 281036, at *13 (D.C. Cir. Jan. 28, 2011), and redress asymmetries between plaintiffs subject to the same discriminatory practices, none of whom could shoulder the burden of individual litigation, and defendants who enjoy built-in economies of scale. Second, class actions reduce the noise that attends individual, yet common, claims of employment discrimination, allowing the courts to attach liability more precisely than in the disaggregated approach favored by Petitioner and its *amici*. Third, district courts can more accurately evaluate proof of damages and compute award magnitudes through an aggregate statistical analysis. Plaintiffs are more likely to receive only the amount necessary to compensate them for discrimination harms (and no more), while defendants can avoid the excessive liability often created by individualized approaches to recovery. Hence, the federal courts long have recognized the inherent value of aggregate assessments of liability and damages. *See, e.g.*, *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264 (5th Cir. 2008); *United States v. City of Miami*, 195 F.3d 1292 (11th Cir. 1999); *Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984); *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974).

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ARGUMENT

I. DATA INDICATE THAT CLASS CERTIFICATION IS A RARE EVENT, AND CIVIL RIGHTS CLASS ACTIONS ARE AMONG THE RAREST

Petitioner argues that the lower courts in this case erred in certifying the Wal-Mart employees as a class because the requirements set out in Rule 23(a) were not satisfied. Relying on the standards in, among other cases, *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147 (1982), and *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), Petitioner denies that the original complaint demonstrates the commonality, typicality, and adequacy prongs of the Rule. Petitioner attempts to bolster its strictly legal claims that the Rule was not satisfied in this case by urging this Court, as a matter of prudence, to read class certification requirements very stringently because, Petitioner asserts, class certification has grown rampant and unchecked in the federal courts. To the contrary, complaints that begin as class actions rarely obtain judicial certification. This Court should therefore reject Petitioner's implicit assumption in light of the data on class action dispositions.

Collecting and analyzing data on the universe of class actions traditionally has been difficult given the diversity of legal issues and the frequent removal of state cases to federal court. INST. FOR CORP. JUSTICE, RAND INST., ANATOMY OF AN INSURANCE CLASS ACTION 1 (2007) ("Courts do not generally track and report on class actions, and, often, only the attorneys involved know the outcomes of settlements. Almost all that is empirically known is based on the few cases in which a judge certifies the absent plaintiffs as a class."). Fortunately, social scientists are beginning to shed light on actual practices and provide a more accurate description of class action dispositions. Two recent studies conducted by the Federal Judicial Center indicate rather clearly that Petitioner's claims about class action patterns have little grounding in empirical fact. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., IMPACT OF THE CLASS ACTION FAIRNESS ACT ON THE FEDERAL COURTS: PRELIMINARY FINDINGS FROM PHASE TWO'S PRE-CAFA SAMPLE OF DIVERSITY CLASS ACTIONS 2 (2008) [hereinafter LEE & WILLGING I]; EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS: FOURTH INTERIM REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2008) [hereinafter LEE & WILLGING II].

First, reported data usually distinguish the broader category of filings of proposed class actions from the outcomes of interest in this case: class certifications. One investigation of 748 claims filed against insurance companies between 1993 and 2002 reports striking results. Over the period analyzed the absolute number of attempted class actions increased almost seven-fold. INST. FOR CORP. JUSTICE, *supra*, at 1. Yet, among the 564 class actions in which plaintiffs *sought* certification that had closed at the time of the study, only 78 (14%) *were certified* for class treatment.

Id. at 2. Of the remainder, 37% were subject to a pretrial ruling for the defense and another 27% were voluntarily dismissed by the plaintiff. Thus, Petitioner's subtle intimations that class action certification has become commonplace, at first glance, seem to be without merit.

Second, studies covering a wider array of litigation matters provide little support for the hypothesis that the federal courts have shown a pro-certification bias. Just as in the insurance industry report, an investigation of 231 diversity cases found that plaintiffs ultimately filed motions to certify a class for litigation purposes in fewer than one in four lawsuits that had been originally filed as proposed class actions. LEE & WILLGING 1, *supra*, at 2. Among other empirical facts, the report's authors concluded that:

- Parties proposed class settlements in 21, or 9%, of the 231 class actions;
- Voluntary dismissal was the most frequent disposition of cases not remanded, occurring 38% of the time; and
- One in five cases was terminated by the court granting a dispositive motion [for the defendants]. *Id.*

After voluntary dismissals, the most frequent outcome among the sampled cases was a remand to state court (30%) or a judicial ruling dismissing the entire complaint (20%). *Id.* at 6 tbl. 6. Thus over three-quarters of all the class actions studied were either dropped by the complaining party or removed from the federal courts.

The evidence from these objective examinations undercuts the notion that, once a potential set of plaintiffs achieves requisite numerosity, district courts routinely or automatically find that the other requirements of Rule 23 are satisfied. Although Petitioner does not claim outright that class certification in general has outpaced what proper application of the law would predict, it certainly argues that certification was inappropriate in the case at bar and suggests a broader problem, while its *amici* have quite openly posited that the floodgates on class certification would open if this Court affirmed the ruling below. An examination of the record here demonstrates that compelling econometric data in Respondents' expert reports, examined at length by the district court, provided a more than adequate basis for finding of typicality and commonality here. Moreover, if the courts below committed "multiple and manifest errors in allowing the case to proceed as a class action," then we would expect other courts faced with similar factual records to "mistakenly" order class certification. That the incidence of certification is so rare, combined with the reliable statistical inference performed by Respondents' experts, suggests that the courts below favored certification in this case for legally valid reasons.

Even if one were to analyze the class action data at a higher level of generality, the conclusion would remain the same: class actions are dwindling in frequency as a method of resolving multiple plaintiffs' claims in employment discrimination suits. A study of the Class Action Fairness Act's (CAFA) effect on plaintiff behavior concluded that, although CAFA had spurred more class actions overall filed in or removed to federal court (as was Congress's intent), the 72% growth in diversity class actions across 88 district courts stemmed from a higher incidence of contracts, consumer protection/fraud, and torts-property damage claims. LEE & WILLGING II, *supra*, at 2. Over the same time period

> civil rights class actions [of which employment discrimination class actions are a subset] declined in absolute numbers, from 195 in July-December 2001 to 162 in January-June 2007, a decrease of 17 percent. Civil rights class actions constituted 6.9 percent of total class action filings and removals in January-June 2007, compared with 14.2 percent in July-December 2001.

Id. at 5. Note that class actions here are defined not as the subset of complaints that achieve Rule 23(a) certification. They encompass more broadly all complaints brought as proposed class actions. Thus, the decline in civil rights cases represents not only a conservative estimate for the decline in civil rights class certifications but, more important, the waning of employment discrimination class action certifications, a subset of all civil rights certifications.

II. THE EMPIRICAL EVIDENCE ON CLASS ACTIONS PROVIDES NO SUPPORT FOR A "BLACKMAIL SETTLEMENT" ARGUMENT AGAINST CERTIFICATION

Petitioner and its *amici* also argue that a certified class action imposes an undue burden on defendants, especially those averse to the risk of liability at trial. The myth of compelled settlement through class actions comes in many guises. Some courts have referred to "legalized blackmail," *Deposit Guar. Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326 (1980) (citing Jonathan M. Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842 (1974)), or "blackmail settlements," *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995). Regardless of the label, such class actions are viewed as generating "settlements induced by a small probability of an immense judgment in a class action." HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973). There are, however, no empirical data that substantiate the view that defendants regularly make offers in excess of their best estimate of expected liability, simply because they fear low probability, but extremely high, judgment awards.

Petitioner and its *amici* suggest one can infer that a class has obtained a blackmail settlement, in part, because of high civil litigation settlement rates generally. But one also would have to believe that settlement is common only when there are special reasons attributable to class certification for defendant risk aversion for such an inference to be plausible. The data indicate, however, that high settlement rates are ubiquitous in civil litigation; settlement rates in class action suits closely parallel settlement rates in litigation brought by individual parties more generally. *See* Robert G. Bone & David S. Evans, *Class Certification and Substantive Merits*, 51 DUKE L.J. 1251, 1285 n.129 (2002); Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1401-02 (2003).

The reason that we might observe more settlements in discrimination suits brought by groups than in those brought by individuals is that, individual employment discrimination plaintiffs might not be able to bear the costs required to prove a defendant's liability, so the expected value of litigation falls short of the expected value of recovery based on the underlying merits of the suit. But, more generally, when individuals bring suits that are viable as individual actions, *i.e.*, where expected damages exceed suit costs, settlement rates are just as high as they are in class action cases. Thus, the different cost structures for substantiating employment discrimination claims brought by groups or individuals implies that class plaintiffs without a valid claim have little financial incentive to move for certification solely to obtain a settlement award.

Petitioner contends that blackmail settlements are an inherent element of sizeable class actions, if not all class actions, in employment discrimination cases such as the one before this Court. To the contrary, commentators reject the idea that both blackmail and "sweetheart" settlements (whereby the principal-agent problem drives a wedge between the plaintiff class's and counsel's interests) are necessarily linked to certification. The myth has been overstated. Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1379 (2000). Formal empirical review undermines the proposition of blackmail settlements because there is no factual reason to believe that settlements are not tied to a claim's merits rather than the size of the award sought. *See* Silver, *supra*, at 1359. The magnitude of potential damages does not pose a threat of blackmail so long as defendants settle based on the odds of their losing and their potential liability as grounded in a defensible quantitative analysis, as has been conducted in the case before this Court. *See id.* at 1367 ("Companies that break billion-dollar promises should face billion-dollar losses at trial. . . . A civil justice system in proper working order should therefore always cause a person with an enormous legal obligation to fear losing an enormous sum at trial."). In addition, this Court has recognized that aggregating plaintiffs into a certified class, *without more*, should not be viewed as a settlement threat by defendants. The class action device simply solves a collective action problem. *Amchem*, 521 U.S. at 617 ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.") (internal quotation marks omitted).

Briefs filed by Petitioner's *amici* suggest that employment discrimination plaintiffs can move to have a class certified, thereby threatening the possibility of very large judgments, almost without any cost. *See* Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioner at 16, Wal-Mart v. Dukes, No. 10-277 (Jan. 2011) ("The decision below interpreted [precedent] as essentially carving out a cause of action whereby a plaintiff can leverage her own alleged injury, plus statistical disparities in the employee population, into a lawsuit on behalf of all persons who claim to have fallen victim to one or another aspect of an 'overall policy.'"). In the antidiscrimination arena, however, it is typically costly for plaintiffs' lawyers to establish the existence of a class. This barrier to entry for individual plaintiffs is true even when plaintiffs complain solely about a fairly well-specified, narrow practice (*e.g.*, the use of a particular screening device for hiring or promotion that might either have been consciously adopted to restrict a protected group's access or might simply have unjustified disparate impact) given that they still will have to establish some sort of commonality in the impact that the practice had on the plaintiff group. The barrier is *especially* high, though, when – as in this case – Respondents complain about a range of specific and more generalized practices, namely related to undue subjectivity and corporate culture.

While class action plaintiffs do not have to present statistical evidence at the certification stage sufficient for them to prevail on the merits, they usually need to obtain and analyze statistical evidence (at great cost) for the court to make a reasonable inference that common issues will predominate in assessing allegedly discriminatory practices. The argument that class certification will open up the floodgates to blackmail suits depends on the unwarranted assumption that plaintiffs' lawyers will be willing to bear these high upfront costs of pursuing litigation absent strong reason to believe they can prevail on the merits, *i.e.*, by showing disparities in pay or promotion rates relative to industry-comparable employers, observed features of corporate culture that are typical of employers whose behavior has been found to violate Title VII strictures in the past. Even if plaintiff's lawyers were willing to engage in expensive discovery and motion practice in pursuing a weak case – which is not very plausible – the district courts would typically find through "first-round" statistical evidence that there is often no reason to believe that the plaintiffs have identified any unifying practices that impact pay or promotion, corrected for distinctions in relevant traits. This reasoning comports with the empirical findings on judicial decisions not to certify proposed classes noted *supra*.

Finally, as a matter policy, this Court has acknowledged that the costs of litigation or settlement raise important issues, but altering the standards under the Federal Rules is not the appropriate solution.

Cf. Reiter v. Sonotone Corp., 442 U.S. 330, 344-45 (1979) ("[R]espondents argue that the cost of defending consumer class actions will have a potentially ruinous effect on small businesses in particular and will ultimately be paid by consumers in any event. These are not unimportant considerations, but they are policy considerations more properly addressed to Congress than to this Court."); *see also* Brief for the United States as Amicus Curiae at 8, Erica P. John Fund, Inc. v. Halliburton, Co. No. 09-1403 (Dec. 2010) ("None of those rationales links proof of loss causation to the prerequisites for class certification under Rule 23. . . . [T]he . . . view that class actions bestow 'extraordinary leverage' upon plaintiffs does not authorize it to impose requirements above and beyond those specified in Rule 23.") (internal citation omitted). Thus, even if Petitioner were to offer evidence supporting the blackmail settlement hypothesis – which it has not – denying certification for Respondents would not be the appropriate remedy for a systemic failure in civil procedure.

III. AGGREGATING INDIVIDUAL CLAIMS THROUGH THE CLASS CERTIFICATION PROCESS REDUCES ERROR COSTS AND PROMOTES SOUND INFERENCE REGARDING PATTERN AND PRACTICE DISCRIMINATION IN THE WORKPLACE

The efficiencies with respect to litigation costs, accuracy in determining liability, and the more efficient calibration of damages all are promoted by the aggregation of individual workplace discrimination claims into a certified class action.

A. Class Actions Promote the Fair and Efficient Adjudication of Large-Scale Claims

First, the federal courts have recognized the cost-saving and efficiency gains advanced by class actions. *See, e.g., Blackman v. Dist. of Columbia*, No. 10-7019, 2011 WL 281036, at *13 (D.C. Cir. Jan. 28, 2011) ("Class actions offer the possibility of economies of scale in litigation by resolving the claims of many similarly situated parties in one action rather than forcing each individual claim to be brought as a separate action."). Moreover, in some cases, individual plaintiffs would find the cost of separate litigation so onerous as to preclude satisfactory resolution of the claim. *See In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283 (3d Cir. 1998) ("[O]ne of the primary rationales for class actions is allowing access to the courts for parties whose individual claims are so small that it would be economically infeasible to pursue them individually.")

As Professors Hay and Rosenberg have observed, if plaintiffs were forced to litigate their common claims separately, "a defendant facing a large number of plaintiffs generally has an enormous, and unwarranted, upper hand over the plaintiffs. The defendant firm, but not the plaintiffs, can take advantage of economies of scale in case preparation, enabling it to invest far more cost-effectively in the litigation." Hay & Rosenberg, *supra*, at 1379.

Second, class actions help courts pinpoint liability much more accurately than several individual suits brought by aggrieved employees. Consider an example from the world of law school admissions testing.

Assume, for the sake of argument, that law schools admit students entirely on the basis of their performance on the Law School Admission Test (LSAT); admission to law school thus is analogous to a workplace "promotion." The LSAT is centrally administered, just as we are assuming, again, for argument's sake, that Petitioner's promotion policies are entirely centrally administered. The central office – the Education Testing Service (ETS) for the LSAT case and Wal-Mart corporate headquarters in the case at bar – "scores" all candidates for "promotion." In the LSAT case, assume each law school (the equivalent of a local store) accepts (promotes) 100 of its 200 applicants, and the applicant pool is evenly divided between men and women. Fifty female and 50 male applicants have a "true" LSAT score of 170, *i.e.*, if they took the test often enough, their individual average scores would converge to 170, and the other 50 female and 50 male applicants have a "true" LSAT of 168. Of course, the tests are a bit random (just as promotion decisions contain random error): test scores around the mean have a standard deviation of 4 points.

Now imagine that ETS engages in blatant sex discrimination; it reduces the reported score of each woman by 1 point (a quarter of a standard deviation.) Such action will not preclude women from admission to any law school or the law school of their choice, but it will lower the probability that any woman with the same underlying qualifications as a man will gain admission. In the employment discrimination context, most "pattern and practice" sex discrimination cases work in the same way. For instance, failing to use a public posting system does not preclude women from learning about job vacancies, but women are less likely to be aware of them. The key question, then, is whether we will observe this blatant sex discrimination if we merely look at schools with admissions classes of 100: the answer decidedly is no. Although absent the discrimination, we would expect to observe (over a very large number of cases) equal representation for men and women in first-year cohorts, we actually would observe statistically significant sex discrimination in only 26% of cases. Moreover, we would observe more women than men in roughly 7% of the entering law school classes, even though women are not more qualified and actually are the victims of blatant discrimination.

Finally, an aggregate approach to recovery can better calibrate the damages a defendant pays to reflect *only* the harm and *all* of the harm that the defendant causes. Consider a claim for lost wages based on a discriminatory failure to promote women. Imagine further that men received promotion to 60 supervisory positions and that 100 women were both eligible for those positions and better qualified than the 60 men who were promoted. In an individualized litigation strategy, each of the women would have a good chance of prevailing. After all, the odds alone would suggest that, absent discrimination, each woman would have been promoted; each faced a greater than 50% chance. The cumulative effect of these individual determinations could be excessive liability. The employer would have to pay lost wages to all 100 women although we know with certainty only 60 of them suffered harm. *See, e.g., Kraszewski v. State Farm Gen. Ins. Co.*, No. C-70-1261 TEH, 1986 WL 11746, at *1 (N.D. Cal. July 17, 1986). The converse could occur as well. If, say, only 40 of the 100 women would have been promoted, because 20 men were more qualified than the group of 100 equally qualified women, no individual woman might satisfy the preponderance of evidence standard in litigation even if a statistical analysis could establish with a great degree of certainty – much greater than the preponderance of evidence standard – both that discrimination had occurred and that a certain number of women in the aggregate suffered resulting harm. The sorts of high error costs under an individualized approach to damage calculations can lead, respectively, to excessive or insufficient deterrence, imposing significant social costs. *See* Joshua P. Davis, Class-Wide Recoveries 18-23 (unpublished manuscript, available at http://ssrn.com/abstract=1768148).

A robust statistical analysis can be used to gauge the total harm to the class with great confidence even if we cannot be sure with similar confidence which of the class members suffered individual harm. An individualized approach to recovery, therefore, can give rise to excessive liability or inadequate damages. A class-wide approach, in contrast, could calibrate liability at just the right amount. If 60% of a class of 100 women failed to receive promotion because of sex discrimination, the employer could be forced to pay the wages lost by that percentage of the class for a total liability of $600,000, precisely the harm the legal violation caused. If 40% of the class failed to receive promotion, awarding $400,000 would have the same effect. For purposes of liability and deterrence – that is, from the perspective of employer – the court could award just the right amount. *Id.*

Further, under an appropriate aggregate approach to liability made possible by class certification, a defendant's liability will not be affected by the class containing some members who were not injured, nor should it be as discussed *infra*. Multivariate regression analysis, for example, can be used to assess the total lost wages to a class as a whole. If class members are included who suffered no harm, their presences would not increase the total harm calculated; it would just decrease the average harm per class member. A statistical analysis, if done properly, will capture the total harm done to the class, *id.* at 39-40, and also can provide individualized damages calculations for allocation among class members.

Additionally, under an aggregate approach to recovery, evidence that any particular class member was not harmed should have no effect on a defendant's overall liability. If there is evidence, for example, that a particular class member would not have promoted – even decisive evidence – that would simply increase the likelihood that other women in the class would have been promoted but for discrimination. *Id.* at 34.

The federal courts have recognized the value of establishing proof of damages in the aggregate rather than through piecemeal, individual adjudications. In *United States v. City of Miami*, 195 F.3d 1292 (11th Cir. 1999), the 11th Circuit reaffirmed its belief that awarding remedial backpay in an employment discrimination suit "is appropriate when fashioning an individualized remedy would create a quagmire of hypothetical judgment[s] as to which individuals, out of a large class, should receive remedial relief." *Id.* at 1299 (internal quotation marks omitted). The court's preference for class-based relief would "avoid both granting a windfall to the class at the employer's expense and the unfair exclusion of claimants by defining the class . . . too narrowly." *Id.* at 1299-1300 (quoting *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 262 n.152 (5th Cir. 1974)); *see also McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 281 (5th Cir. 2008) ("In this case, the district court concluded that the size of the class and the inherent uncertainty of the individual claims contraindicates the use of an individualized approach. We agree."); *Segar v. Smith*, 738 F.2d 1249, 1290 (D.C. Cir. 1984) ("We perceive no error in the District Court's finding that it would be impossible to reconstruct the employment histories of DEA's senior black agents. Examination of discrete promotion decisions, as difficult as even that might be, will not suffice.").

Despite these justifications for aggregation, Petitioner and its *amici* would have this Court require some division of the class certified by the courts below into subunits for separate disposition. One argument in favor of subdivision, advanced by Petitioner and its *amici*, is that a class as large as the one certified by the courts below in this case is inherently too expansive. But this Court has held otherwise:

> Nothing in Rule 23 . . . limits the geographical scope of a class action that is brought in conformity with that Rule. Since the class here was certified in accordance with Rule 23(b)(2), the limitations on class size associated with Rule 23(b)(3) actions do not apply directly. Nor is a nationwide class inconsistent with principles of equity jurisprudence, since the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class. If a class action is otherwise proper, and if jurisdiction lies over the claims of the members of the class, the fact that the class is nationwide in scope does not necessarily mean that the relief afforded the plaintiffs will be more burdensome than necessary to redress the complaining parties.

Califano v. Yamasaki, 442 U.S. 682 (1979) (quoting *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 414-420 (1977)).

Scholars also have devoted attention to the issue of class subdivision and its relationship to prima facie showings of employment discrimination They point out that, in response to class certification motions, defendants typically argue that the analysis should take place at some disaggregated level, where subunits (*e.g.*, geographic regions, individual stores, specialty departments) are compared to each other rather than analyzing all employees forming the company's employment base. *See, e.g., Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 288 (2d Cir. 1999) (describing how defendant's expert's main rebuttal to the plaintiffs' report was that the analysis "was done on a company-wide basis and not on a position-by-position basis" and therefore the report "had created a statistical illusion of disparity by aggregating data across many different job titles."); *Krueger v. N.Y. Tel. Co.*, 163 F.R.D. 433, 440 (S.D.N.Y. 1995) (recounting how defendants countered plaintiffs' framing of the challenging employment action as "most assuredly *not* a single event which can be analyzed in the aggregate" and rather that "the plaintiff class members [were] scattered across forty-three of the sixty-nine banding entities, each subject to dissimilar treatment in almost every respect"). One simulation exercise even prompted the conclusion that

> courts should become more critical of statistical expertise purporting to test for subunit differences, particularly when offered at the class certification phase of the case. Under some circumstances, the statistical approach often used to oppose class certification in

> employment discrimination litigation is guaranteed to support the defendant's position, *regardless of the actual facts of the case*.

William T. Bielby & Pamela Coukos, *"Statistical Dueling" with Unconventional Weapons: What Courts Should Know About Experts in Employment Discrimination Class Actions*, 56 EMORY L.J. 1563, 1565 (2007) (emphasis added). In both *Krueger*, the case that introduced the phrase "statistical dueling" into the legal lexicon, and *Caridad*, federal courts rejected a subunit approach and ordered class certification.

B. Aggregation Reduces the Noise Surrounding Individual Experiences of Employment Discrimination and Increases Sound Inferences about Discriminatory Patterns and Practices

The very nature of discrimination calls for the statistical inferences that can be achieved only through aggregate analysis. When we describe some centralized rule or practice that emerges from the combination of central mandates and local practice, we include not only practices with binary outcomes (*e.g.*, no women are promoted, all women receive lower wages relative to men), but ones with *probabilistic* features.

Assume, for example, that a company's practice of failing to post the availability of promotion opportunities reduces the proportion of women, relative to men, who learn of these opportunities because men are more connected to informal informational networks. The claim is not that no women will learn of these opportunities or receive promotions, only that a lower percentage of equally qualified women likely will be promoted because a lower proportion even learns of opportunities. Or assume, for example, a woman who actually has been late a certain number of times is more likely to be denied a promotion on account of lateness than a man who actually has been late the same number of times. This may be true if discrimination works in the ways that most conventional modern social psychological theories of discrimination assert discrimination operates. Supervisors may actually notice and recall the negative actions taken by "out-group" members more than they recall those taken by "in-group" members. These supervisors may also be more prone to think the negative actions of an out-group member reflects a persistent bad characteristic rather than bad luck, and they may show some degree of simple preference for members of the in-group. For explanations of these phenomena and experimental and observational data suggesting their ubiquity, *see, e.g.*, Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, *in* 2 HANDBOOK OF SOCIAL PSYCHOLOGY 357 (Daniel T. Gilbert, S.T. Fiske & and Gardner Lindzey eds., 4th ed. 1998); John W. Howard & Myron Rothbart, *Social Categorization and Memory for In-Group and Out-Group Behavior*, 38 J. PERSONALITY & SOC. PSYCHOL. 301 (1980); Bernadette Park & Myron Rothbart, *Perception of Out-Group Homogeneity and Levels of Social Categorization: Memory for the Subordinate*

Attributes of In-Group and Out-Group Members, 42 J. PERSONALITY & SOC. PSYCHOL. 1051 (1982); Janet K. Swim & Lawrence J. Sanna, *He's Skilled, She's Lucky: A Meta-Analysis of Observers' Attributions for Women's and Men's Successes and Failures*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 507 (1998). Still, these phenomena do not imply that women who are late never get promoted or that men who are late never suffer on account of their lateness. These biases simply may mean that a woman who has been late for work x times in the last year may face an 80% chance of losing out on a promotion, whereas a man's chances are only 70%. Given that most modern discrimination is probabilistic rather than a simple choice between taking prohibited action and not, class certification helps courts with fact-finding.

Respondents' core substantive claim – that the centralized policy that harms female workers the most is undue discretionary delegation – suggests that there are almost surely some differences across "units," however finely those units are defined. Petitioner's centralized policies, which impact all female employees, in fact almost certainly permit some local variation. Whether the expectation is to find variations in *statistics* across localities above what mere chance would generate depends in part on the size of "localities" and the nature of local discretion-based discrimination.

This is not to say that the class action device is inconsistent with learning more about local practices. Professors Bielby and Coukos rightly suggest that, at the merits stage, we might use multilevel models to account for heterogeneity, across stores or functional units (both in terms of discrimination effects and covariates). In fact, unless the court certifies the whole class and tries an employment discrimination suit in one venue and at one time, it is unlikely that we will be able to account for this heterogeneity. Aggregating the data is precisely what permits us to know when decision-making is in fact less uniform. But "[c]onsideration of this level of factual nuance at the class certification stage of the case is inconsistent with preserving a real boundary between procedural hurdles and merits adjudication." Bielby & Coukos, *supra*, at 1608. This last point hints at a seemingly "neutral" reason, *i.e.*, neither favorable to plaintiffs or defendants, to embrace aggregation. Petitioner would ask this Court to break up "discriminatory units" such that their magnitudes are small enough that we could not distinguish true discrimination from chance variation in expected pay or promotion levels.

There are defenses Petitioner might raise, for which the plausibility of the defense can *only* be verified in the context of a broad class action. Thus, employers gain advantages from class actions as do employees. Consider the possibility that, when observing all of the store's departments, a very weak wage or promotion bonus for experience emerges in a particular department, separate from experience at the company more generally. If one analyzed the data at the level of Sub-department *S*, though, experience becomes a highly predictive factor for wage increases and promotion opportunities.[2] As a result, the wage-predicting regression equation for the company as a whole is distinct from the regression equation for Sub-department *S*.

Finally, imagine either of the following: (1) women are unduly concentrated in departments in which they lack a positive trait that either sex must possess in order to advance in that department; or (2) if the aggregate wage decomposition regression equation is affected by each department's rules, the mismatch between relevant traits and sex is pronounced (*e.g.*, although women have little experience in Sub-department *S*, the only place it actually matters, women will possess intra-department experience in other irrelevant departments). Ironically for Petitioner's case, if the class were not certified, it would not be able to demonstrate this fact. One cannot fit a regression equation with any persuasive power to Department *D* at a single store. Thus, even if experience in Department *D* is critical, it could not be so observed; one can only draw this conclusion by examining a sufficient number of entities. Nor could we determine if women are "mismatched" to the needs of subunits within the company without investigating matching patterns across a wide swath of departments and stores. Only by looking at the class could we evaluate the claim that women are missing locally critical traits that either matter very little when viewing the company's operation across the board or that they atypically lack them in the very situations where those traits matter greatly.

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[2] In this hypothetical, one would also imagine that there exists one or several traits in each sub-department important only in the one department and have little impact on store-wide prediction.

◆

CONCLUSION

This Court should affirm the certification of the class.

Respectfully submitted,

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APPENDIX

Each of the *amici* has written about class action, statistical inference, or employment discrimination issues. The affiliations and selected scholarship of the *amici* are:

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Two Publications on Related Topics

Disability-Selective Abortion and the Americans with Disabilities Act, 2009 UTAH L. REV. 845 (with Dov Fox)

Assessing Post-ADA Employment: Some Econometric Evidence and Policy Considerations (John M. Olin Ctr. for Studies in Law, Econ., & Pub. Policy, Research Paper No. 358, 2008), *available at* http://ssrn.com/abstract=1282307 (with John J. Donohue, Michael Ashley Stein & Sascha Becker) (under review with the *Journal of Empirical Legal Studies*)

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Class-Wide Recoveries (Feb. 2011) (unpublished manuscript, *available at* http://ssrn.com/abstract=1768148)

Antitrust, Class Certification, and the Politics of Procedure, 18 GEO. MASON L. REV. 969 (2010) (with Eric L. Cramer)

Of Vulnerable Monopolists: Questionable Innovation in the Standard for Class Certification in Antitrust Cases, 41 RUTGERS L.J. 355 (2009) (with Eric L. Cramer)

Chimerical Class Conflicts in Federal Antitrust Litigation: The Fox Guarding the Chicken House in Valley Drug, 39 U.S.F. L. REV. 141 (2004) (with David F. Sorensen)

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Three Publications on Related Topics

Defining the Antidiscrimination Norm To Defend It, 43 SAN DIEGO L. REV. 735 (2006)

Market Discrimination and Groups, 53 STAN. L. REV. 833 (2001)

Concepts of Discrimination in "General Ability" Job Testing, 104 HARV. L. REV. 1157 (1991)

AMICUS
CURIAE
BRIEF

26

No. 10-277

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IN THE

Supreme Court of the United States

WAL-MART STORES, INC.,
Petitioner,

v.

BETTY DUKES, et al.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

Brief of NAACP Legal Defense and Educational Fund, Inc., National Association for the Advancement of Colored People, Leadership Conference on Civil and Human Rights, AARP, Disability Rights Education and Defense Fund, Inc., LatinoJustice PRLDEF, Asian American Justice Center, Asian Law Caucus, and Lawyers' Committee for Civil Rights Under Law As *Amici Curiae* In Support of Respondents

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Bell v. EPA,
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Davis v. Coca-Cola Bottling Co. Consolidated,
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Dothard v. Rawlinson,
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Duke v. University of Texas at El Paso,
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East Texas Motor Freight System Inc. v. Rodriguez, 431 U.S. 395 (1977) 5

EEOC v. Associated Dry Goods Corp.,
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General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147 (1982) 10

TABLE OF AUTHORITIES
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Griggs v. Duke Power Co.,
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Hall v. Alabama Association of School Boards,
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Kristian v. Comcast Corp.,
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St. Mary's Honor Ctr. v. Hicks,
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Stephen v. PGA Sheraton Resort, Ltd.,
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United States v. N.L. Industries, Inc., 479 F.2d 354 (8th Cir. 1973) 27

Walters v. Reno, 145 F.3d 1032 (9th Cir. 1998) 30

Wang v. Chinese Daily News, Inc., 623 F.3d 743 (9th Cir. 2010) 27

Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) 6-7, 15

Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239 (3d Cir. 1975) 5-6, 27, 31

Wicker v. Hoppock, 73 U.S. 94 (1867) 25

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Butler v. Home Depot, Inc., No. 3:94-cv-4335 (N.D. Cal. Jan. 14, 1998) 19-20

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Davis v. Eastman Kodak Co.,
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Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified at 42 U.S.C. § 1981a) 25

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H.R. Rep. No. 92-238,), *reprinted in* Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, *Legislative History of the Equal Opportunity Act of 1972* (1972) 9, 22, 23

Other Authorities

Fed. R. Civ. P. 23 advisory committee's note, 39 F.R.D. 69 (1966) 4, 5, 30

TABLE OF AUTHORITIES
(continued)

Miriam Hechler Baer, *Corporate Policing and Corporate Governance: What Can We Learn From Hewlett-Packard's Pretexting Scandal?*, 77 U. Cin. L. Rev. 523 (2008) 20

Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 945 (1982) 18

Robert Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 Vand. L. Rev. 905 (1978) 7

Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. Pa. L. Rev. 2179 (1989) 6

Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 Fordham L. Rev. 659 (2003) 22

Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 Ala. L. Rev. 741 (2005) 10

Nancy Levitt, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. Rev 367 (2008) 20

TABLE OF AUTHORITIES
(continued)

Barbara T. Lindemann & Paul Grossman, *Employment Discrimination Law* (4th ed. 2007) 9, 13, 18, 26

Note, *Certifying Class and Subclasses in Title VII Suits*, 99 Harv. L. Rev. 619 (1986) 12, 19

Alba Conte & Herbert Newberg, *Newberg on Class Actions* (4th ed. 2002) 6

Petition for Rehearing En Banc, *Dukes v. Wal-Mart Stores, Inc.* Nos. 04-16688 & 04-16720, (9th Cir. Feb. 20, 2007) 29

Hon. Jack B. Weinstein, *et al.*, *Some Reflections on the "Abusiveness" of Class Actions*, 58 F.R.D. 299 (1973) 22

INTEREST OF *AMICI CURIAE*[1]

Amici NAACP Legal Defense & Educational Fund, Inc., National Association for the Advancement of Colored People, Leadership Conference on Civil and Human Rights, AARP, Disability Rights Education and Defense Fund, Inc., LatinoJustice PRLDEF, Asian American Justice Center, Asian Law Caucus, and Lawyers' Committee for Civil Rights Under Law are non-profit organizations dedicated to, among other goals, eradicating workplace discrimination and addressing workplace conditions that affect racial and ethnic minorities, women, older workers, and those with disabilities.

More details about individual *amici* are included in the Addendum.

SUMMARY OF ARGUMENT

Title VII jurisprudence has consistently recognized that class treatment of claims alleging pervasive and systemwide discrimination is often the best, and sometimes the only, way to ensure effective resolution of claims of workplace civil rights violations. Taken together, Title VII and Rule 23(b)(2) provide a mechanism for the fair and efficient adjudication of claims similarly affecting large classes of individuals. The statute and Rule have a long history of working in tandem to address the congressional purpose of eradication of discrimination in the workplace.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part, and that no person other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed blanket consent letters with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

As explained in detail in Plaintiffs' brief, Wal-Mart seeks to resist class treatment by imposing a series of heightened standards on Plaintiffs' claims, above and beyond the appropriate and rigorous review conducted by the district court. Such heightened standards are inconsistent with the purposes of the Rule, and would dramatically narrow the circumstances in which the class action vehicle could be used, regardless of the extent and scope of the underlying discriminatory conduct. Considered separately, each of the proposed interpretations of Rule 23 is legally tenuous. But when viewed collectively, Wal-Mart's stance would unnecessarily constrict access to the class action as a viable vehicle for challenging broad-scale discrimination, contrary to congressional intent and well-established practice and precedent.

In this case, perhaps the most serious threat to the continued salience of the class action vehicle for employment discrimination claims is Wal-Mart's novel argument that back pay is entirely inconsistent with (b)(2) certification. Wal-Mart's reading of Rule 23 would effectively force plaintiffs to choose between maintaining a viable class action and seeking make whole relief. Significantly, this is not merely an academic exercise about the appropriate subsection of the rule under which to seek certification: Wal-Mart argues that Plaintiffs' claims cannot go forward as a class under either (b)(2) *or* (b)(3).

In this brief *amici* explain some of the important consequences of Wal-Mart's approach to class certification. First, Wal-Mart's arguments conflict with decades of precedent as to the applicability of (b)(2) certification to employment discrimination cases, including those that challenge discrimination conducted through excessively subjective decisionmaking. Indeed, hampering discrimination victims' ability to proceed on a classwide basis would gravely undermine two well-established theories of liability under Title VII—pattern-or-practice and disparate impact—both of which are essential tools in eradicating broad-scale discrimination of the sort alleged here. Both types of class actions allow plaintiffs broader access to the evidence necessary for careful judicial evaluation of systemic patterns of discrimination and, where appropriate, the remedies necessary to eradicate them.

Second, Wal-Mart's proposal to limit (b)(2) classes to those plaintiffs who request exclusively injunctive relief conflicts with decades of judicial precedent and with congressional intent. Back pay is a presumptively available remedy for victims of job discrimination, is integral to full equitable relief, and is uniformly available in (b)(2) class actions. This Court need not decide whether punitive damages are consistent with (b)(2) certification in the instant case because the Ninth Circuit vacated and remanded that issue for a factual determination by the district court in the first instance.

Finally, Wal-Mart's assertion that the question of whether injunctive relief predominates can be answered by calculating the number of former employees in the class is contrary to logic and case law, and would create perverse incentives for employers.

This Court should reject Wal-Mart's invitation to refashion Rule 23 and affirm the Ninth Circuit's decision to certify the plaintiff class.

ARGUMENT

I. Class actions of the kind at issue here play a vital role in the enforcement of Title VII.

The "central statutory purposes" of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e to 2000e-17, are "eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975). Private class actions play a vital role in achieving these purposes. In the instant case, Plaintiffs seek only a fair opportunity to vindicate their rights through the proper enforcement of Title VII. Class treatment is necessary for this goal to be achieved.

A. Civil rights cases are paradigmatic cases for Rule 23(b)(2) certification.

The case at bar, aimed at redressing systemic discrimination, fits comfortably within the Rule 23(b)(2) civil rights class action paradigm. The Advisory Committee's Note to Rule 23 recognizes that civil rights class actions seeking injunctive and other relief to end invidious discrimination are paradigmatic cases for (b)(2) certification. Fed. R. Civ. P. 23 advisory committee's note, *reprinted in* 39 F.R.D. 69, 102 (1966) [hereinafter Advisory

Committee Note]. The Note cites eight class action lawsuits as illustrative of the principal category of cases intended to be certified under this subsection, each of which was brought on behalf of a class of African Americans and other minorities to eradicate intentional race discrimination.[2] *See id.* Both before and after the 1966 Amendments, this Court has recognized the particular suitability of anti-discrimination suits for class action treatment. *See, e.g., Amchem Prods., Inc., v. Winsdor*, 521 U.S. 591, 614 (1997) (recognizing that civil rights cases alleging class-based discrimination are "prime examples" of appropriate (b)(2) cases); *E. Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977) ("We are not unaware that suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs."); *Rogers v. Paul*, 382 U.S. 198, 199 (1965).

Courts have also frequently invoked the Advisory Committee's Note in holding that this subsection is suitable for class certification of Title VII cases specifically. *See, e.g., Kyriazi v. W. Elec. Co.*, 647 F.2d 388, 393 (3d Cir. 1981) (explaining that a Title VII class action seeking relief for systemic discrimination is "the paradigm of a Rule 23(b)(2) class action"); *Wetzel v. Liberty Mut. Ins. Co.*, 508

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[2] Wal-Mart's contention that the Rule's citation to desegregation cases alone indicates that employment discrimination cases are disfavored for class treatment is unpersuasive. Pet. Br. 48. As Plaintiffs properly point out, the Advisory Committee's Note to Rule 23 was drafted prior to the passage of Title VII, meaning no case law existed from which to cite. Resp. Br. 51-52. As we explain above, the assertion is also contrary to experience.

F.2d 239, 250 (3d Cir. 1975) ("[A] Title VII action is particularly fit for (b)(2) treatment, and the drafters of Rule 23 specifically contemplated that suits against discriminatory hiring and promotion policies would be appropriately maintained under (b)(2)."); *see also* 8 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* §24:81, at 315 (4th ed. 2002) ("The aptness of designating employment discrimination suits as class actions under Rule 23(b)(2) has been recognized repeatedly and definitively by courts."). Indeed, Title VII and Rule 23(b)(2) work in tandem: "[The two] should be construed so as to further the strong public policy of eradicating all vestiges of racial discrimination in employment." *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1152 (11th Cir. 1983).

In bringing suit under Title VII, "the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974). This principle applies *a fortiori* when private plaintiffs pursue class actions to challenge broadly applicable policies and practices of discrimination and seek classwide relief. *See, e.g.*, Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. Pa. L. Rev. 2179, 2184 (1989) (describing the "special dependence of civil rights (and other public rights) litigation on the device of the class action"). Accordingly, class actions have led to many of the key employment discrimination precedents that invigorated enforcement of Title VII. *See, e.g., Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988); *Albemarle Paper Co.*, 422 U.S. 405; *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *see also* Robert Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 Vand. L. Rev. 905, 932-47 (1978).

Congress too has continuously recognized the importance of class actions to the enforcement of Title VII.[5] For example, in 1972, when Title VII was amended by the Equal Employment Opportunity Act, proposals to abolish class actions or to restrict their scope in Title VII cases were rejected. As the Senate Report stated: "This section [706] is not intended in any way to restrict the filing of class complaints. The committee agrees with the courts that Title VII actions are by their very nature class complaints, and that any restriction on such actions would greatly undermine the effectiveness of Title VII." S. Rep. No. 92-415, at 27 (1971), *reprinted in* Subcomm. on Labor of the S. Comm. on Labor and Pub. Welfare, *Legislative History of the Equal Opportunity Act of 1972*, at 436 (1972) [hereinafter *Legislative History*].

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[5] Title VII remedies and procedures have also been explicitly incorporated into other major federal civil rights statutes, giving the availability of Title VII class action remedies even broader significance. *See, e.g.*, Americans with Disabilities Act of 1990, 42 U.S.C. §12117(a) (incorporating Title VII remedies into the Americans with Disabilities Act of 1990, which provides nondiscrimination protection to individuals with disabilities).

B. Plaintiffs' claims must proceed as a class action to allow proper judicial evaluation of, and, if appropriate, remedies for the broad-scale discrimination they allege.

Plaintiffs have alleged in great detail a broad pattern of discrimination that begins in Wal-Mart's Home Office and affects female employees in stores throughout its network. Appropriately, therefore, Plaintiffs put forth two well-established legal theories that are uniquely suited to addressing this type of broad-scale discrimination. Limiting the availability of the class action vehicle will inevitably constrain courts' ability to properly resolve allegations of the pervasive type of discrimination at issue here. Class treatment is essential in this instance to give thousands of female employees a fair opportunity for vindication of their substantive rights under Title VII.

1. The pattern-or-practice discrimination claim alleged by Plaintiffs requires class treatment for proper resolution.

Plaintiffs here allege disparate treatment on a systemic basis. For decades, this pattern-or-practice framework[4] first established by this Court in

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[4] Title VII explicitly empowers the Attorney General to bring a civil action whenever he or she "has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice" of discrimination. 42 U.S.C. § 2000e-6. Although Title VII endows only the government with such technical "pattern-or-practice" authority, it is commonplace for courts and parties to refer to disparate treatment suits brought on a classwide basis as "pattern-or-practice" cases. *See, e.g.*, *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876

Franks v. Bowman, 424 U.S. 747 (1976), and further developed in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977)—has been recognized by courts as an essential tool in combating pervasive workplace discrimination and providing "make whole relief" to large groups of victims.[5] *See Teamsters*, 431 U.S. at 336 n.16 (observing the necessity of pattern-or-practice litigation to address discrimination that is "repeated, routine or of a generalized nature"); *see also Shell Oil Co.*, 466 U.S. at 69 (noting that the pattern-or-practice model is "essential if the purposes of Title

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(1984); *Bell v. EPA*, 232 F.3d 546, 553 (7th Cir. 2000); Barbara T. Lindemann & Paul Grossman, 1 *Employment Discrimination Law* 104 (4th ed. 2007) [hereinafter Lindemann & Grossman].

[5] Congress too has recognized the particular problem of systemwide discrimination, and the difficulty of attacking it. As the House Committee reported, in considering the 1971 amendments to Title VII: "Pattern or practice discrimination is a pervasive and deeply imbedded form of discrimination. Specific acts or incidents of discrimination . . . are frequently symptomatic of a pattern or practice which Title VII seeks to eradicate." H.R. Rep. No. 92-238, at 14 (1971), *reprinted in Legislative History*, at 74. So important was this theory of liability that Congress granted the EEOC authority to prosecute such cases because "[u]nrelenting broad-scale action against patterns or practices of discrimination is . . . critical in combating employment discrimination." *Id.*; *see also EEOC v. Shell Oil Co.*, 466 U.S. 54, 69 (1984) ("Congress was aware that employment discrimination was a 'complex and pervasive' problem that could be extirpated only with thoroughgoing remedies." (citation omitted)). But as the Supreme Court subsequently observed, Congress still considered the private litigant "a 'private attorney general,' whose role in enforcing the ban on discrimination is parallel to that of the Commission itself." *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 602 (1981) (citation omitted).

VII [are] to be achieved"). It continues to be necessary for those purposes, particularly where, as here, the alleged discriminatory practices are ongoing and pervasive. *See, e.g., United States v. City of New York*, 683 F. Supp. 2d 225, 232-33 (E.D.N.Y. 2010) (finding a pattern-or-practice of discrimination in the New York City fire department).

Moreover, this Court has endorsed the use of the pattern-or-practice framework to address hiring and promotion processes based on excessively subjective criteria. *See Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 159 n.15 (1982); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 301, 303 (1977). Classwide evaluation of such decisionmaking processes makes sense where, as here, an employer is structured and administered in such a fashion that the challenged employment practices are likely to have an impact throughout the class. *See Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326, 331-33 (4th Cir. 1983) (upholding (b)(2) certification of challenge to excessively subjective decisionmaking process); *Shipes v. Trinity Indus.*, 987 F.2d 311, 316 (5th Cir. 1993) (same). The class action device allows for consideration of overly subjective decisions in the aggregate, which may reveal a pattern of discrimination. *See* Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 Ala. L. Rev. 741, 788 (2005).

In any pattern-or-practice class action, the plaintiff bears the initial burden at the liability phase of demonstrating "that unlawful discrimination has been the regular procedure or policy followed by an employer or group of employers." *Teamsters*, 431 U.S. at 360. If the plaintiff meets this high burden, it establishes a presumption that "any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy," thus shifting the burden of persuasion to the defendant employer. *Id.* at 362. This is as it should be: "No reason appears . . . why the victim rather than the perpetrator of the illegal act should bear the burden of proof on this issue."[6] *Franks*, 424 U.S. at 772 n.32.

Teamsters makes clear that because pattern-or-practice cases involve a distinct type of discrimination, the inquiry is correspondingly distinct from that in an individual case. *Teamsters*, 431 U.S. at 357. A court's chief role in a pattern-or-practice case is to determine whether discrimination is the employer's standard operating procedure, rather than to parse the motives behind individual employment decisions. *Id.* at 360 & n.46. In contrast, in an individual case, even if patterns of discrimination are shown to exist, the individual plaintiff must also prove that a particular adverse employment decision was motivated by discriminatory intent.[7] *See Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973). This individual method of proof is appropriate for evaluating isolated instances of bias, but is ill-suited to uncover a pattern of discrimination. The pattern-or-practice framework not only allows, but requires courts to step back and assess the universe of an employer's actions as a whole; only through this broader lens can widespread discrimination be uncovered and evaluated.

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[6] The *Teamsters* framework is well-established law that has been endorsed and utilized by federal courts for decades. *See, e.g.*, *Bazemore v. Friday*, 478 U.S. 385, 398 (1986); *Obrey v. Johnson*, 400 F.3d 691, 694 (9th Cir. 2005); *Hall v. Alabama Ass'n of Sch. Bds.*, 326 F.3d 1157, 1171 (11th Cir. 2003); *Robinson v. Metro North Commuter R.R. Co.*, 267 F.3d 147, 158 (2d Cir. 2001); *EEOC v. United Ass'n of Journeymen*, 235 F.3d 244, 251 (6th Cir. 2000); *Munoz v. Orr*, 200 F.3d 291, 299 (5th Cir. 2000).

The pattern-or-practice framework is strongly tied to the class action vehicle. This Court first elucidated this important framework in the context of a (b)(2) class action, *Franks*, 424 U.S. at 747, and today, the prosecution of such claims often depends on certification of a class. Although this Court has never held that individual plaintiffs cannot utilize the *Teamsters* framework, several circuit courts have indeed so concluded. *See, e.g., Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 968-69 (11th Cir. 2008); *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 575 (6th Cir. 2004); *Celestine v. Petroleos de Venezuella SA*, 266 F.3d 343, 355-56 & n.4 (5th Cir. 2001); *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 759 (4th Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999).

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[7] "In a time when overt acts of employment discrimination are relatively rare—when discrimination takes more subtle if no less invidious forms—such a showing is extremely difficult to make." Note, *Certifying Class and Subclasses in Title VII Suits*, 99 Harv. L. Rev. 619, 628 (1986) [hereinafter Note].

Even evidence indicating a pattern of discrimination has been considered by some courts to be inadmissible, or of limited relevance, in a case brought by an individual plaintiff. *See, e.g., Carman v. McDonnell Douglas Corp.*, 114 F.3d 790, 792 (8th Cir. 1997). In particular, statistical evidence demonstrating an employer's discriminatory conduct toward a class of employees is considered "rarely determinative" and sometimes irrelevant when the suit is not a class action. *See* 1 Lindemann & Grossman 79; *see also Adreani v. First Colonial Bankshares Corp.*, 154 F.3d 389, 400 (7th Cir. 1998); *Robinson*, 267 F.3d at 158 n.5. By contrast, pattern-or-practice theory allows courts to take legal cognizance of the fact that statistical disparities are often indicative of institutional, pervasive, and sometimes relatively covert discrimination.[8] *See Hazelwood*, 433 U.S. at 307-08 (1977) (observing that "[w]here gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination"); *Teamsters*, 431 U.S. at 340 (noting that statistical evidence is often "the only available avenue of proof . . . to uncover clandestine and covert discrimination by the employer").

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[8] This is not to say that statistical disparities alone require the conclusion that an employer is using a discriminatory policy. Courts have rejected that view and *amici* do not press it here. *See, e.g., Lopez v. Metro. Life Ins. Co.*, 930 F.2d 157, 161 (2d Cir. 1991), *overruled on other grounds by, St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); *Am. Fed'n of State, Cnty., & Mun. Employees v. Washington*, 770 F.2d 1401, 1407 (9th Cir. 1985). Certainly, statistical disparities may exist for benign or legitimate reasons. And both the pattern-or-practice and the disparate impact evidentiary frameworks allow employers the opportunity to explain any such disproportionalities. 42 U.S.C. §2000e-2(k)(1)(A)(i) (employer has the opportunity to "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity"); *Hazelwood*, 433 U.S. at 308-09 (employer may challenge statistical proof offered or suggest other explanation for the apparent statistical anomaly).

Plaintiffs here have demonstrated that women throughout Wal-Mart's stores were paid significantly less than men, J.A. 518a-519a, and that "a statistically significant shortfall of women [were] being promoted into each of the in-store management classifications over the entire class period," App. 212a. Only if Plaintiffs here can proceed on a classwide basis, allowing a challenge to Wal-Mart's entire system of pay and promotion, is the larger picture likely to be considered legally relevant.

Wal-Mart would eliminate this well-established method of proof, requiring instead that systemic discrimination cases be litigated for both liability and remedies on an individual-by-individual basis. Plaintiffs would be required to prove that "the motive for *every single* discretionary pay and promotion decision affecting every single class member was discriminatory." Pet Br. 40 (emphasis in original). This is contrary to the very essence of a pattern-or-practice claim in which the relevant question at the liability stage is whether discrimination was the employer's "standard operating procedure," *Teamsters*, 431 U.S. at 336, and "individually applicable evidence *cannot* serve as a justification for the denial of relief to the entire class." *Franks*, 424 U.S. at 772 (emphasis added);

see also Cooper, 467 U.S. at 876 (observing that in "a pattern-or-practice trial the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decisionmaking") (quoting *Teamsters*, 431 U.S. at 360 n.46). If Wal-Mart's argument is accepted, no disparate treatment class action where plaintiffs' individual claims for relief differed, even minimally, in merit or value could ever be certified, and the entire concept of the pattern-or-practice claim would be upended. Wal-Mart's position, advocating for heightened standards for certifying these claims as a class, would undermine the role of pattern-or-practice suits in the private enforcement of Title VII, as well as other laws—federal, state, and municipal—that follow Title VII precedent.

2. Wal-Mart's arguments threaten to undermine the viability of disparate impact claims in addressing systemic workplace discrimination.

Plaintiffs also allege that Wal-Mart's excessively subjective decisionmaking practices cause a disparate impact on female employees. More than twenty years ago, this Court removed any doubt that Title VII reaches this kind of practice under disparate impact theory. *Watson*, 487 U.S. at 990-91.

Disparate impact theory goes to the purpose of Title VII itself, which "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[9] *Griggs*, 401

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[9] Title VII's disparate impact provisions prohibit employment practices that operate to discriminate on a prohibited basis even where such practices are not motivated

U.S. at 431. Disparate impact suits—which challenge facially-neutral policies that disproportionately disadvantage members of a protected group—"by their very nature implicate class-based claims." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 409 (5th Cir. 1998); *accord United States v. Chicago*, 549 F.2d 415, 427 (7th Cir. 1977). Indeed, the disparate impact theory of liability—first articulated by this Court, and later codified by Congress—relies exclusively on class-based inquiries. *Griggs*, 401 U.S. at 426; 42 U.S.C. 2000e-2(k). The initial showing, for example, requires statistical evidence demonstrating the disproportionate effect of an employment practice on members of a protected group as a whole. Thus *all* members of the protected group are implicated, and *no* individualized facts or decisions are considered. *See, e.g.*, *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977); *Griggs*, 401 U.S. at 426. After the plaintiff meets that initial burden, the employer must show proof of business necessity. 42 U.S.C. §2000e-2(k)(1)(A)(i). Should the employer make that showing, the plaintiff may demonstrate that the employer could have used a less discriminatory alternative. *Id.* at §2000e-2(k)(1)(A)(ii). Both these

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by discriminatory intent. *See* 42 U.S.C. 2000e-2(k); *Griggs*, 401 U.S. at 426 n.1, 433-36. Because Congress intended for Title VII to reach the *consequences* of employment practices, rather than just the motivations underlying them, the "absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as built-in headwinds" for protected groups. *Id.* at 432 (internal quotation marks omitted).

inquiries also go generally to the employer's conduct and its effect classwide.

Unsurprisingly then, use of the (b)(2) class action to bring disparate impact claims has been essential to efforts at combating widespread, institutional discrimination. *See, e.g.*, *Lewis v. City of Chicago*, 127 S. Ct. 2191 (2010); *Griggs*, 401 U.S. 426; *see also Bacon*, 370 F.3d at 576 (noting that disparate impact analysis usually arises in the class action context). Such litigation continues to be essential to the eradication of employment discrimination, particularly as obstacles to fair workplaces are often covert and thus harder to identify and resolve through disparate treatment theory. *See Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 730 (2003) ("It can hardly be doubted that . . . women still face pervasive, although at times more subtle, discrimination . . . in the job market." (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)) (internal quotation marks and brackets omitted)); *Ricci v. DeStefano*, 129 S. Ct. 2658, 2696 (2009) (Ginsburg J., dissenting) ("More subtle—and sometimes unconscious—forms of discrimination replaced once undisguised restrictions.").

Restricting the reach of 23(b)(2) class actions—by, *inter alia*, limiting their certification to instances where monetary relief is not requested—contravenes the structure and purpose of disparate impact theory, as first conceived by this Court. An individual plaintiff is not the most logical vehicle for dismantling class-based "built-in headwinds"—the goal of a disparate impact claim. When an individual brings suit under this theory, the court's focus changes from the overall impact of the practice to the individual employment decision: The plaintiff must show not only that the employment practice in question negatively impacted a protected class as a whole, but that "the allegedly discriminatory practice directly resulted in harm to him or her."[10] *See* 1 Lindemann & Grossman 111 n.8; *accord Coe v. Yellow Freight System, Inc.*, 646 F.2d 444, 451 (10th Cir. 1981) ("Where the disparate impact doctrine has been used by the courts in individual actions rather than class actions, a plaintiff has been required to show that he personally has been the victim of discrimination by the general practice . . . ."); *Melendez v. Ill. Bell Tel. Co.*, 79 F.3d 661, 668 (7th Cir. 1996). Accordingly, courts frequently dismiss individual disparate impact cases at the liability stage despite evidence of a classwide adverse impact.[11] *See, e.g., Bacon*, 370 F.3d at 577 ("Whatever the validity of [plaintiffs] disparate impact claims . . . we agree with the district court that the plaintiffs cannot show that the policies injured them personally, and therefore their claim must fail."); *Stephen v. PGA Sheraton Resort, Ltd.*, 873 F.2d 276, 279 (11th Cir. 1989) (holding that even if the plaintiff's proof showed disparate impact, that impact did not relate to this particular plaintiff who was terminated for a legitimate reason); *Coe*, 646 F.2d at 451. "In both adverse-impact and disparate-treatment cases, then, the difference between the success and the failure of a *valid* claim is often the difference between a class action and an individual suit." Note, 99 Harv. L. Rev. at 628 (emphasis added).

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[10] This inquiry is separate and apart from the "same decision" affirmative defense, which applies at the remedy phase to prohibit courts from awarding individual remedies, such as reinstatement or back pay, to plaintiffs who were subject to an adverse employment decision for reasons other than discrimination. 42 U.S.C. §2000e-(5)(g)(2)(B).

[11] Individual disparate impact cases may actually require *more* intrusion on an employer's prerogatives than a class-based suit, where specific decisions need not be scrutinized at the liability stage. *See* Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 945, 1002 (1982).

3. Classwide treatment of both the disparate impact and the pattern-or-practice claims alleged here is necessary for Plaintiffs to obtain a just outcome.

Both the pattern-or-practice and the disparate impact causes of action play vital roles in the enforcement of Title VII. Each type of class action is well-suited to combat institutional and ingrained discrimination in the modern workplace. Increasingly, the most serious instances of alleged employment discrimination involve large corporate entities whose reach extends across multiple states and regions.[12] Although large corporations frequently function through the operation of semi-independent branches, corporate uniformity can be imposed through the maintenance of a company-wide corporate culture and standardized workplace policies and practices. Miriam Hechler Baer, *Corporate Policing and Corporate Governance: What Can We Learn From Hewlett-Packard's Pretexting Scandal?*, 77 U. Cin. L. Rev. 523, 549 (2008) (noting that some commentators urge the adoption of "mechanisms" that would encourage the creation and maintenance of a single "corporate culture across the firm"); Nancy Levitt, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. Rev 367, 417 (2008) (observing that "CEOs have enormous influence" in producing and changing corporate cultures). Therefore, the core purposes of Title VII can be realized only if discriminatory company-wide policies and practices are challenged at their source. *See id.* at 417-29. Class-based claims offer significant advantages in achieving this goal.

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[12] *See, e.g., Davis v. Eastman Kodak Co.*, Nos. 6:04-cv-6098, 6:07-cv-6512 (W.D.N.Y. Sept. 3, 2010) (approving class settlement on behalf of over 3,000 current and former African-American employees); *Satchell v. FedEx Corp.*, Nos. 3:03-cv-2659, 3:03-cv-2878 (N.D. Cal. Aug. 14, 2007) (approving class settlement on behalf of 20,000 African-American and Latino employees); *Gonzalez v. Abercrombie & Fitch Stores, Inc.*, Nos. 3:04-cv-2817, 3:04-cv-4730, 3:04-cv-4731 (N.D. Cal. Apr. 15, 2005) (approving consent decree settling claims of systemic discrimination against Latino, African-American, Asian-American, and female applicants and employees); *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685 (N.D. Ga. 2001) (approving class settlement on behalf of 2,200 current and former African-American employees); *Butler v. Home Depot, Inc.*, No. 3:94-cv-

First, class-based discrimination claims allow for the formulation of broader remedies that have a realistic chance of reforming workplace practices. In the Title VII context, a (b)(2) class provides the vehicle for a generally applicable and efficient classwide remedy, resulting in cessation of the discriminatory practice and, where appropriate, additional equitable remedies for class members. This is particularly true in cases where the harm is

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4335 (N.D. Cal. Jan. 14, 1998) (approving consent decree on behalf of 17,000 current and former female employees and 200,000 unsuccessful applicants).

extraordinarily widespread and ingrained. In this case, Plaintiffs have introduced into evidence statistics showing that Wal-Mart's female employees are paid less than male employees in virtually *every* job category in *every* one of Wal-Mart's regions, despite the fact that female employees on average have greater seniority and higher performance scores. J.A. 518a-519a. Moreover, it is a matter of record that Wal-Mart's own Executive Vice President for People regularly reported that it lagged "significantly behind" its competitors in the advancement of women in management. J.A. 408a. If proven, these systemic harms will require a comprehensive and universal solution.

Absent class certification, courts often refrain from granting relief that extends beyond the harms suffered by the individual plaintiffs. *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) ("[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs."); *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("[T]he scope of injunctive relief is dictated by the extent of the violation established."). In this case, where Plaintiffs have claimed pervasive and systematic gender discrimination by the nation's largest private employer, relief granted to an individual plaintiff, or even a small group of plaintiffs, would be inadequate. Class treatment empowers courts to craft relief appropriate to the extent of the identified problem. *See Albemarle Paper Co.*, 422 U.S. at 418 (1975).

The difficulty of obtaining meaningful relief as an individual is real. For example, in *Lowery v. Circuit*

City Stores, a unanimous jury found that Circuit City had engaged in a pattern or practice of racial discrimination, and the district court ordered broad injunctive relief, including the creation of new procedures to ensure nondiscriminatory promotion. 158 F.3d at 755-56. On appeal, the Fourth Circuit held that because the trial court had declined to certify a class, the *Teamsters* framework was inapplicable. The court promoted one of the named plaintiffs, but vacated all other equitable relief, including an injunction requiring the employer merely to promote employees "without regard to their race." *Id.* at 766-67. Here, the lack of class certification forced the court to disregard a finding of pervasive discrimination, thwarting the plaintiffs' effort to fully vindicate the purposes of Title VII.

Unlike most individual suits, the "impact of class suits in civil rights cases is substantial." Hon. Jack B. Weinstein et al., *Some Reflections on the "Abusiveness" of Class Actions*, 58 F.R.D. 299, 304 (1973). "Precedent alone never has the effect of a judgment naming a particular class of which a person is a member. Very often, a class action permits the judge to get to the heart of an institutional problem." *Id.* Because it broadens "the number of complainants, the class action triggers inquiry about institutional and organizational sources of harm and encourages development of solutions aimed at systemic reform." Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 Fordham L. Rev. 659, 678 (2003). This fits with the nature of employment discrimination in practice, which "is a far more complex and pervasive phenomenon" than just "a series of isolated and distinguishable events." H.R. Rep. No. 92-238, at 8 (1971), *reprinted in Legislative History* at 68.

Second, class proceedings allow victims to obtain and present the evidence necessary to prove broad-based discrimination, either intentional patterns and practices or disparate impact. When the issue is one individual's job treatment rather than the treatment of a larger class, courts may not permit the extensive discovery and proof needed to understand how an employment system operates. Even if statistical evidence were equally probative in individual cases, the practical realities of modern litigation mean that such evidence is available only in class proceedings. An individual "is unlikely to have or make available the up-front costs needed to prosecute" a complex lawsuit requiring experts, sophisticated statistical analyses, and extensive discovery. *Kristian v. Comcast Corp.*, 446 F.3d 25, 54-55 (1st Cir. 2006). Extensive discovery is essential to the prosecution of almost any employment discrimination claim, because evidence of an employer's practices regarding such matters as hiring, assignment, promotion, workplace conditions, and termination lies almost completely within the employer's control. *See, e.g.*, 29 C.F.R. § 1607.4.A (requiring employers subject to Title VII to maintain certain employment records). But discovery of this evidence – especially in cases involving large employers – is prohibitively expensive in individual actions, and thus the ability to spread the costs over a class is essential to obtaining redress. *See, e.g.*, *Duke v. Univ. of Texas at El Paso*, 729 F.2d 994, 996-97 (5th Cir. 1984) (reversing judgment against discrimination plaintiff in order to permit broad discovery in support of a class certification motion, and observing that "[h]ad Duke's class claims prevailed, she would have faced a distinctively less onerous burden at the trial of her individual claim"). Class actions allow for burden sharing in order to level the playing field against sophisticated and well-resourced corporate entities. These limitations on obtaining evidence make individual cases relatively poor vehicles for rooting out institutional discrimination.

II. Wal-Mart's attempt to bar monetary relief from 23(b)(2) classes would severely hamper the effectiveness of such actions and is unsupported by legislative intent or legal precedent.

Wal-Mart's opening brief argues that Rule 23(b)(2) "does not authorize certification of any monetary claims." Pet. Br. 44. Wal-Mart also argues that punitive damages are categorically unavailable in a (b)(2) action. *See id.* at 55. Wal-Mart's proposed standard for class certification of Title VII claims that include monetary relief is unsupported by existing case law, inconsistent with congressional intent, and a harmful interpretation of Rule 23.

Wal-Mart's proposal that victims of discrimination must waive their entitlement to all but injunctive relief in order to proceed as a class would vitiate Title VII's purposes of making victims whole and eradicating discrimination. "If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality."[13] *Albemarle*, 422 U.S. at 417. Any reading of Rule 23(b)(2) that prohibits economic remedies when victims of discrimination seek to litigate as a class denies them a remedy that is equal to their injury. "Title VII deals with legal injuries of an economic character occasioned by racial or other antiminority discrimination. . . . And where a legal injury is of an economic character, . . . 'the compensation shall be equal to the injury.'" *Id.* at 418 (quoting *Wicker v. Hoppock*, 73 U.S. 94, 99 (1867)).

Forcing plaintiffs to forgo their entitlement to full Title VII remedies in order to litigate as a class would contravene the principle that relief in Title VII cases should not frustrate the purposes of the statute.[14] *See id.* at 421.

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[13] This theme has been consistent throughout the history of Title VII. For example, the legislative history of the Civil Rights Act of 1991, amending Title VII to, *inter alia*, include the possibility of punitive damages for victims of intentional discrimination, makes clear that Congress sought to expand, not curtail, remedial relief to such victims in order to better achieve the original purposes of the statute. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072 (1991) (codified at 42 U.S.C. § 1981a); *see also Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 852 (2001) ("In the Civil Rights Act of 1991, Congress determined that victims of employment discrimination were entitled to *additional* remedies . . . without giving any indication that it wished to curtail previously available remedies.") (emphasis in original).

[14] Significantly, Wal-Mart is not engaging the Court in an inquiry as to *which* subsection of Rule 23 is best suited for certification of this action. Wal-Mart argues that Plaintiffs' claims cannot be certified under (b)(2) *or* (b)(3). Pet. Br. 43.

A. Back pay remedies are central to full equitable relief and consistent with Rule 23(b)(2) certification.

Congress enacted Title VII as part of the Civil Rights Act of 1964 to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs*, 401 U.S. at 424. A central objective of the statute is "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle*, 422 U.S. at 418.

These objectives are achieved in part through the Title VII remedial scheme, which critically includes back pay. 42 U.S.C. § 2000e-5(g). This Court has explained that back pay has an "obvious connection" to Title VII's central purposes, and is a necessary catalyst for employers to "endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." *Albermarle*, 422 U.S. at 417-18 (internal quotation mark omitted). For this reason, this Court has made clear that back pay is presumptively available to victims of discrimination under Title VII: "[G]iven a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."[15] *Id.* at 421.

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[15] "[C]ourts have cited few circumstances that justify denying back pay other than the plaintiff's failure to mitigate damages." 2 Lindemann & Grossman 2757 & n.27; *see also*

Accordingly, federal courts have—for decades—held that back pay relief is available in (b)(2) class actions, and that the award of this monetary remedy is consistent with the requirement that declaratory and injunctive relief predominate. *See, e.g.*, *Wang v. Chinese Daily News, Inc.*, 623 F.3d 743, 754 (9th Cir. 2010); *Chisholm v. U.S. Postal Serv.*, 665 F.2d 482, 488 (4th Cir. 1981); *Gay v. Waiters' & Dairy Lunchmen's Union*, 549 F.2d 1330, 1331-34 (9th Cir. 1977); *accord Senter v. Gen. Motors Corp.*, 532 F.2d 511, 525 (6th Cir. 1976); *Wetzel*, 508 F.2d at 250-53; *United States v. N.L. Indus., Inc.*, 479 F.2d 354, 378-80 (8th Cir. 1973); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 719-21 (7th Cir. 1969).

Indeed, as the Ninth Circuit en banc correctly noted, every circuit to have addressed the issue has held that Rule 23(b)(2) allows for claims of monetary relief, and that a "request for back pay in a Title VII case is fully compatible with the certification of a 23(b)(2) class." App. 91a.

B. The issue of punitive damages in (b)(2) classes should not be considered by this Court.

This Court need not resolve whether punitive damages may be certified under Rule 23(b)(2). The Ninth Circuit en banc vacated and remanded the punitive damages claim for the district court to decide in the first instance whether punitive

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Pegues v. Miss. State Employment Serv., 899 F.2d 1449, 1457 (5th Cir. 1990) ("[O]nce a plaintiff establishes a violation of the statute, 'the instances wherein [a backpay] award is not granted are exceedingly rare.'" (quoting *Sellers v. Delgado Cmty. Coll.*, 839 F.2d 1132, 1136 (5th Cir. 1988))).

damages predominate over injunctive relief. Thus, the issue is not properly before this Court.

Wal-Mart attempts to manufacture a circuit split because the Ninth Circuit, in vacating the punitive damages certification, did not foreclose the possibility of certification entirely and instead ordered the district court to inquire into the particular facts of this case. Pet Br. 55 (asserting that in "not foreclosing [the possibility of certification of punitive damages under (b)(2)] the Ninth Circuit broke ranks with every other circuit"). But no such circuit split exists. Indeed, Wal-Mart's merits brief conspicuously fails to cite any case law supporting its contention that the Ninth Circuit's decision to remand because the district court had not conducted a predominance inquiry was inconsistent with other circuits. Indeed, the circuits that have declined to certify punitive damages in a (b)(2) class have recognized that this issue requires an approach tied to the individual circumstances of the case, consistent with the Ninth Circuit's decision to remand. *See Allison*, 151 F.3d at 417 (declining to certify a claim for punitive damages where the award would be dependent on compensatory damages, but explicitly allowing for the possibility that punitive damages might "be awarded on a class-wide basis, without individualized proof of injury" in an appropriate case); *Cooper v. S. Co.*, 390 F.3d 695, 720 (11th Cir. 2004) (upholding district court's refusal to certify class after it found that too many individualized issues would be involved in the award of both compensatory and punitive damages in that particular case), *overruled on other grounds by*, *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006);

Lemon v. Int'l Union of Operating Eng'rs, 216 F.3d 577, 579 (7th Cir. 2000) (remanding for consideration of whether class for punitive damages could be certified under Rule 23(b)(2) if notice and opt-out rights were provided); *see also* Petition for Rehearing En Banc at 11-12, *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010) (Nos. 04-16688 & 04-16720) (citing the previous three cases as representing the only other Courts of Appeals to consider this issue).

C. The fact that the class includes former employees is not an appropriate ground for denying certification under Rule 23(b)(2).

Wal-Mart argues that Plaintiffs' claims for monetary relief predominate because the "majority" of the class are former employees who lack standing to pursue injunctive relief. Pet. Br. 52. Besides failing to demonstrate that the underlying assertion is factually correct, Wal-Mart has cited no case law to support this argument, and has failed to explain how it is relevant to the modified "incidental damages" standard it proposes for determining whether monetary relief predominates.[16] *See* Pet. Br. 50-51.

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[16] Indeed, to the extent that Wal-Mart raises this, it seems to have adopted the Second Circuit's approach that the subjective intent of plaintiffs in bringing suit should be paramount. *See Robinson*, 267 F.3d at 164. This approach could logically allow for limited consideration of the proportion of the class who are former employees as an indication of the intent of the plaintiffs in seeking injunctive relief. *See id.* ("Insignificant or sham requests for injunctive relief should not

Wal-Mart cites no case law for its argument that the question of whether injunctive relief predominates can be definitively settled by calculating the proportion of the class that is former employees. Indeed, this proposition is contrary to the accepted understanding that "[a]n action or inaction is directed to a class within the meaning of [23(b)(2)] even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds, which have general application to the class." Advisory Committee Note, 39 F.R.D. at 102; *see also Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998) ("Even if some class members have not been injured by the challenged practice, a class may nevertheless be appropriate."). The appropriate question then is whether a defendants' actions are based on grounds generally applicable to the class, not whether a majority of class members will benefit from an injunction. Advisory Committee Note, 39 F.R.D. at 102.

To the extent that the number of class members who will benefit from injunctive relief is relevant to the inquiry of whether monetary relief predominates, it is only if that number is so trivial as to call into question the legitimacy of the request for injunctive relief. One appellate court has asserted that where the proportion of the class that could benefit from injunctive relief is "negligible" it may endanger (b)(2) certification because it would raise the question of whether "the class as a whole is deemed properly to be seeking injunctive relief." *In re Monumental Life Ins. Co.*, 365 F.3d 408, 416 (5th

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provide cover for (b)(2) certification of claims that are brought essentially for monetary recovery.")

Cir. 2004). On remand in that case, the district court found that certification was inappropriate where *fewer than 2%* of class members could possibly benefit from the requested injunctive relief. *In re Indus. Life Ins. Litig.*, No. 1371, slip op. at 4-5, 6, 9 (E.D. La. Jan 11, 2006); *see also Bolin v. Sears Roebuck & Co.*, 231 F.3d 970, 978 (5th Cir. 2000) (finding class certification was inappropriate where the "vast majority" of the class could not benefit from injunctive relief, and where the equitable relief "serve[d] only to facilitate the award of damages"). Wal-Mart has never alleged that the number of current employees in Plaintiffs' class is so insignificantly small as to be "negligible."[17] Moreover, the district court found as a matter of fact that Plaintiffs' claims for prospective relief "would achieve very significant long-term relief in the form of fundamental changes to the manner in which Wal-Mart makes its pay and promotions decision nationwide that would benefit not only current class members, but all future female employees as well." App. 239a.

Wal-Mart's proposed rule is not only untethered to any legal basis, but it would create perverse incentives for employers and frustrate the objective of Title VII to eliminate discrimination. *Cf. Wetzel*, 508 F.2d at 247 (asserting that if a former employee could not serve as a class representative, "employers would be encouraged to discharge those employees suspected as most likely to initiate a Title VII suit in the expectation that such employees would thereby be rendered incapable of bringing the suit as a class action" (citing *Reed v. Arlington Hotel Co.*, 476 F.2d 721 (8th Cir. 1973)); *Ellis v. Costco Wholesale Corp.*, 240 F.R.D. 627, 637 (N.D. Cal. 2007) ("To hold that employees must continue to work in jobs where they face discrimination in order to challenge the discrimination would pervert Article III's injury-in-fact requirement."). In many cases, including the instant one, victims leave their employer because of the very discrimination challenged or as a result of retaliation for having objected to discriminatory treatment. J.A. at 1158, 1162, 1167, 1209, 1297, 1300. If a majority of victims had to remain with a discriminatory employer in order for a class to seek prospective relief, employers could manipulate their workforce in order to avoid class-wide liability. *Cf. Robinson v. Shell Oil Co*, 519 U.S. 337, 346 (1997). Wal-Mart's rule would create a constantly moving target for discrimination victims to hit in order to certify their class—a target that is entirely in the control of the defendant.

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[17] Indeed, Wal-Mart never raised this argument as to former employees in the district court at all.

CONCLUSION

Wal-Mart proposes a version of class action law that would force plaintiffs to choose between class certification and full remedial relief.

That interpretation of the class action rule and law is at variance with Congress's intent and this Court's precedents. It would dramatically undermine Congress's stated goals of eliminating discrimination throughout the workplace and making victims of discrimination whole, and unnecessarily heighten barriers for class certification. It should therefore be firmly rejected by this Court.

Amici respectfully request that this Court affirm the Ninth Circuit's decision affirming certification of the plaintiff class under Rule 23(b)(2).

Respectfully submitted,

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ADDENDUM

The *NAACP Legal Defense & Educational Fund, Inc.*, is a non-profit corporation established to assist African Americans in securing their civil and constitutional rights through the prosecution of lawsuits that challenge racial discrimination. For six decades, LDF attorneys have represented parties in litigation before the Supreme Court and other federal courts on matters of race discrimination in general, and employment discrimination in particular, including *Lewis v. City of Chicago*, 127 S. Ct. 2191 (2010); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); and *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). LDF has focused its employment discrimination work particularly upon class actions because of their effectiveness in securing systemic change.

The *National Association for the Advancement of Colored People* (NAACP) is a non-profit corporation with membership throughout the nation. The NAACP is the nation's oldest and largest civil rights organization. The mission of the NAACP is to ensure the political, educational, social and economic equality of all persons and to eliminate racial hatred and racial discrimination. For over a century, the NAACP has been at the forefront of ending unlawful employment discrimination. The NAACP relies on the use of class actions, inter alia, as an effective method of eliminating systemic workplace discrimination.

The *Leadership Conference on Civil and Human Rights* is a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the civil and human rights of all persons in the United States. It is the nation's premier civil and human rights coalition working to build an America that's as good as its ideals. The Leadership Conference was founded in 1950 by A. Philip Randolph, head of the Brotherhood of Sleeping Car Porters; Roy Wilkins of the NAACP; and Arnold Aronson, a leader of the National Jewish Community Relations Advisory Council. For more than half a century, The Leadership Conference, based in Washington, D.C., has led the fight for civil and human rights by advocating for federal legislation and policy, securing passage of the Civil Rights Acts of 1957, 1960, and 1964; the Voting Rights Act of 1965; the Fair Housing Act of 1968; and the Americans With Disabilities Act of 1990. Many of the member organizations of The Leadership Conference use the class action mechanism in their efforts to combat discrimination and advance civil and human rights.

AARP is a non-partisan, non-profit organization of people age 50 or older dedicated to addressing the needs and interests of older people. AARP supports the rights of older workers and strives to preserve the legal means to enforce them. More than half of AARP's members are in the work force and are protected by Title VII of the Civil Rights Act of 1964, as well as other civil rights laws at the federal, state and municipal level in regard to which legislatures, courts, and enforcement agencies look to Title VII as a model. AARP attorneys also represent clients in cases concerning access to healthcare and long-term care, consumer protection and other matters of concern to older persons. In each of these areas, the option of seeking systemic and/or broad-based relief through a class action may be and often is critical to vigorous and successful private enforcement of the rights and claims of older persons. AARP thus has a strong interest in the continued vitality of class actions as a means of serving the needs and interests of older persons, including older persons of limited means, older persons of color, older women and other vulnerable groups of older persons.

The *Disability Rights Education and Defense Fund, Inc.*, (DREDF) is a national nonprofit disability civil rights law and policy organization dedicated to protecting and advancing the civil rights of people with disabilities. Based in Berkeley, California, DREDF has remained board- and staff-led by people with disabilities since its founding in 1979. DREDF pursues its mission through education, advocacy and law reform efforts, and is nationally recognized for its expertise in the interpretation of federal disability civil rights laws. As part of its mission, DREDF works to ensure that people with disabilities have the legal protections, including effective legal remedies, necessary to vindicate their right to be free from discrimination. The federal Americans with Disabilities Act explicitly incorporates Title VII remedies to enforce its employment nondiscrimination protections, and thus DREDF and the disability community it represents have an interest in the Title VII issues presented by this case.

LatinoJustice PRLDEF is a national not for profit civil rights organization that has advocated for and defended the constitutional rights and the equal protection of all Latinos under law; sought to promote the civic participation of the pan-Latino community; and to cultivate future Latina/o community leaders. Since our founding in 1972 as the Puerto Rican Legal Defense and Education Fund, we have brought precedent-setting impact litigation across the country on behalf of the Puerto Rican and the greater pan-Latino community in the areas of education, employment, fair housing, language rights, immigrants' rights, redistricting and voting rights. During its 39 year history, LATINOJUSTICE PRLDEF has litigated numerous cases of employment discrimination on behalf of Latina and Latino workers, and seeks to ensure that Latina/o workers continue to have unfettered access to the courts for full legal redress of workplace discrimination.

The *Asian American Justice Center* (AAJC) is a national nonprofit, nonpartisan organization whose mission is to advance the civil and human rights of Asian Americans and to promote a fair and equitable society for all. A member of the Asian American Center for Advancing Justice, AAJC engages in litigation, public policy, advocacy, and community education and outreach on a range of civil rights issues, including anti-discrimination. AAJC's longstanding interest in employment discrimination matters that impact Asian Americans and other underserved communities has resulted in the organization's participation in numerous *amicus curiae* briefs before the courts.

Founded in 1972, the *Asian Law Caucus* ("ALC") is the nation's oldest legal organization advancing the civil rights of Asian American and Pacific Islander communities. A member of the Asian

American Center for Advancing Justice. ALC has a long history of protecting low-wage immigrant workers and engages in broad community education and litigation on pressing civil and employment rights issues. ALC is committed to ending discrimination and unfair treatment of vulnerable workers.

The *Lawyers' Committee for Civil Rights Under Law* is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, law school deans and professors, and many of the nation's leading lawyers. The Lawyers' Committee is dedicated, among other goals, to eradicating all forms of workplace discrimination affecting racial and ethnic minorities, women, individuals with disabilities and other disadvantaged populations. Since the passage of the Civil Rights Act of 1964, the Lawyers' Committee has relied on the class action mechanism and all available remedies as essential tools for combating unlawful discrimination in the workplace.

AMICUS
CURIAE
BRIEF

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No. 10-277

IN THE

Supreme Court of the United States

WAL-MART STORES, INC.,

Petitioner,

v.

BETTY DUKES, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, THE EQUAL JUSTICE SOCIETY, AND THE LEGAL AID SOCIETY-EMPLOYMENT LAW CENTER IN SUPPORT OF RESPONDENTS

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OTHER AUTHORITIES

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INTERESTS OF THE *AMICI CURIAE*[1]

The National Employment Lawyers Association (NELA),[2] the Equal Justice Society (EJS)[3], and the Legal

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[1] This brief is filed with the consent of all parties. No party or counsel for a party authored any part of this brief or made any financial contribution to its preparation or submission. Other than *amici* and their counsel, no person has made any monetary contribution to the preparation or submission of this brief.

[2] The National Employment Lawyers Association (NELA) advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. Founded in 1985, NELA is the country's largest professional organization comprised exclusively of lawyers who represent individual employees in cases involving labor, employment, and civil rights disputes. NELA and its 68 state and local affiliates have more than 3,000 members nationwide committed to working for those whose rights have been violated in the workplace. As part of its advocacy efforts, NELA supports precedent-setting litigation and has filed dozens of *amicus curiae* briefs before this Court and the federal appellate courts to ensure that the goals of workplace statutes are fully realized. NELA's interest in this case is to assist the Court based on its long experience with the use of Title VII to address disparate impact and pattern or practice claims and to ensure that employees retain access to class action remedies in cases involving systemic discrimination.

[3] The Equal Justice Society (EJS) is a national organization of scholars, advocates, and citizens that seeks to promote equal opportunity and enduring social change through law, public policy, public education, and research. EJS has long been engaged in efforts to promote equal opportunity for women and people of color. Consistent with that effort, EJS works to overturn barriers to the protection and enforcement of the anti-discrimination protections of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and federal statutes. EJS has been at the forefront of applying social science knowledge about

Aid Society – Employment Law Center (LAS-ELC)[4] appear as *amici curiae* to address the impact of this case on the viability of Title VII's systemic discrimination remedies. Petitioner Wal-Mart, and various *amici* appearing in support of Wal-Mart's position, challenge the use of Federal Rule of Civil Procedure 23 to certify claims involving subjective or discretionary employment practices. They ask this Court to establish a novel and unduly constraining standard for certifying such classes. (*See, e.g.*, Brief of Petitioner ("Pet'r. Br.") 10-11; *infra at* Part I, Part II.A). *Amici* organizations and their members have decades of experience protecting equal employment opportunity in the workplace, including seeking relief from systemic discrimination on behalf of classes under Title VII of the Civil Rights Act of 1964. *Amici* respectfully submit that applying a higher or different standard to class cases involving subjective decisionmaking would

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discrimination to law, serving as a leader in educating courts, litigators and civil rights agencies about the mechanisms and processes of bias in the workplace and elsewhere.

[4] The Legal Aid Society – Employment Law Center (LAS-ELC) is a non-profit public interest law firm whose mission is to protect, preserve, and advance the workplace rights of individuals from traditionally under-represented communities. Since 1970, the LAS-ELC has represented plaintiffs in cases involving the rights of employees in the workplace, particularly those cases of special import to communities of color, women, recent immigrants, individuals with disabilities, LGBT individuals, and the working poor. The LAS-ELC's interest in preserving the protections afforded employees by federal anti-discrimination laws is longstanding. The LAS-ELC has successfully litigated several cases against major metropolitan fire departments to provide increased opportunity for people of color and appeared before this Court on numerous occasions as counsel for plaintiffs as well as in an *amicus curiae* capacity.

be at odds with core Title VII enforcement principles. Further, it would significantly restrict the ability of employees to seek redress for valid claims involving discriminatory employment policies. It would reduce employer incentives to adopt best practices that limit or avoid the potential for bias in pay, promotion and other employment decisions. Because of these potentially far-reaching implications of the Court's disposition of this case on civil rights plaintiffs, *amici* file this brief.

SUMMARY OF ARGUMENT

When subjective or discretionary employment practices lead to systemic discrimination, Title VII allows plaintiffs to seek relief as a class. Rule 23 ensures that they can. Employment discrimination class action cases frequently involve concerns with subjective employment practices – formal policies or standard ways of doing business that encourage managers to make ad-hoc unexamined decisions about workers.[5] When company structures allow favoritism and personal preferences to override merit in hiring, pay and promotion decisions, protected classes can end up with fewer opportunities and smaller paychecks as a result.[6] If a corporate policy delegates open-ended discretion to supervisors, and thereby limits equal employment opportunity for an entire class of employees, class actions are a key mechanism for reducing systemic discrimination in the workplace.

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[5] *See, e.g.*, *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 982 (1988) (defendant "had not developed precise and formal criteria for evaluating candidates for the [relevant] positions," but "relied instead on the subjective judgment of supervisors").

[6] *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 236-37 (open-ended evaluation process for partnership decisions allowed gender-based stereotypes to influence outcome); *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 276-77 (5th Cir. 2008) (African-Americans systematically denied promotion opportunities where managers had discretion to bypass objective

Claims that subjective pay and promotion practices systematically disfavor women at Wal-Mart raise common issues of law and fact under the applicable substantive law. Plaintiffs rely on two well-established Title VII liability theories that test evidence of discrimination in the context of a classwide wrong—pattern or practice and disparate impact. Under Title VII's class-based discrimination framework, plaintiffs must show that discrimination in the workplace manifests as the company's "standard operating procedure." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336 (1977); *see also Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), or that specifically challenged practices have a measurable adverse effect on equal employment opportunity. *Lewis v. City of Chicago*, 130 S.Ct. 2191 (2010); 42 U.S.C. § 2000e-2(k). These doctrines formally recognize that employment practices can operate systematically to deprive workers as a class from being treated on the basis of merit–instead of because of race, gender or other protected status. Critically for the legal

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seniority requirements and choose "candidate they favored"); *Green v. USX Corp.*, 843 F.2d 1511, 1527-28 (3d Cir. 1988), *relevant portion reinstated by Green v. USX Corp.*, 896 F. 2d 801 (3d Cir. 1990) (significant racial disparity in hiring at workplace where applicants chosen by foreman after interviews using "unguided" and "never validated" subjective criteria); *Franks v. Bowman Transportation Co.*, 495 F.2d 398, 403 (5th Cir. 1974) (Plaintiff "watched white workers hired 'off the street' into higher paying positions for which he was qualified").

dispute in this case, and contrary to the implications of Petitioner's presentation, Title VII permits plaintiffs to address discrimination on a systemic level regardless of the degree of subjectivity or the presence of intent. *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 990-91 (1988). Applying Rule 23(a) to claims involving subjective practices requires considerable deference to this well-established Title VII law, and to traditional Rule 23 interpretive principles. When considering a class certification motion for subjective employment practices, there is no requirement that claims be "entirely subjective" to satisfy commonality, nor are there special proof or evidentiary requirements that go beyond or differ from those under Rule 23. *See* discussion *infra* at Part I.[7]

Consequently, this Court has sought to balance the recognition that discrimination claims "by their very nature" may encompass class-based wrongs, *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977), against Rule 23's gatekeeping role. Although Title VII clearly contemplates class-based liability and relief, whether plaintiffs may proceed as a class in any particular case depends on the evidence regarding the employment practice at issue. For decades, federal courts have followed this Court's mandate to scrutinize that evidence carefully in considering whether to certify classes in employment discrimination cases. *See Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147 (1982). Accordingly, federal courts usually do not permit plaintiffs to proceed absent a preliminary evidentiary record as to two key points: (1) the challenged employment practice applies in generally the same manner to the class as a whole and (2) there is statistical or other evidence that could support a reasonable inference of classwide discrimination, which in turn satisfies the court that a legitimate common question as to classwide harm exists. *See* discussion *infra* at Part II.A. This requirement serves to "bridge the gap" between individual claims of discrete instances of discrimination, and the existence of additional employees "fairly encompassed" within a proposed class affected by a common discriminatory policy or practice. *Falcon*, 457 U.S. at 157-58.

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[7] Petitioner Wal-Mart and its *amici* argue in direct conflict with *Watson* that subjective practices claims involve special rules and forms of proof and that courts should draw distinctions between entirely subjective, partially subjective, and objective practices. *See, e.g.*, Pet'r Br. 10-11; *id.* 19-22; *infra* at Part I.

Apparently rejecting current practice as inadequate, Wal-Mart and its *amici* contend that *Falcon* adopts a novel heightened proof requirement that only applies to cases involving subjective practices.[8] They justify this by claiming that subjective practices are inherently individualized and cannot give rise to common questions of law or fact. Whether subjective practices give rise to common questions can only be determined by a fact-specific review in each case. The view that subjective practices are *per se* inconsistent with class treatment would conflict with *Watson* and with how circuit courts have addressed this question for years. There are no special rules or exceptions from the general Rule 23 inquiry based on the type of employment practice. Nor is there any need to adopt such rules.

Based on a review of prior cases, federal courts have been highly selective about letting these cases go forward, with due regard to both the due process rights of employers and the interests of absent class members. *See* discussion *infra* at Part II.B. and Appendix 1 ("App. 1"), Appendix 2 ("App. 2") (tables documenting filing and certification trends in Title VII class cases). Similarly, in this case, the district court made its ruling after considering and addressing a substantial evidentiary record in significant detail regarding the commonality and centralization of human resources practices at Wal-Mart, the prevalence of gender stereotyping in the workplace, and statistical and anecdotal evidence of gender differences in pay and promotions that could not be explained by differences in qualifications.[9] That fact-based conclusion is clearly entitled to deference. Adopting Wal-Mart's position would tip the balance from judicial respect for all interests under Title VII to mere acquiescence to employers. It would further erode the protection for merit-based decisions, allowing companies to tolerate workplace decisions based on favoritism.

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[8] *See, e.g.*, Pet'r. Br. at 19-22; *see also infra* nn. 16, 23 and accompanying text (detailing arguments of *amici*).

For close to five decades, this Court has safeguarded Title VII's promise that all Americans have access to job opportunities on the basis of talent, qualifications and expertise – and without regard to race, gender or other impermissible grounds. *Ricci v. DeStephano*, 129 S.Ct. 2658, 2674 (2009) (Court's decisions interpreting employment discrimination doctrine "must be consistent with the important purpose of Title VII – that the workplace be an environment free of discrimination, where race is not a barrier to opportunity"). Petitioner and its supporting *amici* have utterly failed to justify a rewrite of these longstanding rules.

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[9] *See infra* nn. 21-22 and accompanying text.

ARGUMENT

I. TITLE VII PERMITS CLASS REMEDIES FOR DISCRIMINATORY PRACTICES, REGARDLESS OF THE LEVEL OF INTENT OR OBJECTIVITY

Title VII does not restrict discrimination claims to one particular set of practices or contexts. *See Lewis*, 130 S.Ct. at 2198 (no specific definition of unlawful employment practice). The statute operates to prohibit all discriminatory employment practices, whether intentional or unintentional, subjective or objective, or any combination of these characteristics. *Franks*, 424 U.S. at 763 ("Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination."). *Accord Watson*, 487 U.S. at 989. Even an apparently nondiscriminatory practice may be illegal if it systematically limits equal employment opportunity for a protected class. *See Griggs v. Duke Power Co.*, 401 U.S. at 430. ("Under [Title VII], practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.").

This Court has repeatedly concluded that Title VII prohibits discriminatory employment practices whether they are objective, subjective, or a mix of both. *See Watson*, 487 U.S. at 990 (Title VII protections extend to both subjective and objective employment practices); *Falcon*, 457 U.S. 147, 159 n.15 (1982) (noting that Title VII prohibits discriminatory practices, including subjective employment practices); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 302 (1977) (recognizing that highly subjective hiring process in which decisionmakers were told to consider "personality, disposition, appearance, poise, voice, articulation, and ability to deal with people," was conducive to subtle discrimination).

Federal courts and Congress have operationalized this broad coverage of all discriminatory practices in two doctrines applicable to systemic discrimination: disparate impact and pattern or practice (intentional systemic discrimination). These liability theories originated in milestone cases of this Court in the battle against racial segregation in the workplace. *See, e.g., Teamsters*, 431 U.S. 324; *Franks*, 424 U.S. 747; *Griggs*, 401 U.S. 424. Since then, the Court has applied these doctrines in cases involving sex discrimination, and to a range of contemporary employment practices involving little or no overt evidence of bias. *Lewis*, 130 S.Ct. 2191; *Ricci*, 129 S.Ct. 2658; *Watson*, 487 U.S. 977 ; *Dothard v. Rawlinson*, 433 U.S. 321 (1977). Over the years and up to the current day, federal courts have followed them in cases involving subjective practices like the ones raised here. *See, e.g., Brown v Nucor*, 576 F.3d 149, 153-157 (4th Cir. 2009); *McClain*, 519 F.3d at 272; *Staton v. Boeing*, 327 F.3d 938 (9th Cir. 2003); *Shipes v. Trinity Indus.*, 987 F.2d 311 (5th Cir. 1993); *Green v. USX Corp.*, 843 F. 2d 1511 (3d Cir. 1988), *relevant portion reinstated by Green v. USX Corp.*, 896 F. 2d 801 (3d Cir. 1990); *Rossini v. Ogilvy & Mather*, 798 F.2d 590, 598-99 (2d Cir. 1986); *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546 (11th Cir. 1984). Congress, in exercising its statutory authority, has approved of and expanded on these remedial frameworks. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. These doctrines continue to address discriminatory employment practices however they manifest in the workplace.

Disparate impact theory permits plaintiffs to challenge discriminatory practices on behalf of a class without any proof of discriminatory intent. Liability turns on whether a statistically-determined disparate impact exists, and whether an employer may nonetheless justify that practice based on job- or business-specific criteria. *Lewis*, 130 S.Ct. at 2198; 42 U.S.C. § 2000e-2(k). Although the doctrine originated in the context of objective practices and criteria, such as degree requirements,[10] written employment tests,[11] or height and weight requirements,[12] it is not limited to objective practices. Indeed, this Court in *Watson* specifically held that the disparate impact doctrinal framework applies to subjective criteria. 487 U.S. at 990-91.

The subjective practices challenged in *Watson* are on all fours with the practices plaintiffs challenge on behalf of the proposed class. At issue in both cases is "whether *an employer's practice of committing promotion decisions to the subjective discretion of supervisory employees* has led to illegal discrimination." *Watson*, 487 U.S. at 982 (emphasis supplied). In *Watson*, the defendant "had not developed precise and formal criteria for evaluating candidates for the [relevant] positions," but "relied instead on the subjective judgment of supervisors." *Id.* 487 U.S. at 982. Further, the company declined to make centralized or coordinated promotion decisions, but delegated promotional authority to individual supervisors.

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[10] *Griggs*, 401 U.S. at 428-429.

[11] *Id.*

[12] *Dothard*, 433 U.S. at 332.

Despite the fact that in operation this practice involved discrete individual interactions, its legality could be evaluated exactly the way a height or weight requirement, or a written test, would be – based on its overall impact on a protected class and the need for, or benefit of that practice to, the employer:

> We are also persuaded that disparate impact analysis is in principle *no less applicable to subjective employment criteria* than to objective or standardized tests. In either case, a facially neutral practice, adopted without discriminatory intent, may have effects that are indistinguishable from intentionally discriminatory practices . . . If an employer's undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply.

Watson, 487 U.S. at 990-91 (emphasis supplied). By proposing additional hurdles for class claims involving subjective practices, Petitioner and its *amici* are effectively asking the Court to reverse its holding in *Watson*.

Watson places subjective and objective practices on the same legal footing. 487 U.S. at 990. By its holding, the Court recognized that subjective or discretionary decisionmaking can be an identifiable and measurable discriminatory **practice**, rather than just a series of unique or random events. In a disparate impact claim, all members of a proposed class are challenging the effect of a common employment practice. Whether Wal-Mart's common pay and promotion practices systematically result in unequal opportunities for women employees is directly analogous to whether Duke Power Company's common practice of requiring high school diplomas resulted in unequal opportunities for African-American employees. *Griggs*, 401 U.S. at 431 ("What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."). Following *Watson*, it is not the level of subjectivity, but the question of adverse impact, that matters.

Notably, a key issue before the Court in *Watson* was the extent to which traditional expert tools used to assess the disparate impact of objective criteria could apply in the context of personal discretion. The Court had before it the views of leading social science researchers who explained how statistical evidence, psychological assessment and validation tools were as relevant to understanding discrimination that operates through subjective decisionmaking as they were to written tests or objective criteria.[13] Thus, the conclusion that Title VII applies to practices "based on the exercise of personal judgment or the application of inherently subjective criteria...," including "an employer's undisciplined system of subjective decisionmaking," 487 U.S. at 988, 990, envisioned using exactly the kind of aggregate statistical assessment and expert evidence before the District Court in this case.

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[13] *See, e.g.,* Brief for American Psychological Association, *Amicus Curiae* supporting Petitioner, 1987 WL 881423 at 5 & n.7 (the "widely held view" that subjective practices are "less scientific, less quantifiable, less reliable, and less facially neutral than their objective counterparts" does not mean they cannot be systematically assessed. "It is not intrinsic in such devices to be unquantifiable.")

Subjective or partially subjective practices are no less capable of resulting in consistent, measurable discriminatory effects, and thus, no less actionable on a classwide basis, than claims of discrimination emanating from objective practices. This is particularly the case in the modern workforce where the "problem of subconscious stereotypes and prejudices" continues to exist. *Watson*, 487 U.S. at 990. As in the case of Ann Hopkins, employers must evaluate employees based on qualifications and merit, not improper stereotypes. *Price Waterhouse*, 490 U.S. at 251. Indeed, the record here reveals significant evidence of sex stereotyping in the workplace, and empirical evidence of the potential for subjective practices to allow stereotypes to override merit for women at Wal-Mart. (Pet. App. at 193a-94a.)

However, Petitioner and its *amici* consistently argue that subjective practices should be treated *differently* from any other Rule 23 inquiry, and that special rules and proof requirements apply only to these class actions. *See, e.g.*, Pet'r. Br. 13, 21-23; Brief of *Amicus Curiae* Pacific Legal Foundation ("PLF Br.") 15-16. The core of their argument is the one rejected in *Watson* – one that equates subjective with random or treats it as by definition solely individualized.[14] Disparate impact theory requires conceiving of a system of delegated discretion, like that at issue in *Watson* and here, as a *system*. It tests the effect of the entire system on the class. It asks whether comprehensive defenses such as business necessity apply. To view subjective practices as inherently inconsistent with Rule 23's commonality requirement, or so much in tension that only an extremely high level of proof allows certification, is as wrong as viewing them as inherently inconsistent with disparate impact. As the Third Circuit explained in considering a related prong of Rule 23(a):

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[14] *See, e.g.*, Pet'r. Br. 21 (where plaintiffs challenge discretionary decisions by managers it is the "antithesis" of a common policy); *id.* at 31-32 (PLF Br. at 2-3 (where company delegates hiring or promotion authority to managers by definition there is no common practice).

> This contention rests in part upon the same rationale that USX asserts with regard to the applicability of disparate impact analysis to this case—that where subjective criteria are employed, it is necessary to evaluate each instance of discrimination independently. As we noted above, we find nothing in Title VII that requires that result. The argument is similarly unpersuasive in this context. It completely misperceives the typicality requirement of Rule 23.

See Green, 843 F.2d at 1533.

Following Petitioner's arguments to their logical extreme, and requiring a higher showing to certify cases involving subjective practices, creates an unacceptable end-run around *Watson* itself. It abrogates the Court's stated goal of avoiding loopholes in Title VII enforcement. *See Watson*, 487 U.S. at 989 ("Our decisions in *Griggs* and succeeding cases could largely be nullified" unless disparate impact applies to subjective practices). If claims involving objective criteria are easier to certify than those involving subjective criteria, the likely result is that employers will move further away from objective measures of job performance, skills, or qualifications. That in turn will reduce employer incentives to adopt oversight mechanisms that lessen the risk that subjectivity will lead to bias. Certainly the argument that claims must be "entirely subjective" in order to be certified must fail: *Watson* treats objective, subjective, and mixed systems consistently as do virtually all the Courts of Appeal.[15] This principle becomes even more significant given that Congress has now codified disparate impact theory formally into Title VII's statutory scheme. *Lewis*, 130 S.Ct. at 2200 ("By enacting § 2000e-2(k)(1)(A)(i), Congress allowed claims to be brought against an employer who uses a practice that causes disparate impact, whatever the employer's motives and whether or not he has employed the same practice in the past.").

Similarly, whether plaintiffs' evidence sufficiently demonstrates intent is a distinct inquiry from the issue of determining commonality. It is simply not plausible, as Petitioner and its *amici* contend, that Rule 23 requires "significant proof" of an intent to discriminate, or proof that subjective practices are a mere fig leaf for intentional discrimination, or evidence that virtually all class members had been discriminated against, in order to satisfy the threshold procedural question of class certification.[16] First, because Title VII forbids both facially neutral and intentionally discriminatory practices, plaintiffs could bring and win their case on the merits without ever proving an intent to discriminate at all. (Indeed, many of the briefs seeking reversal are written as if disparate impact theory never existed, or the *Watson* decision applying it to subjective practices on equal footing with objective practices, never happened.) Second, some of the scenarios provided in the briefs of Petitioner and its *amici* go beyond what is likely required to sustain a pattern or practice claim on the merits.[17] It is hard to imagine how a threshold question like class certification could be limited to certain sets of facts to the exclusion of all others.

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[15] *Watson*, 487 U.S. at 991. This principle has been followed in the First, Second, Third, Fourth, Fifth, Eight, and Eleventh Circuits which treat partially subjective, objective and entirely subjective practices identically for purposes of disparate impact theory. *Brown*, 576 F.3d at 157; *McClain*, 519 F. 3d at 272; *Caridad v. Metro North Commuter R.R.*, 191 F.3d 283, 291-93 (2d Cir. 1999); *Bergel v. Metropolitan Waste Control Commission*, 873 F.2d 1166, 1167-69 (8th Cir. 1989); *Green*, 843 F. 2d at 1525; *Griffin v. Carlin*, 755 F.2d 1516, 1525 (11th Cir. 1985); *Robinson v. Polaroid Corp.*, 732 F.2d 1010, 1015 (1st Cir. 1984).

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[16] *See, e.g.*, Pet'r. Br. at 19-22 (*Falcon* requires "significant proof" at R.23 stage); PLF Br. at 15-16 (proposing to limit subjective practices claims to the single scenario where plaintiff has proof of employer who wants to avoid a litigation "paper trail" and deliberately adopts subjective practices as a subterfuge allowing it to hire only white males); Brief of *Amici Curiae* Altria Group, *et al.* ("Altria Br.") at 6 ("the general policy that unites the claims must itself be one 'of discrimination'—for example, a policy that is discriminatory on its face, or a policy adopted for the purpose of enabling discrimination."); Brief of *Amicus Curiae* Costco Wholesale Corp. ("Costco Br.") at 5; Brief of *Amicus Curiae* Retail Litigation Center ("Retail Lit. Ctr. Br.") at 8, 7-10.

[17] For example, in *Teamsters* itself, the proof of a discriminatory pattern or practice was based on statistical and anecdotal evidence, not on the theory that an employer adopted certain practices in order to freely discriminate without sanction. *See generally Teamsters*, 431 U.S. 324.

It may certainly be the case that ultimate recovery for the class requires strong evidence of intentional discrimination, but the decision regarding certification should only consider whether plaintiffs have raised a legitimate question as to the existence of a pattern or practice of discrimination. The pattern or practice framework is fully applicable to cases involving subjective practices. The misuse of discretionary or unstructured procedures to limit opportunities available to particular classes of employees can give rise to a workplace broadly permeated by discrimination. For example, in *Teamsters* itself, it was alleged that

> [n]umerous qualified black and Spanish-surnamed American applicants who sought line driving jobs at the company over the years, either had their requests ignored, were given false or misleading information about requirements, opportunities, and application procedures, or were not considered and hired on the same basis that whites were considered and hired.

Teamsters, 431 U.S. at 338. *See also, e.g.*, *Cox*, 784 F.2d at 1551-52 (word of mouth hiring led to pattern or practice of sex-based discrimination in promotions); *Rossini*, 798 F.2d at 599 (class could pursue pattern or practice claims where employer's subjective promotions practices discriminated against women). Plaintiffs must provide sufficient evidence to satisfy a court that a legitimate question as to intentional discrimination exists; they will be able to show more than a discriminatory effect, and; this question is common to the class.

In a comparable case involving objective practices, all of these objections to certification would clearly fail. Suppose that instead of giving store managers undisciplined discretionary authority to set pay rates, Wal-Mart determined salaries based solely on level of education. And suppose that aggregate statistical evidence showed this policy systematically resulted in women being paid less than otherwise comparable men. Even under Petitioner's view of the law, plaintiffs could move to certify a class, present their evidence of impact, and require Wal-Mart to justify its policy. Plaintiffs clearly do so regardless of whether measurable statistical disparities existed at each individual store, or whether women were merely somewhat disfavored versus completely shut out of higher paid opportunities, or whether Wal-Mart chose that criteria deliberately in order to exclude women. Because under Title VII, there is "in principle" no distinction between these two systems, *Watson*, 487 U.S. at 990, under Rule 23 there should not be either.[18]

Certifying a class in a case challenging subjective decisionmaking requires satisfying Rule 23—nothing more and nothing less. The requirements of Rule 23(a) are the same for subjective or objective practices. Rule 23(a) requires plaintiffs, to establish, *inter alia*, that there are questions of law or fact common to the class. Title VII requires the federal enforcement power to apply consistently across all employment practices. And so we must turn from the relationship between Title VII and Rule 23, to the specifics of how to establish Rule 23 requirements in subjective practices cases and all other cases.

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[18] Such a distinction would also be flatly inconsistent with Congress' decision in 1991 to expand available remedies in all cases – class and individual – without distinction. Congress took this step despite the decline of extreme workplace race and gender segregation and the decline of explicit racism and sexism in society between 1964 and 1991.

II. FEDERAL COURTS FOLLOWING *FALCON* ARE ALREADY REQUIRING PLAINTIFFS TO PROVIDE APPROPRIATE EVIDENCE of COMMONALITY IN CASES INVOLVING SUBJECTIVE PRACTICES

The district court's class certification ruling in this case rests on the application of widely accepted legal principles and an ample supporting factual record. Federal courts regularly certify similar classes in cases challenging subjective employment practices as discriminatory, and regularly decline to certify such cases, after a careful review of the specific claims at issue and the evidence as to the elements of Rule 23 presented by the plaintiffs and defendant. Where there is evidence permitting an inference that a common policy of subjective decisionmaking has resulted in class-wide harm, commonality is satisfied. Under this approach, federal courts typically consider less than 100 Title VII class action cases each year, and certify only a handful of them. Following *Falcon*'s "rigorous analysis" evidentiary requirements, district courts have exercised their gatekeeping role to deny class certification in the majority of contested cases.

A. The Court Below Employed an Appropriate and Rigorous Factual Analysis Consistent with this Court's Ruling in *Falcon*, and the Practice of Other Courts of Appeal, to Determine Whether Plaintiffs Satisfied Rule 23(a)

In applying Rule 23(a) to class claims under Title VII, circuit courts generally require evidence of a common policy or practice, supported by statistical or other evidence, following this Court's ruling in *Falcon*, 457 U.S. 147 (1982). As this Court held, trial courts must apply a "rigorous analysis" to each element of Rule 23 when considering whether to certify a class. A rigorous analysis may require courts to "probe behind the pleadings" to evaluate the factual and legal issues of the cause of action, in order to determine whether the putative class is in actual conformance with the requirements of Rule 23(a).[19] *Falcon*, 457 U.S. at 160. This framework, established by this Court nearly three decades ago, was followed by the Ninth Circuit, and guided the trial court in reaching its class certification decision. Both the district court and the Ninth Circuit allowed only a putative class meeting the specific requirements of Rule 23 and demonstrating a reasonable inference of discrimination on the merits to be certified.

Similarly, consistent with the "rigorous analysis" required under *Falcon*, the circuits, in applying Rule

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[19] Courts make this analysis without regard to whether it overlaps with the merits inquiry, and the analysis often involves the examination of extensive evidence and tests factual and legal theories. *E.g.*, *Brown v. Am. Honda (In re New Motor Vehicles Canadian Export Antitrust Litig.)* 522 F.3d 6, 25-26 (1st Cir. 2008); *Miles v. Merrill lynch & Co. (In re Initial Pub. Offerings Securities Litigation)* (*"IPO"*), 471 F.3d 24, 41 (2d Cir. 2006).

23(a) to claims involving subjective practices, typically test evidence in support of class certification against two key elements:

> (1) Whether the defendant has a common employment policy or practice permitting subjective or discretionary decisionmaking that applies in generally the same manner to the class;
>
> (2) Whether the plaintiffs have proffered competent, admissible statistical and/or other evidence at the class certification phase that can support a reasonable inference of discrimination against the class.

Brown, 576 F.3d at 157; *McClain*, 519 F. 3d at 272; *Staton*, 327 F.2d at 954; *Caridad v. Metro North Commuter R.R.*, 191 F.3d 283, 291-93 (2d Cir. 1999); *Rossini*, 798 F.2d at 598-99; *cf. Green*, 843 F. 2d at 1533.[20]

These elements allow a court to be satisfied both that a legitimate question of law or fact exists as to defendant's discriminatory conduct, and that this question is "common to the class" as Rule 23(a) requires. Requiring plaintiffs to proffer competent, admissible evidence that can support an inference of classwide discrimination raises the question -- beyond mere pleading or allegations.

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[20] Courts have treated the failure on one or both of these elements as fatal to a plaintiff's certification motion. *See, e.g.*, *Cooper v. Southern Co.*, 390 F.3d 695 (11th Cir. 2004) (policies differed by unit); *Garcia v. Johanns*, 444 F.3d 625 (D.C. Cir. 2006) (plaintiff offered simplistic statistics without major variables).

Cf. Griffin v. Duggar, 823 F.2d 1476, 1489 (11th Cir. 1987)("Falcon requires more than mere allegations and an intent to rely on statistics as proof.") Courts must further consider evidence that the question being raised is likely to be one that is common to the class, such as the company's practice, structure, organization, knowledge, or culture. This was the approach of the District Judge here. In addition to statistical and anecdotal evidence of discrimination, Plaintiffs presented evidence of common employment policies and practices governing pay and promotions that allowed subjective and/or discretionary decision-making to apply to the class in the same manner.[21] This was bolstered by a detailed proffer of statistical evidence supporting a reasonable inference of discrimination against the class through the use of such common employment practices.[22] The district court considered this evidence and concluded that plaintiffs satisfied Rule 23, applying these settled legal rules to reach a fact-based conclusion entitled to deference.

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[21] Plaintiffs submitted extensive evidence of Wal-Mart's common personnel structure across all stores (Pet. App. 173a-175a); uniform pay structure for all hourly employees and common compensation policies for salaried in-store management, including the broad range of discretion built into the compensation structure for each position (Pet. App. 176a-180a); lack of guidelines for District and Regional Managers making promotion decisions and the lack of monitoring of these promotion decisions (Pet. App. 180a-182a), and; Defendant's general practice of not posting promotion opportunities (Pet. App. 182a-183a.)

[22] Plaintiffs' preferred expert, statistician Dr. Drogin, concluded that there were statistically significant gender-based disparities in compensation and promotions across all Wal-Mart regions. (Pet. App. 196a, 200a.) Dr. Drogin's regression analysis showed that Wal-Mart's women employees were paid 5-15% less than their male counterparts. (Pet. App. 200a.) He further concluded that women took longer to enter into management positions and that the percentage of women in management declined the higher the ranks. (Pet. App. 198a-99a.)

Nevertheless Wal-Mart and its *amici* propose this Court go beyond the existing requirement that plaintiffs prove they satisfy Rule 23. They argue for adoption of a novel heightened standard for class claims involving subjective practices only, wrongly claiming it is mandated by *Falcon*, 457 U.S. at 159 n.15. Petitioner claims Plaintiffs *must* show "'significant proof that an employer operated under a general policy of discrimination' that was implemented through 'entirely subjective decisionmaking processes' in a manner that affected all class members." (Pet'r. Br. 19.)[23] However, *Falcon* itself requires neither "significant proof" nor does it hold that the challenged practice be "entirely subjective." More importantly, their proposed standard conflicts with established Title VII law and violates any reasonable conception of a separation between class and merits proof.

In *Falcon*, this Court reversed and remanded the certification of a class consisting of Mexican-American applicants for employment, and also employees who had been turned down for promotion where the named plaintiff had been hired and promoted. 457 U.S. at 150-51. The Court, in looking beyond the pleadings, found that the trial court did not conduct a rigorous analysis to determine whether the named plaintiff's allegations of discrimination in the denial of a promotion were sufficient to support an across-the-board claim of discrimination against Mexican-American applicants that were not hired and employees not promoted. *Falcon*, 457 U.S. at 158-59. In the particular footnote number 15 that Wal-Mart uses to argue for limited class remedies, the Court actually goes on to make clear the contexts where even across-the-board classes could be viable. As this Court noted, carefully setting limits on tne *Falcon* holding itself:

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[23] *See also, e.g.*, Altria Br. at 4 (claiming *Falcon* holds that discrimination claims involving subjective practices "may not proceed as a class action absent 'significant proof' of a 'general policy of discrimination'.); Retail Lit. Ctr. Br. at 3, 7-10 (*Falcon* only allows certifying classes where practices are "entirely subjective").

> [s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, *such as* through entirely subjective decisionmaking processes.

Falcon, 457 U.S. at 159 n.15. (emphasis supplied). The use of the prepositional phrase "such as" requires the conclusion that "entirely subjective" is merely a demonstrative example. *Accord Staton*, 327 F.3d at 955; *Griffin*, 823 F.3d at 1490. Moreover, the footnote simply suggests that "significant proof" could be used to "justify a class of both applicants and employees" – hardly a mandate regarding the level of proof applying to a narrower class such as the one in this case. Moving from examining a single footnote describing the exception to the text of the opinion which lays out the rule reveals the weakness of Petitioner's interpretation.

The claim that a different and higher requirement of "significant proof" applies only to certifying cases involving subjective practices[24] misunderstands the essential concern in *Falcon*. Plaintiffs seeking class certification must "bridge the gap" between the existence of individual and class-wide claims, "such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims." *Falcon*, 457 U.S. at 157. The text of the opinion provides specific scenarios where the gap may be bridged and a court can be satisfied that the claims of the proposed class are "fairly encompassed" by those of the named plaintiff. *Id.* at 158. One listed example, which involves no mention of "entirely subjective" or "significant proof" is by a showing that the representative plaintiff's promotion claim is typical of the Company's promotion practices. *Id.* at 159. Another is by showing that discrimination in one practice is manifested in the same way as in other practices. *Id.* at 158. Within this larger context it becomes even more clear the footnote is just one scenario among many rather than the sole path to class certification.

To address the real concern in *Falcon*, the federal courts are appropriately requiring some evidence that an aggrieved class may exist. Under this practice, the gap can be bridged by the plaintiff's presentation of statistical and/or other evidence which creates a reasonable inference that the anecdotal evidence of the representative plaintiff's discriminatory treatment is typical of that permitted by the Company's employment policies or practices. *Falcon* requires that plaintiffs must be put to some threshold test of whether their case may involve more than isolated or individual claims. *Griffin*, 823 F.2d at 1489 (*Falcon* sought to eliminate relying on pleadings and mandate a consideration of evidence regarding Rule 23 requirements). Courts are in fact putting plaintiffs to that test.

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[24] Pet'r. Br. 19-21.

Going further than *Falcon*'s requirement of testing the existence of common questions risks undercutting essential elements of Title VII. For example, as set forth above, proposing a novel heightened standard for cases involving subjective employment practices, and restricting class remedies solely to those cases involving "entirely subjective" systems is in direct conflict with the subsequent decision in *Watson*. Almost every Circuit that has considered the question has treated systems that combine objective and subjective factors the same way as fully subjective systems for purposes of Title VII – and Rule 23.[25] The very idea that the class certification standard should turn on either the level of subjectivity, or intent, rather than the level of commonality, violates the core principle that Title VII applies to any discriminatory practice.

Going further also risks a mandate that courts impermissibly reach a determination of merits issues. It is one thing to evaluate plaintiffs' evidence that a common question exists under an appropriately rigorous standard, quite another to answer it. The standard for certifying a class action, the prevalent standard in most Circuits, following *Falcon*, requires a rigorous analysis of factual evidence supporting each element of Rule 23. *Falcon*, 457 U.S. at 160. In *IPO*, the Second Circuit established more specific guidelines for determining whether the elements of Rule 23 have been met. *In re Initial Public Offerings Securities Litigation*, 471 F.3d 24, 33 (2d Cir. 2006). *IPO* holds that trial courts must examine enough factual evidence to determine whether each requirement of Rule 23 has been met without regard to whether such an examination overlaps with the consideration of the merits of the case. *Id.* at 41. In addition to the Ninth Circuit, the First, Fourth, Fifth, and Seventh Circuits have adopted a similar standard. *Brown v. Am. Honda (In re New Motor Vehicles Canadian Export Antitrust Litig.)* 522 F.3d 6, 25-26 (1st Cir. 2008); *Unger v. Amedisys Inc.*, 401 F.3d 316, 321-22 (5th Cir. 2005); *Gariety v. Grant Thorton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004); *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675-76 (7th Cir. 2001). *See also In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310 (3d Cir. 2009); *Staton*, 327 F.3d at 954.

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[25] 25. *See supra* at n. 15 and accompanying text. *Cf. Bacon v. Honda of Amer. Mfr., Inc.*, which departs from *Watson* and *Falcon* by requiring a showing of an entirely subjective decisionmaking process. 370 F.3d 565 (6th Cir. 2004).

The significant proof standard proposed by Wal-Mart and its *Amici* extends well beyond asking if plaintiffs' claims raise legitimate common questions of law or fact. It essentially argues that class treatment should be reserved for only the most outrageous cases. In *Eisen*, this Court stated: "We find nothing in either the language or history of *Rule 23* that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen v. Carlise & Jacquelin*, 417 U.S. 156, 177 (1974). While the Court further explains that a rigorous factual inquiry that overlaps with a merits inquiry to determine whether the elements of Rule 23 have been met is appropriate, the adoption of a "significant proof" standard would cross over into an analysis of the merits for its own sake. Such an inquiry is indeed improper and prejudicial at the class certification stage of litigation. *See id.* at 178.

The prevailing approach to Title VII class actions in federal court balances employer concerns against the federal policy interest in preserving equal employment opportunity. *Price Waterhouse*, 490 U.S.at 239 ("Title VII eliminates certain bases for distinguishing among employees while otherwise preserving employers' freedom of choice. . . . [striking a] balance between employee rights and employer prerogatives"). As plaintiffs must do more than merely allege classwide harm to satisfy Rule 23, and as courts are requiring statistical or other evidence of discrimination at the class certification stage, there is no generalized liability for merely having subjective employment practices. Employers have the opportunity under existing law to defend the need for subjectivity.[26] Where an employer's existing way of doing business or chosen practices cause genuine harm to a protected class, however, federal law properly requires a searching review of the justification and incentivizes improvements and safeguards. Ultimately, allowing federal courts to continue evaluating class actions on a case-by-case basis, and requiring no more and no less than a rigorous analysis of Rule 23 requirements, is the best mechanism for balancing all of the important interests at stake.

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26. Under disparate impact theory, an employer may defend against an impact by showing an appropriate justification – such as particular job requirements or business needs. *Lewis*, 130 S.Ct. at 2198; 42 U.S.C. § 2000e-2(k). Plaintiffs may also propose less discriminatory alternative mechanisms to meet the business need.

B. Since the 1991 Amendments, District Courts Have Required Plaintiffs to Provide a Substantial Factual Record in Support of Certification and Have Certified Only a Limited Number of Title VII Class Actions

The approach of requiring evidence that an employment practice may affect an entire class has resulted in a significantly limited number of Title VII class actions being certified. A historical review of class certification practices over the last three decades shows that district courts act carefully in deciding whether to certify a class. Although Petitioner implies that federal district courts are simply rubber-stamping requests for class treatment, the reality is quite different. Despite Wal-Mart's assertions that *Dukes* facilitates a flood of employment discrimination claims,[27] few such claims are ever filed. *See* App. 1 (Tables 1-3). In fact, the *Dukes* decision reflects the thoughtful and measured approach currently used by federal district court judges, incorporating the mandates of Rule 23(a) and *Falcon*'s "rigorous analysis" requirement. 457 U.S. at 160. Because of the constraints imposed on class claims by Congress[28] and in cases like *Falcon* and *Amchem*, *see* 521 U.S. at 613, the volume of employment discrimination class actions has declined drastically over the past several decades. The low rate at which employment discrimination cases are actually certified demonstrates how thoroughly the courts approach class certification. *See* App. 2. The district court should be permitted to manage this case, applying the discretion granted to it under Rule 23 and Title VII, just as the courts have done for over four decades.

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[27] Petitioners argue in their brief that "[a]s this case well illustrates, the rulemakers' prescriptions for class actions may be endangered by those who embrace Rule 23 too enthusiastically just as they are by those who approach the Rule with distaste." Pet'r. Br. 39-40 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 629 (1997)) (internal quotations omitted).

[28] To the extent that there have been perceived abuses of the class action device, Congress has stepped in to address these concerns; for example, Congress passed the Class Action Fairness Act of 2005 to prevent class action lawsuit abuse. Pub. L. No. 109-2, 119 Stat. 4.

1. The Number of Employment Discrimination Class Actions Filed And Certified Shows That Class Actions Are An Important, But Sparingly Used, Device To Confront Unlawful Employment Discrimination

Over the years, the number of employment discrimination class action lawsuits filed in federal courts has fallen precipitously.[29] App. 1. In 1976, 1,174 employment discrimination class actions were filed in federal district court. *Id.* By 2010, however, that number had fallen to 114, more than a 90 percent drop. *Id.* In 1981, the year before *Falcon* was decided, the number of employment discrimination class actions filed had fallen to 301. *Id.* The total number of employment discrimination filings reached its lowest point in the early 1990s, when 32 employment discrimination class claims were filed. The number increased slightly following the enactment of the Civil Rights Act of 1991. Notwithstanding arguments that the 1991 amendments caused a dramatic increase in these filings,[30] by the end of the decade, the rate of employment discrimination class actions filed continued to hold fairly steady, averaging approximately 90 per year. This relatively low level of class filings is remarkable given that Congress in passing the 1991 Amendments made compensatory and punitive damages available under Title VII.

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[29] This data is taken from information gathered by the Administrative Office of the United States Judiciary and from CourtLink. The Administrative Office of the United States Judiciary has this information publicly available from 1997-2004. CourtLink, an electronic service offered by LexisNexis, was used to collect the figures and to compile the class action data for 2005 through 2010. CourtLink, as the Federal Judiciary Center notes, identifies class actions via PACER docket records by searching for the terms "similarly situated" or "representative of the class" among the parties' names in the case caption. *See* Emery G. Lee & Thomas E. Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts*, Fourth Interim Rep. to the Jud. Conf. Advisory Committee on Civ. Rules, April 2008, at 15 n.10. Additionally, CourtLink electronically searches the first five docket entries of each docket sheet for the term "class action complaint." Finally, CourtLink compiles data for civil rights-employment cases and does not limit the search to only Title VII cases. This Data is summarized in Appendix 1, attached (charting totals from 1976 until 2010).

Despite a rise in the number of all class action lawsuits filed in or removed to federal court over the last six years,[31] employment discrimination class claims have increased only marginally.[32] Currently, employment discrimination class action lawsuits continue to make up only a very small percentage of the total amount of class actions filed. For example, during the 12-month period ending on September 30, 2004, 2,693 class action lawsuits were filed in the district courts, with only 96 designated as employment discrimination suits. App. 1. That represents only 3.5% of all class actions filed in this period. In 2010, the percentage of employment discrimination class actions filed dropped significantly, accounting for only 1.9% of the total number of class actions filed.[33] There is simply no factual support for the contention that there has been an abuse of Rule 23 certification in the employment discrimination context.

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[30] *See* Brief of *Amici Curiae* Equal Employment Advisory Council ("EEAC Br.") 11-12.

[31] *See* App. 1. *See generally* Lee, *supra*, at n.28 (Noting that the number of class action lawsuits filed nationally increased after the passage of the Class Action Fairness Act of 2005).

[32] *See* App. 1. From 1997 until 2004, the last year that the Administrative Office of the United States Judiciary publically released the number of class action lawsuits filed annually, the average number of employment discrimination class actions filed was 78.4. From 2005 until 2010, the average rose to 104.8.

2. While the Number of Class-Based Employment Discrimination Cases Filed Each Year Is Small, An Even Smaller Percentage Are Actually Certified

In addition to the consistently low number of employment discrimination class action lawsuits filed, courts are rigorously applying Rule 23 to certify a very small number of these cases. For example from 2008 through 2010, of the 31 Title VII decisions addressing class certification , courts granted class certification in 8 and denied it in 23,[34] a certification rate of just 25.8%.

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[33] According to the information found on CourtLink, of the 6,059 class action lawsuits filed in 2010, only 114 were classified as employment discrimination, representing only 1.9% of all class actions. *See* App. 1.

[34] In compiling the data for this three-year period, Westlaw and LexisNexis search engines were used. The following search terms were used: Class /3 certif! & "Title VII"; Class /5 certif! & "Title VII"; Class /7 certif! & "Title VII"; Class /10 certif! &

App. 2. Courts deny far more class certification motions than they grant. The low rate of class certifications in the employment discrimination context further demonstrates the rigor that courts apply when determining whether to certify an employment discrimination class. The fact that the district court in *Dukes*, based upon a voluminous record, determined that class certification was appropriate is not a reason for this Court to restrict the discretion that Rule 23 grants to the district courts.

"Title VII"; "Class action" & "Title VII"; "Class certification" & "Title VII." The use of other search parameters provided the same group of cases. The resulting data is limited to Title VII cases where the courts either granted or denied class certification (excluding cases that were either dismissed or granted summary judgment). Additionally, to the extent that a court either granted or denied class certification and a subsequent Court of Appeals decision reversed the ruling, this information is also captured. As reflected in App. 2 there were two cases where the court granted certification as to some claims but denied it as to others. These have been included in the list of cases but were not used in calculating certification rates.

CONCLUSION

The decision certifying the class should be affirmed.

Respectfully Submitted,

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APPENDIX

APPENDIX 1

Total Number of Class Action Lawsuits Filed as Compared to the Number of Employment Discrimination Class Action Lawsuits Filed since 1976[35]

Table 1.

	1976	1981	1986	1991	1993	1996
Total #	N/A	N/A	N/A	N/A	N/A	N/A
Em. Disc.	1,174	301	68	32	39	68
Percentage	∞	∞	∞	∞	∞	∞

Table 2.

	1997	1998	1999	2000	2001	2002	2003	2004
Total #	1,476	1,881	2,133	2,393	3,092	2,916	2,148	2,693
Em. Disc.	70	85	74	79	73	74	76	96
Percentage	4.7%	4.5%	3.5%	3.3%	2.4%	2.5%	3.5%	3.2%

Table 3.

	2005	2006	2007	2008	2009	2010
Total #	5,395	5,351	6,957	7,315	7,068	6,059
Em. Disc.	86	94	110	99	126	114
Percentage	1.5%	1.8%	1.6%	1.4%	1.8%	1.9%

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[35] The data in Tables 1 and 2 come from the Administrative Office of the United States Courts, *available at* http://www.uscourts.gov/Statistics/JudicialBusiness.aspx. The data in Table 3 is from CourtLink. *See* LexisNexis CourtLink, *available at* http://litigator.lexisnexis.com.

APPENDIX 2

Employment Discrimination Class Certification Decisions under Title VII from 2008 through 2010[36]

Class Certification was Granted in the Following 8 Cases:

- *Walker v. E. Allen Cnty. Sch.*, No. 1:08 CV 32 PPS, 2008 WL 4367579 (N.D. Ind. Sept. 19, 2008)
- *Curtis-Bauer v. Morgan Stanley & Co.*, No. C06-3903, 2008 U.S. Dist. LEXIS 85028 (N.D. Cal. Oct. 22, 2008)
- *United States v. City of New York*, 258 F.R.D. 47 (E.D.N.Y. 2009)
- *Brown v. Nucor Corp.*, No. 08-1247, 2009 U.S. App. LEXIS 22224 (4th Cir. Aug. 7, 2009)
- *Wood v. City of San Diego*, No. 03cv1910-MMA(WMc), 2010 U.S. Dist. LEXIS 123788 (S.D. Cal. Nov. 22, 2010)
- *Easterling v. Conn. Dep't of Corr.*, 265 F.R.D. 45 (D. Conn. 2010)
- *NAACP v. N. Hudson Reg'l Fire & Rescue*, 255 F.R.D. 374 (D.N.J. 2010)
- *Card v. City of Cleveland*, 270 F.R.D. 280 (N.D. Ohio 2010)

Class Certification was Denied in the Following 23 Cases:

- *Remien v. EMC Corp.*, No. 04 C 3727, 2008 U.S. Dist. LEXIS 74174 (N.D. Ill. Aug. 28, 2008)
- *Marable v. Dist. Hosp. Partners*, No. 01-02361, 2008 WL 5501106 (D.D.C. Dec. 1, 2008)
- *Sherman v. Westinghouse*, 263 F. App'x. 357, 368 (4th Cir. 2008) (per curiam) ("[B]ecause none of the plaintiffs [ ] made meritorious disparate impact claims . . . they cannot constitute proper class representatives, and the issue of whether the district court abused its discretion in denying class certification [was] moot.")
- *Curry v. SBC Comm'ns, Inc.*, 250 F.R.D. 301 (E.D. Mich. 2008)
- *Serrano v. Cintas Corp.*, Nos. 04-40132, 06-12311, 2009 WL 910702 (E.D. Mich. Mar. 31, 2009)

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[36] In compiling the data for this three-year period, January 1, 2008 through December 31, 2010, Westlaw and LexisNexis search engines were used. The following search terms were used: Class /3 certif! & "Title VII"; Class /5 certif! & "Title VII"; Class /7 certif! & "Title VII"; Class /10 certif! & "Title VII"; "Class action" & "Title VII"; "Class certification" & "Title VII." The use of other search parameters provided the same group of cases. The resulting case list is limited to Title VII cases where the courts either granted or denied class certification (excluding cases that were either dismissed or granted summary judgment). Additionally, to the extent that a court either granted or denied class certification and a subsequent court of appeals decision reversed the ruling, this information is also captured. *See* n. 34.

- *Haliye v. Celestica Corp.*, No. 06-CV-4769 (PJS/JJG), 2009 U.S. Dist. LEXIS 49051 (D. Minn. June 10, 2009)
- *Boyd v. Interstate Brands Corp.*, 256 F.R.D. 340 (E.D N.Y. 2009)
- *Schanfield v. Sojitz Corp. of Am.*, 663 F.Supp. 2d 305 (S.D.N.Y. 2009)
- *Jackson v SEPTA*, 260 F.R.D. 168 (E.D. Pa. 2009)
- *Puffer v. Allstate Ins. Co.*, 255 F.R D. 450 (N.D. Ill 2009)
- *Atwell v. Gabow*, 248 F.R.D 588 (D. Colo. 2009)
- *Nieman v. Nationwide Mut. Ins. Co.*, No. 09-3304, 2010 U.S. Dist. LEXIS 17499 (C.D. Ill Feb. 26, 2010)
- *Randall v. Rolls-Royce Corp.*, No. 1 06-cv-860-SEB-JMS, 2010 U.S. Dist. LEXIS 23421 (S.D. Ind. Mar. 12, 2010)
- *Berndt v. Cal. Dep't of Corr.*, No. C 03-3174 VRW, 2010 U.S. Dist. LEXIS 57833 (N.D Cal May 19, 2010)
- *Badger v. Stryden, Inc.*, No. 09-3619, 2010 U.S. Dist. LEXIS 77323 (E.D. Pa July 29, 2010)
- *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 05-C-6583, 2010 U.S. Dist. LEXIS 80002 (N.D. Ill. Aug. 9, 2010)
- *Kennedy v. Va. Polytechnic Inst. & State Univ*, No. 7-08-cv-00579, 2010 WL 3743642 (W.D. Va. Sept. 23, 2010)
- *Rollins v. Ala. Cmty Coll. Sys.*, No. 2:09cv636-WHA, 2010 WL 4269133 (M.D. Ala. Oct 25, 2010)
- *Syrja v. Westat, Inc.*, No. PJM 09-1956, 2010 U.S. Dist. LEXIS 118085 (D. Md. Nov 2, 2010).
- *Martinez v. City & County of Denver*, No 08-cv-01503-PAB-MJW, 2010 U.S. Dist. LEXIS 133866 *(D. Colo. Dec. 10, 2010)*
- *DeRosa v. Mass. Bay Commuter Rail Co.*, 694 F.Supp. 2d 87 (D. Mass 2010)
- *Gutierrez v. Johnson & Johnson*, 269 F R.D. 430 (D.N J 2010)
- *Moore v. Napolitano*, 269 F.R.D 21 (D.D C. 2010)

Class Certified was Denied in Part and Granted in Part in the Following 2 Cases:

- *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264 (5th Cir. 2008) (Upholding the district court's decision to deny certification of plaintiffs' disparate treatment claims; previously the district court had certified a class on the disparate impact claims)
- *Duling v. Gristede's Operating Corp.*, 267 F.R.D. 86 (S.D N.Y. 2010) (Granting certification for injunctive and declaratory relief but denying without prejudice certification for front pay, back pay, and other money damages)

AMICUS
CURIAE
BRIEF

18

Supreme Court, U.S.
FILED

JAN 26 2011

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No. 10-277

In the

Supreme Court of the United States

◆

WAL-MART
STORES, INC.,

Petitioner,

v.

BETTY DUKES, et al.,

Respondents.

◆

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

◆

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether claims for monetary relief can be certified under Federal Rule of Civil Procedure 23(b)(2)—which by its terms is limited to injunctive or corresponding declaratory relief—and, if so, under what circumstances.

2. Whether the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a).

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Sprague v. GMC,
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cert. denied, 507 U.S. 914 (1993) 10, 13

Stastny v. S. Bell Tel. & Tel. Co.,
628 F.2d 267 (4th Cir. 1980) 7

Vaughan v. MetraHealth Cos., Inc.,
145 F.3d 197 (4th Cir. 1998) 19

Wards Cove Packing Co., Inc. v. Atonio,
490 U.S. 642 (1989) 29-30

Watson v. Fort Worth Bank & Trust,
487 U.S. 977 (1988) 16, 26, 29

Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City,
473 U.S. 172 (1985) 20

Wright v. Circuit City Stores, Inc.,
201 F.R.D. 526 (N.D. Ala. 2001) 9

Rules of Court

Fed. R. Civ. P. 23 . . . . 3, 12, 14

Fed. R. Civ. P. 23(a) 2, 5-7, 10-11, 13, 15

Sup. Ct. R. 37.3(a) 1

Sup. Ct. R. 37.6 1

TABLE OF AUTHORITIES—Continued

Page

Miscellaneous

Cox, W. Michael & Alm, Richard, *Myths of Rich and Poor: Why We're Better Off Than We Think* (1999) 26

Frasier: The Good Son (NBC television broadcast Sept. 16, 1993), *available at* http://www.kacl780.net/frasier/transcripts/season_1/episode_1/the_good_son.html (last visited Jan. 18, 2011) 11

Green, Tristin K., *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 Fordham L. Rev. 659 (2003) 21-22

Hayek, Friedrich A., *Law, Legislation and Liberty, Volume 2: The Mirage of Social Justice* (1976) 28

de Jasay, Anthony, *Justice and Its Surroundings* (2002) 27, 29

Kirk, Sarah, *Ninth Circuit Discrimination Case Could Change the Ground Rules for Everyone*, 14 Tex. Rev. Law & Pol. 163 (2009) 18

La Fetra, Deborah J., *A Moving Target: Property Owners' Duty to Prevent Criminal Acts on the Premises*, 28 Whittier L. Rev. 409 (2006) 2

La Fetra, Deborah J., *Freedom, Responsibility, and Risk: Fundamental Principles Supporting Tort Reform*, 36 Ind. L. Rev. 645 (2003) 2

TABLE OF AUTHORITIES—Continued

Page

Levit, Nancy, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. Rev 367 (2008) 19

Monahan, John, et al., *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* 94 Va. L. Rev. 1715 (2008) 26

Nagareda, Richard A., *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97 (2009) 21

Nagareda, Richard A., *Common Answers for Class Certification*, 63 Vand. L. Rev. En Banc 149 (2010) 23

Nat'l Ctr. for Educ. Statistics, The Condition of Education, *Table 27-1: Degrees Earned By Women*, *available at* http://nces.ed.gov/programs/coe/2008/section3/table.asp?tableID=910 (last visited Jan. 19, 2011) 31

Nozick, Robert, *Anarchy, State, and Utopia* (1974) 27

Paul, Ellen Frankel, *Equity and Gender* (1989) 26

Regan, Milton C., Jr. & Heenan, Palmer T., *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services*, 78 Fordham L. Rev. 2137 (2010) 17

TABLE OF AUTHORITIES—Continued

Page

Sandefur, Timothy, *The Right to Earn a Living* (2010) 2

Selmi, Michael, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. Rev. 1401 (1998) 14

Sobel, Russell S. & Leeson, Peter T., *The Use of Knowledge in Natural-Disaster Relief Management*, 11 Indep. Rev. 519 (2007) 17

Stempel, Jeffrey W., *A More Complete Look at Complexity*, 40 Ariz. L. Rev. 781 (1998) 6

Tsoukas, Haridimos, *The Firm as a Distributed Knowledge System: A Constructionist Approach*, 17 Strategic Mgmt. J. 11 (1996) 17

U.S. Dep't of Labor, Bureau of Labor Statistics, *2007 Current Population Survey: Table 11, available at* http://www.bls.gov/cps/wlf-table11-2008.pdf (last visited Jan. 18, 2011) 30

U.S. Dep't of Labor, Women's Bureau, *Quick Stats, available at* http://www.dol.gov/wb/stats/main.htm (last visited Jan. 18, 2011) 30

IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3(a), Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioner, to address the second question presented.[1]

PLF was founded more than 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF attorneys engage in research and litigation over a broad spectrum of legal issues, representing the views of thousands of supporters nationwide who believe in limited government, individual rights, and free enterprise. PLF's Free Enterprise Project engages in litigation, including the submission of amicus briefs, in cases affecting America's economic vitality, and in particular in cases involving the abuses of civil rights law and class action procedures which harm businesses, stifling entrepreneurialism and job creation. *See, e.g.*, *Philip Morris v. Jackson*, No. 10-735 (U.S. filed Dec. 30, 2010) (pending); *Barber v. American Airlines*, No. 110092 (Ill. filed Aug. 2, 2010) (pending); *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

(11th Cir. 2009). PLF participated as amicus in this case before the Ninth Circuit Court of Appeals.

In addition, PLF staff have published extensively on the effects of tort liability on the business community. *See, e.g.*, Timothy Sandefur, *The Right to Earn a Living* 239-55 (2010); Deborah J. La Fetra, *A Moving Target: Property Owners' Duty to Prevent Criminal Acts on the Premises*, 28 Whittier L. Rev. 409 (2006); Deborah J. La Fetra, *Freedom, Responsibility, and Risk: Fundamental Principles Supporting Tort Reform*, 36 Ind. L. Rev. 645 (2003). PLF believes its public policy experience will assist this Court in considering whether the certification of this class is consistent with the requirements of Federal Rule of Civil Procedure 23(a).

SUMMARY OF ARGUMENT

The class certification order is inconsistent with Rule 23(a) because it does not satisfy the commonality or typicality requirements. Instead, the class consists of an aggregation of individual injuries resulting from hiring and promotion decisions made by myriad managers in thousands of Wal-Marts across the country. The Ninth Circuit allowed certification on the theory that the lack of a common employment and promotion decisionmaker *itself constitutes* a common source of injury, because it allows thousands of different types of injuries to occur. In other words, the *absence* of commonality or typicality was held to satisfy the commonality and typicality requirements. This interpretation of Rule 23(a) cannot stand.

First, it is contrary to the purpose and rationale of the commonality requirement. The purpose of class action lawsuits is not to allow plaintiffs to sue over a spectrum of assorted harms, but to allow recovery by a large group of plaintiffs injured by a single, discrete action or policy, who would lack the economic incentives to sue individually. Rule 23 prevents the abuse of class actions by requiring plaintiffs to show that the members of the putative class suffered substantially similar injuries from a specific common source. In the employment context, this means showing that the putative class members were injured in substantially the same way by the same discrete action or process. Where this cannot be shown, the plaintiffs must sue individually for their particular harms.

Wal-Mart allows local managers to make hiring and promotion decisions for their own stores, and the plaintiffs allege that a variety of different decisionmakers, in different locations, harmed them in different ways, at different times; in each case, different factors may have influenced the decisions, and different claims and defenses may apply. There simply is no discrete common injury here; the Ninth Circuit could only label these many different incidents as a common injury by adopting an extremely broad or general approach to the notions of commonality and typicality. But that approach conflicts with the law's focus on specific harms. The law "prohibits discriminatory employment *practices*, not an abstract policy of discrimination." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 159 n.15 (1982).

Second, the theory that the lack of a common hiring or employment policy itself constitutes a policy is not warranted by statutory or decisional law. The only basis for that interpretation is a dictum in footnote 15 of *Falcon*. But that footnote is better read as allowing plaintiffs to sue when they bring forth significant proof that a business purposely delegated decisions to local managers and adopted subjective criteria for the purpose of evading antidiscrimination laws—evidence that is lacking here. *Falcon's* reference to "excessive subjectivity" was not intended to let plaintiffs aggregate all sorts of different allegations into a "common injury," or to sue businesses for simply having a workforce that does not track the demographics of society in general.

There may be cases in which companies adopt wholly subjective employment criteria as a cover so that local managers can engage in *sub rosa* discrimination, but plaintiffs who allege that this has occurred must provide evidence of such intent. Plaintiffs cannot make out a discrimination case based simply on the facts that local employment decisions are made by local managers, and that there are statistical disparities in the workforce. As Justice O'Connor observed in a different context, illegal discrimination cannot be inferred from employment statistics that are skewed relative to the population at large, because "[t]here are numerous explanations for [a] dearth of minority participation, including . . . [individual] career and entrepreneurial choices." *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 503 (1989) (opinion of O'Connor, White, JJ., and Rehnquist, C.J.).

Finally, the decision below would allow plaintiffs to resort to litigation to resolve broad social complaints that are, if anything, within the purview of the legislature. The heart of this case is a broad debate about "social justice," not a specific cognizable legal injury; to allow such litigation would enable plaintiffs to sue defendants on the basis of vague allegations about broad social grievances. This is not the role of the courts, which should address only specific legal injuries. Even if it were, however, the plaintiffs' "social justice" arguments are fatally flawed.

The certification order should be reversed.

ARGUMENT

I

THE COMMONALITY REQUIREMENT OF RULE 23(a) CANNOT BE SATISFIED WHERE DIFFERENT TYPES OF ALLEGED INJURIES RESULTED FROM A VARIETY OF DIFFERENT CAUSES AND UNDER DIFFERENT FACTUAL CIRCUMSTANCES

A. Different Types of Human Resources Decisions Made by Different Managers in Different Locales for Many Different Reasons Cannot Be Treated as a Single, Common Employment Policy

Class action lawsuits exist so that where a defendant causes the same small injury to a large number of persons, each of which is too small to warrant litigation, the injured parties can combine their right to recovery and obtain redress. The prototypical case is one in which a flawed product or fraudulent service is used by many people, inflicting the same, relatively minor injury on each. The victims normally would not invest the time and money needed to bring a lawsuit, and the wrongdoer could escape prosecution. The class action device enables the victims to obtain representation together and recover for their common injury. *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 302 (1854).

Class actions are therefore the exception to the general rule that plaintiffs sue to recover for their own specific injuries. *Falcon*, 457 U.S. at 155. That limited exception lets courts treat the group of injured persons like a single party, putting aside only the legally irrelevant differences among their circumstances. It would be unjust to ignore *relevant* differences; that would, among other things, deprive defendants of the opportunity to present different defenses to different allegations. Therefore Rule 23(a) includes the commonality and typicality requirements, to allow collective treatment only of allegations that are similar enough that it is logical and equitable to treat them as a single case. These elements exist to prevent plaintiffs with *disparate* claims from papering over the differences between them and intimidating the defendant into settling. As Professor Stempel writes, class action lawsuits

> hold[] a potential *in terrorem* effect for defendants and may extract extortionate settlements for claims best described as weak . . . . The mere act of certifying the class provides significant settlement value to the claim, and by making the case a potentially crippling one that the company cannot afford to lose, the court arguably makes settlement mandatory for defendants irrespective of the merits.

Jeffrey W. Stempel, *A More Complete Look at Complexity*, 40 Ariz. L. Rev. 781, 842 (1998) (emphasis added).

In a discrimination case, Rule 23(a)'s commonality and typicality elements require the plaintiffs to show that they "all suffered an adverse effect from the same . . . [employment] policy—and their showing must be 'significant.'" *Garcia v. Johanns*, 444 F.3d 625, 633 n.10 (D.C. Cir. 2006) (citation omitted).

Common sense suggests that where hiring or promotion decisions are made by local managers exercising broad autonomy, there is less likelihood that all of the plaintiffs were harmed by a discrete company-wide policy of discrimination. *Id.* at 632 (where a class alleges harm from "multiple decisionmakers with significant local autonomy," certification is rarely appropriate). As one district court warned when refusing to certify a class, "a decentralized hiring procedure, which allows decisionmakers to consider subjective factors, supports individual claims of discrimination but cuts against the assertion that an employer engages in a pattern or practice of discriminatory hiring as a standard operating procedure." *Ellis v. Elgin Riverboat Resort*, 217 F.R.D. 415, 424 (N.D. Ill. 2003) (citing *Stastny v. S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 279 (4th Cir. 1980)).

Courts have generally followed this common-sense approach, refusing to manufacture commonality and typicality by blending allegations of different types of discrimination at the hands of different, autonomous local managers.

For example, in *Cooper v. Southern Co.*, 390 F.3d 695, 714-15 (11th Cir. 2004), *overruled in part on other grounds, Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 458 (2006), the Eleventh Circuit found no abuse of discretion in denying certification where the allegedly discriminatory personnel decisions "were made by individual managers in disparate locations, based on the individual plaintiffs' characteristics, including their educational backgrounds, experiences, work achievements, and performance in interviews, among other factors."

Similarly, in *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565 (6th Cir. 2004), *cert. denied*, 543 U.S. 1151 (2005), the Sixth Circuit found no abuse of discretion in denying certification of a class of 800 past and present employees alleging racial discrimination in promotions at four separate facilities of defendant over a twenty-year period. The plaintiffs were subject to "differing promotion criteria," *id.* at 571, for a variety of different jobs, so that even if their allegations were true, they could not therefore plausibly claim to have suffered the same *type* of discrimination.

In *Gutierrez v. Johnson & Johnson*, 467 F. Supp. 2d 403 (D.N.J. 2006), *app. dismissed*, 523 F.3d 187 (3d Cir. 2008), the district court refused to certify a large class of employees in an employment discrimination case for similar reasons. Like the plaintiffs here, the *Gutierrez* plaintiffs

> [did] not challenge an express policy of [the corporate defendant]. Nor do they dispute that the employment policies and practices varied widely from operating company to company. Rather, Plaintiffs' theory of commonality is that Johnson & Johnson's policy of delegating discretion to the operating companies to implement general employment guidelines resulted in excessively subjective employment practices.

Id. at 409. This did not satisfy the commonality requirement because "Plaintiffs must identify *a specific policy* or practice of discrimination that was excessively subjective." *Id.* at 410 (emphasis added).[2]

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[2] Many other courts have refused to certify classes in circumstances like this, concluding that "a decision by a company to give managers the discretion to make employment decisions, and the subsequent exercise of that discretion by some managers in a discriminatory manner, is not tantamount to a decision by a company to pursue a systematic, companywide policy of intentional discrimination." *Sperling v. Hoffmann-La Roche, Inc.*, 924 F. Supp. 1346, 1363 (D.N.J. 1996); *see also Johnson v. Big Lots Stores, Inc.*, 561 F. Supp. 2d 567, 579 (E.D. La. 2008) (The "diversity in individual employment situations" meant that "the Court cannot confidently adjudicate plaintiffs' claims or [defendants'] defense on the merits."); *Arnold v. Cargill Inc.*, No. 01-2086, 2006 U.S. Dist. LEXIS 41555, at *55-*56 (D. Minn. June 20, 2006) ("Plaintiffs have only established that they have individual claims of discrimination. Where the proposed class is spread across various [geographical areas] and was subject to various decision making authority affecting promotions, compensation, and terminations, class treatment is not appropriate."); *Wright v. Circuit City Stores, Inc.*, 201 F.R.D. 526, 541 (N.D. Ala. 2001) ("The purported class is comprised of a large group of diverse and differently situated employees whose highly individualized claims of discrimination do not lend themselves to class-wide proof."); *Lott v. Westinghouse Savannah River Co., Inc.*, 200 F.R.D. 539, 552-53 (D.S.C. 2000), *aff'd*, 406 F.3d 248 (4th Cir. 2005) ("[T]he true nature of the suit is a consolidation of 99 separate accounts of individualized disparate treatment."); *Abram v. UPS of Am., Inc.*, 200 F.R.D. 424, 430 (E.D. Wis. 2001) ("The decision to permit some consideration of subjective factors is not, *in and of itself*, a discriminatory practice that provides the unifying thread necessary for 'commonality' to exist.").

B. Finding Commonality and Typicality Here Would Require Approaching Those Elements at Such a Level of Generality as to Render Rule 23(a)'s Requirements Toothless

Of course, as several circuits have warned, any group of allegations might be labeled as common or typical if a court ignores the details: "[A]t a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality. What we are looking for is a common issue the resolution of which will advance the litigation." *Sprague v. GMC*, 133 F.3d 388, 397 (6th Cir. 1998) (en banc), *cert. denied*, 507 U.S. 914 (1993); *accord*, *Love v. Johanns*, 439 F.3d 723, 730 (D.C. Cir. 2006). If the commonality and typicality elements are to have real substance, courts cannot allow plaintiffs to satisfy them by "lifting the description of the claims to a level of generality that tears them from their substantively required moorings to actual causation and discrete injury." *In re Fibreboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990).

It was only by adopting this degree of generality—stepping away from the individual details, and into a statistical analyses and anecdotal evidence—that the Ninth Circuit was able to find a common injury. That approach transforms the commonality and typicality requirements into ineffectual, ritualistic formalities. Indeed, the procedure here is reminiscent of the dialogue in an episode of the TV series *Frasier*:

> Frasier: You know, every item here was carefully selected. This lamp by Corbusier, the chair by Eames, and this couch is an

> exact replica of the one Coco Chanel had in her Paris atelier.
>
> Martin: Nothing matches.
>
> Frasier: Well, it's a style of decorating called "eclectic." The theory behind it is, if you've got really fine pieces of furniture, it doesn't matter if they match—they will go together.[3]

This and other courts have refused to take an "eclectic" approach to the commonality and typicality requirements precisely because doing so would allow plaintiffs to evade Rule 23(a)'s requirements through a trick of language. *See, e.g., Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 609 (1997) (denying certification where purported class members "were exposed to different asbestos-containing products, in different ways, over different periods, and for different amounts of time; some suffered no physical injury, others suffered disabling or deadly diseases.").

In fact, notwithstanding the Ninth Circuit's repeated citations to *Falcon*, 457 U.S. 147, that case actually rejected just such an attempt to read the commonality and typicality requirements at a broad level of generality. *Falcon* rejected certification where the named plaintiff alleged that his employer refused to *promote* him because he was Mexican-American, and sought also to represent Mexican-Americans who had allegedly *not been hired* because of their race. *Id.* at 158-59. The distinction between these two types of discrimination was not just relevant, but critical to ensuring specific commonalities between the class members sufficient to justify treating the different claims as a single case. "Title VII prohibits discriminatory employment *practices*, not an abstract policy of discrimination," the Court explained. "The mere fact that an aggrieved private plaintiff is a member of an identifiable class of persons of the same race or national origin is insufficient to establish his standing to litigate on their behalf all possible claims of discrimination against a common employer." *Id.* at 159 n.15.

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[3] *Frasier: The Good Son* (NBC television broadcast Sept. 16, 1993), *available at* http://www.kacl780.net/frasier/transcripts/season_1/episode_1/the_good_son.html (last visited Jan. 18, 2011).

In other words, courts cannot automatically presume that a member of a group that has been discriminated against has suffered an injury common to, or typical of, every other member of that group. To allow class representation in *Falcon* would have required approaching Rule 23 at a broad level of generality, a breadth forbidden by the fact that the law forbids *specific discriminatory acts*, rather than abstract inequalities of outcome. *Falcon* refused to read Rule 23 at such a level of generality as to overlook the "wide gap" between, on the one hand, the plaintiff's allegation that he was discriminated against in *promotion* decisions, and, on the other hand, the conclusion that his injuries are common to, or typical of, discrimination suffered by members of the purported class who were never *hired*. *Id.* at 157.

This Court held that a plaintiff bears the burden of closing that gap by proving that both candidates for promotion and candidates for hiring were subjected to the same common discriminatory act, *see id.* at 158 (Plaintiff must show that discrimination "is reflected in [the defendant's] other employment practices . . . in the same way it is manifested in the promotion practices."). Without evidence of such a specific, shared discriminatory act, any inference of commonality or typicality would be "tenuous." *Id.* Worse, to allow such an inference would convert "every Title VII case [into] a potential companywide class action." *Id.* at 159.

Here, that risk has been realized because the Ninth Circuit adopted the level of generality rejected by the Fifth Circuit (*Fibreboard Corp.*, 893 F.2d at 712), the Sixth Circuit (*Sprague*, 133 F.3d at 397), the D.C. Circuit (*Love*, 439 F.3d at 730), and by this Court in *Falcon*—a level of generality that would view widely different injuries as the same.

The court below held that Wal-Mart's delegation to local managers of discretion in hiring and promotion decisions constitutes a single discrete employment practice injuring the whole class in the same way because it "'provides a wide enough conduit for gender bias to potentially seep into the system.'" *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 601 (9th Cir. 2010) (quoting *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 152 (N.D. Cal. 2004)). But at *that* level of generality, any number of entirely different activities might be characterized as a single act or policy. Indeed, if certification is appropriate here, it is hard to imagine what action by a Wal-Mart employee would *not* qualify as a company-wide policy.

This Court need not formulate the precise level of generality that applies to Rule 23(a) to hold that the class at issue here is far outside its boundaries. The Ninth Circuit employed the broadest possible level of generality, holding that commonality and typicality are established precisely by their absence.

Under *Falcon*, plaintiffs discriminated against in promotion decisions may represent those who have suffered that type of discrimination, but cannot assert the rights of those who have been discriminated against in other ways, such as hiring decisions—just as someone who suffers one type of deception due to a lease agreement cannot represent people who were deceived in different ways, or by dissimilar lease agreements, *Lundquist v. Sec. Pac. Auto. Fin. Servs. Corp.*, 993 F.2d 11, 14 (2d Cir.), *cert. denied*, 510 U.S. 959 (1993), and someone engaged in a contract dispute with a bank cannot represent parties whose contracts have different terms, *Quinn v. Nationwide Ins. Co.*, 281 Fed. Appx. 771, 778 (10th Cir. 2008), and persons harmed by environmental pollution cannot represent everyone exposed to the same pollution. *Amchem*, 521 U.S. at 609.

It is true that requiring specific common injuries may make it harder for class plaintiffs to sue employers for certain incidents of discrimination, but that difficulty does not justify relaxing the requirements of Rule 23. Plaintiffs are always free to bring their own individual lawsuits, *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 878 (1984), and there is no reason to believe that employees have difficulty obtaining representation to press meritorious individual claims. *See* Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. Rev. 1401, 1427 (1998) ("Since the early 1970s, employment discrimination has been the most widely litigated form of discrimination and has received more attention from courts and commentators than other areas of civil rights.").

The question before this Court is whether the harms that would flow from diluting the commonality requirement as the Ninth Circuit did here outweigh the risk that meritorious claims will go unprosecuted due to the difficulty faced by such plaintiffs. The answer is clear: diluting Rule 23(a)'s requirements present a far greater threat to the integrity of the legal process.

II

"EXCESSIVE SUBJECTIVITY" CLAIMS SHOULD BE LIMITED TO CASES WHERE A PLAINTIFF BRINGS FORTH EVIDENCE OF AN EMPLOYER'S INTENTION TO ALLOW *SUB ROSA* DISCRIMINATION

Given the clear laws against racial discrimination in employment, a too-clever employer who wishes to discriminate on the basis of race might try to evade the law by leaving all hiring or promotion decisions to the unguided discretion of managers who are known to act in a discriminatory fashion. *See Rowe v. GMC*, 457 F.2d 348, 359 (5th Cir. 1972) ("[P]romotion/transfer procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman are a ready mechanism for discrimination against Blacks much of which can be covertly concealed."). If, for example, a business's owners intended only to hire white males for management positions, it might try to avoid prosecution by delegating hiring decisions entirely to a manager who reliably rejects all candidates except white males, thereby ensuring that no "paper trail" exists that might form the grounds for a lawsuit.

This was the concern addressed by footnote 15 of *Falcon*, 457 U.S. at 159 n.15, where the Court explained that a plaintiff might make out a case of *sub rosa* discrimination by introducing "[s]ignificant proof that an employer operated under a general policy of discrimination." As the Court explained later, "[i]f an employer's undisciplined system of subjective decisionmaking has *precisely the same effects as a system pervaded by impermissible intentional discrimination*, it is difficult to see why Title VII's proscription against discriminatory actions should not apply." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990-91 (1988) (emphasis added).

The Ninth Circuit relied heavily on this footnote, concluding that it allows plaintiffs to bring class action lawsuits to allege general claims of systematic bias, as opposed to specific, shared incidents of discrimination. *See, e.g.*, *Dukes*, 603 F.3d at 596. The decision below interpreted this footnote as essentially carving out a cause of action whereby a plaintiff can leverage her own alleged injury, plus statistical disparities in the employee population, into a lawsuit on behalf of all persons who claim to have fallen victim to one or another aspect of an "overall policy." *See id.* at 596 n.16.

As explained above, that interpretation of footnote 15 would allow plaintiffs to satisfy the commonality requirement merely by artful pleading: a plaintiff alleging her own injuries would be confined to litigating on behalf of herself or others injured by the same wrongful act; but by cleverly phrasing the allegations as the consequence of an "overall policy" of discrimination, she could represent all persons who claim to have suffered any kind of discrimination, at any time, at any place, at the hands of any manager—with no difference in the actual substance of her allegations. *Cf. Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 833 (1976) (Congress did not intend "to allow its careful and thorough remedial scheme to be circumvented by artful pleading.").

A better reading of footnote 15, which would prevent this abuse, would be to hold that it simply closes the loophole described above and allows a plaintiff to sue an employer for using a subjective policy as a means of avoiding the law's prohibition on discrimination. To make out such a case, however, a plaintiff should be required to prove—with what *Falcon* called "significant proof"—that the business actually *intended* to use subjectivity to serve a discriminatory end.

A decentralized corporate structure that relies heavily on local managers to make decisions is a legitimate business practice. *See, e.g.*, Haridimos Tsoukas, *The Firm as a Distributed Knowledge System: A Constructionist Approach*, 17 Strategic Mgmt. J. 11 (1996) (decentralized management structures take advantage of local managers' better knowledge of local circumstances); Milton C. Regan, Jr. & Palmer T. Heenan, *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services*, 78 Fordham L. Rev. 2137, 2176-77 (2010) (same).[4] Likewise, "subjective evaluations of a job candidate are often critical to the decisionmaking process, and if anything, are becoming more so in our increasingly service-oriented economy." *Chapman v. AI Transp.*, 229 F.3d 1012, 1033 (11th Cir. 2000).

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[4] Indeed, Wal-Mart's decentralized management structure has many benefits. It even contributed to the fact that the company responded far more quickly and efficiently to Hurricane Katrina than did the highly-centralized government response agencies. Russell S. Sobel & Peter T. Leeson, *The Use of Knowledge in Natural-Disaster Relief Management*, 11 Indep. Rev. 519 (2007).

Yet the decision below empowers plaintiffs to sue companies whenever their work forces fail to conform to a pre-determined standard of "social justice," or where the corporate structure relies on local decisionmakers. Already, attorneys alleging "excessive subjectivity" frequently "argue the case to a jury using broad generalities in order to get some sweeping condemnation of the 'atmosphere' of the employer," or assert that the business had a "discriminatory culture. It is virtually impossible to defend against abstract claims of that kind." Sarah Kirk, *Ninth Circuit Discrimination Case Could Change the Ground Rules for Everyone*, 14 Tex. Rev. Law & Pol. 163, 166 (2009). This Court should put a stop to such practices by requiring proof that an employer adopted decentralization and subjectivity for discriminatory reasons.

Some appellate courts already essentially require plaintiffs to prove that the employer adopted a subjective policy with an illicit intent. In *Denney v. City of Albany*, 247 F.3d 1172 (11th Cir. 2001), firefighters alleging that they were passed by for promotions because of their race proffered evidence of statistical disparity in the racial makeup of successful candidates, and showed that decisionmaking was largely subjective. But the court rejected the plaintiffs' argument, holding that "nothing in our precedent establishes that an employer's reliance upon legitimate, job-related subjective considerations suggests in its own right an intent to facilitate discrimination." *Id.* at 1186. Instead, a plaintiff must prove that the employer selected those criteria or chose to focus on them for the purpose of discriminating. *Id.* "Absent evidence that subjective hiring criteria were used as a mask for discrimination, the fact that an employer based a hiring or promotion decision on purely subjective criteria will rarely, if ever, prove pretext under Title VII or other federal employment discrimination statutes." *Id.* at 1185. *Accord, Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1176 (7th Cir.), *cert. denied*, 537 U.S. 884 (2002); *Manning v. Chevron Chem. Co. LLC*, 332 F.3d 874, 882 (5th Cir. 2003), *cert. denied*, 540 U.S. 1107 (2004). Likewise, in *Vaughan v. MetraHealth Cos., Inc.*, 145 F.3d 197, 204 (4th Cir. 1998), the court rejected an age discrimination case in which the plaintiff contended that promotion decisions were "too haphazard and subjective," because without evidence of "age animus," subjectivity alone could not support a finding of illegal discrimination.

The theory applied by the Ninth Circuit here—which "is inevitably in tension with the class requirements of commonality and predominance"—would "permit[] sweeping challenges to company-wide practices and make[] class lawsuits more likely." Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. Rev 367, 377 (2008). Plaintiffs could sue businesses for widely different, ill-defined harms, all grouped together strategically, but without any principled likeness, as a single common source of injury. This is such a case; plaintiffs are exploiting the discrimination laws not to redress specific, individualized harms, but to vindicate ideological preconceptions about the "proper" outcome of a company's hiring and promotion decisions.

It is well within this Court's authority to adopt pleading requirements that outline the statutory elements of a cause of action and bar meritless claims. In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), for example, the Court held that plaintiffs alleging predatory pricing must also prove that the defendant was reasonably likely to recoup its losses as part of its strategy. In *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), it held that plaintiffs in federal takings cases against states must first seek compensation through adequate state procedures. This Court should likewise require plaintiffs to demonstrate "significant proof" that an employer intended to exploit subjectivity and local autonomy to achieve forbidden discriminatory ends. This would bar meritless claims of discrimination against businesses that simply use decentralized decisionmaking policies so as to benefit from local managers' clearer grasp of facts on the ground, or legitimately include an element of subjectivity in promotion and hiring decisions.

III

THE DECISION BELOW WOULD ALLOW PLAINTIFFS TO SUE BUSINESSES FOR GENERAL "SOCIAL JUSTICE" GRIEVANCES INSTEAD OF ACTUAL INJURIES

A. Generalized "Social Justice" Disputes Like This One Do Not Belong in the Federal Courts

At bottom, this lawsuit is an attempt to litigate a general social grievance that the demographics of

Wal-Mart's work force does not align with what the plaintiffs and their allies think desirable. Unable to prove any actual concrete discriminatory policy, the plaintiffs have proven only that Wal-Mart relies on local managers to make hiring and promotion decisions, that some degree of subjectivity factors into those decisions, and that there are statistical disparities in the outcome. None of these is illegal or wrongful. Thus the case boils down to a sociological argument that Wal-Mart's workforce subtly incorporates inequalities that are allegedly inherent in American society. As Professor Nagareda wrote, lawsuits like this are attempts "to alter the meaning of discrimination under Title VII to accord with an emerging body of research that draws on statistical analysis informed by sociology." Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 134 (2009).

The plaintiffs essentially argue that Wal-Mart incorporates American society's discriminatory attitudes; this they characterize as a legal harm to be remedied, presumably by the adoption of central employment policies—*i.e.*, quotas—which will ensure "satisfactory" outcomes. *See* Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 Fordham L. Rev. 659, 688 (2003) (lawsuits like this case "seek . . . organizational change" to eliminate "subtle, often unconscious bias in individuals"). As Professor Green explains, the "excessive subjectivity" rationale is intended to "alter the specific organizational structures or institutional practices that may continue to enable ongoing discrimination," rather than to redress any concrete or particular injury; this rationale "does not depend, in other words, on influencing individual decision makers." *Id.* at 711.

Although Green acknowledges that "modern-day organizations do not subscribe to decentralized, subjective decision-making systems to discriminate" *intentionally*, she contends that decentralized procedures result in disparate outcomes "because workers are influenced more subtly on a day-to-day basis by forms of cognitive and motivational bias." This subconscious discrimination, she argues, must "be understood as a contextual problem that depends on cultural and structural variables that may vary from institution to institution." The "complexity" of this "problem of institutionally enabled discrimination" demands "an equally complex, contextual remedial process." *Id.* at 713-14.

By allowing a class with completely different injuries under a variety of diverse circumstances to cast their claims as the result of a common "excessive subjectivity" injury, the Ninth Circuit's decision empowers plaintiffs to challenge the unintended outcome of millions of independent transactions as if those outcomes were proof of a single discriminatory policy.

> [O]n plaintiffs' own evidence, the disparities at Wal-Mart essentially replicate the disparities in pay and promotion along the dimension of sex across the United States economy as a whole. On plaintiffs' account, this is precisely the point . . . . Indeed, an emerging scholarly literature urges a reconceptualization of the meaning of discrimination under Title VII to encompass

> accounts in the nature of "structural discrimination" on conduit-like lines.

Richard A. Nagareda, *Common Answers for Class Certification*, 63 Vand. L. Rev. En Banc 149, 167 (2010). Federal courts exist to remedy concrete, particularized, individual injuries, not to settle social debates. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 218-19 (1974).

The Ninth Circuit's theory expands the scope of potential class action lawsuits in a way that allows plaintiffs to sue businesses for the abstract "unfairness" of their corporate structures. As one district court put it, "'[e]xcessive subjectivity' . . . is a criticism, not an actual company-wide policy or practice. Without some evidence of the class-wide use of common decisional criteria or practices, Plaintiffs have failed to show the requisite commonality." *Grosz v. Boeing Co.*, No. SACV-02-71-CJC, 2003 U.S. Dist. LEXIS 25341, at *16-*17 (C.D. Cal. Nov. 7, 2003), *aff'd*, 136 Fed. Appx. 960 (9th Cir. 2005) (citation omitted).

Plaintiffs who suffer specific injuries are right to invoke the court's jurisdiction. But plaintiffs whose claims are based on socio-economic patterns and a desire to reshape society should find no traction in Article III courts. These are matters to be addressed, if at all, by legislatures, which are better suited to hear and balance the interests of constituents whose rights might be overlooked in a judicial proceeding. Moreover, voters can check a legislature that sets priorities wrongly, a power they do not have over courts. Legislatures can also prioritize social concerns in light of budgetary constraints and the urgency of resolution.

In *Barcume v. City of Flint*, 638 F. Supp. 1230 (E.D. Mich. 1986), the City of Flint chose to implement an affirmative action program in its firefighter promotions for minorities, but not for women. When the women sued, the court determined that "Flint was not constitutionally obligated to deal with every problem concurrently and with equal vigor nor was it obligated to remedy every aspect of the problem." *Id.* at 1235. Instead, the city "had the right to balance the constraints of limited resources against the evils which needed to be corrected." *Id.* The court explicitly noted that allowing the women to challenge the racial affirmative action program without offering proof of discriminatory purpose "would require the Court to engage in the social and political analysis necessary to decide which group is entitled to participate in the [program]. This would essentially require the Court to engage in social engineering—a task which does not lie within the judicial competence." *Id.* at 1236. Similarly, in *Schulz v. Silver*, 212 A.D.2d 293 (N.Y. App. Div. 1995), *app. dismissed*, 664 N.E.2d 506 (N.Y. 1996), the court refused to issue a writ ordering the legislature to act upon the Governor's proposed budget because "[i]n approving or disapproving the Governor's proposed expenditures, the Legislature is faced with the ordering of socioeconomic priorities which clearly are matters of discretionary judgment constituting a function of the political process and, as such, are not the subject of judicial review." 212 A.D.2d at 296. The same principles should apply here.

The allegations in this case to not specify a legal wrong: merely that Wal-Mart defers to the decisions of on-the-spot managers in human resources matters, and the claimed existence of a wage gap and a glass ceiling. These assertions do not provide courts with a basis for remedying any specific injuries. This Court should follow the example of the Seventh Circuit in *People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205*, 246 F.3d 1073 (7th Cir. 2001). In that case, parents of minority students sought continued federal court control over the school district to remedy alleged vestiges of discrimination. But as the court explained,

> [t]he reality is that until minority students achieve parity of educational achievement with the white students in the Rockford public schools, the plaintiffs will contend that the minority students are victims of the unlawful discrimination of an earlier period in Rockford's history. Yet it is obvious that other factors besides discrimination contribute to unequal educational attainment, such as poverty, parents' education and employment, family size . . . . The board has no legal duty to remove those vestiges of societal discrimination for which it is not responsible . . . [and] no duty that a federal court can enforce to help those students catch up. It may have a moral duty; it has no federal constitutional duty.

Id. at 1076. The same applies here. Allegations of specific discriminatory acts are appropriate for judicial resolution, but large-scale class resolution of social justice concerns is not.

B. Unequal Outcomes of Just Transactions Are Not Unjust

Even if this Court were to consider the plaintiffs' sociological complaints, the basic premise behind their effort at "reconceptualizing" discrimination law is flawed: it is not necessarily true that the disparity between the sexes in the workforce is the result of injustice.[5]

Many social, cultural, historical, educational, and economic factors influence the decisions of individuals and businesses with regard to employment choices. As Justice O'Connor wrote, it is "completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance," because this would ignore "the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces." *Watson*, 487 U.S. at 992 (plurality opinion).

Many women choose to remove themselves from the workforce for significant amounts of time to devote themselves to raising children, which means men tend to have more seniority and thus higher wages and better access to promotions. *See, e.g.*, Ellen Frankel Paul, *Equity and Gender* 49 (1989). Many women in the workforce are less interested in higher-level responsibilities than men; research in the mid-1990s found that only 14% of women aspired to become their company's CEO, while 46% of men did. W. Michael Cox & Richard Alm, *Myths of Rich and Poor: Why We're Better Off Than We Think* 81 (1999).

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[5] Significantly, the creators of the statistical method on which the district court relied in this case have published an article explaining that the district court misused that method, and reached conclusions that "exceeded the limitations . . . [of] both the original and revised proposal of what constitutes 'social framework' evidence." John Monahan, et al., *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* 94 Va. L. Rev. 1715, 1719 (2008).

Statistical outcomes can be misleading in a more abstract way, also. Although it is often assumed that inequalities of result are evidence of injustice, unequal outcomes of non-coercive exchanges between individuals are not unjust. Injustice is the result of unjust actions, but where no injustice intrudes in a series of transactions, the outcome of those transactions, *even if unequal*, must be just. *See* Anthony de Jasay, *Justice and Its Surroundings* 142-69 (2002). Philosopher Robert Nozick put this point in a famous analogy: if everyone in a city were made exactly equal in monetary terms on one day, and the next day, half of the people chose to pay a dollar to see Wilt Chamberlain play basketball, Chamberlain would end up with far more money than any one of them, and yet no person was subjected to any unjust act; the resulting inequality cannot be described as "unjust." Robert Nozick, *Anarchy, State, and Utopia* 160-64 (1974).

Quite to the contrary, using coercion against individuals who have agreed to a transaction—to take Chamberlain's earnings away from him, in that example—would be to *commit* an injustice against an innocent person in the service of some allegedly higher good. *See* Jasay, *supra*, at 157 ("Unless it can be successfully argued that the involuntary, coerced obligors are in fact responsible for the basic needs of others being unmet . . . it is an injustice to coerce them to provide redress and serve these putative rights.").

In the context of this case, the statistical fact that Wal-Mart employs fewer women than men in management positions cannot suffice to demonstrate the existence of any injustice. This is not only because there may be any number of non-discriminatory explanations for this disparity, but also because the non-coerced choices of individual managers and employees with regard to their pay and promotions result from their own cost-benefit analyses in the same way as the audience at Nozick's hypothetical basketball game. Those choices may lead to disparate outcomes, but those results are not indicative of any injustice.

Finally, as Nobel laureate Friedrich Hayek explained, the term "social justice" is actually meaningless. *See* Friedrich A. Hayek, *Law, Legislation and Liberty, Volume 2: The Mirage of Social Justice* (1976). First, justice can apply only to the acts of individuals, and not to the results of their just actions, which will virtually always be unequal. *See id.* at 70. Second, rewards can only arise through exchanges with particular people, so that it cannot be said that any person's activities have a 'value to society as a whole.' *See id.* at 75. One's activities have value only to particular persons. To speak of a person getting what she "deserves from society" is a solecism, since a person only "deserves" what she bargains for and freely exchanges with others. In addition, while "social justice" is often used as a synonym for equality, it does not specify the relevant category of equality, and making people equal in one way often makes them unequal in other ways. *See id.* at 81-82. Most of all, imposing economic equality requires the state to deprive innocent persons of their rights, thus imposing injustice on them. *See id.* at 82.

It is sometimes alleged that the outcomes of just transactions result in injustice because of historical deprivations or lack of opportunities given to women or other minority groups in the past. But this assertion overlooks the complicated web of historical and sociological deprivations against any and all groups deprivations that cannot be practically remedied at this date. Such an argument also establishes no principled limit on the degree or nature of intervention by the government to "remedy" vaguely understood past injustices by rearranging relationships. At no point can such a remedy be completed; one redistribution, or the establishment of one hiring quota, will inevitably be followed by new inequalities, which will be subjected to another round of interventions in the name of social justice, and so on. *See* Jasay, *supra*, at 203 ("The desired end-result must be *continuously enforced*, and as one unjust head is chopped off, two grow in its stead.").

These were the reasons that this Court severely narrowed the use of statistical disparities in *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989). Like the plaintiffs here, the plaintiffs in *Wards Cove* "alleged that several 'objective' employment practices . . . as well as the use of 'subjective decision making' . . . have had a disparate impact on nonwhites." 490 U.S. at 657. But noting that there are many "'innocent causes that may lead to statistical imbalances in the composition of their work forces,'" *id.* at 657 (quoting *Watson*, 487 U.S. at 992), this Court found that "even if on remand respondents can show that nonwhites are underrepresented in the at-issue jobs . . . this alone will *not* suffice to make out a prima facie case of disparate impact," because the plaintiffs must also show "that the disparity they complain of is the result of one or more of the employment practices . . . *specifically showing that each challenged practice* has a significantly disparate impact on employment opportunities for whites and nonwhites."

Id. (emphasis added). Thus plaintiffs in a discrimination suit may not avoid the need to prove that employers have committed *specific* unjust acts that have harmed them in *specific* ways.

Statistical evidence shows that discrimination against women in the workforce is largely a thing of the past. The U.S. Labor Department reports that women account for 51% "of all workers in the high-paying management, professional, and related occupations," outnumbering men in management roles in human resources, finance, medical and health services, and other occupations.[6] The Bureau of Labor Statistics reports that women make up 50.6% of all management, professional, and related occupations. The rates of men and women differ depending on the industry: only 8.1% of managers in the construction industry are female, for instance, but they account for 64.1% of education administrators, and 70.3% of human resources managers. And although women account for 42.6% of managers in retail sales, they account for 73.4% of managers in office and administrative support work.[7] Similar statistics show that women outnumber men in obtaining higher education, as well. Women earned 57.5% of all bachelor's degrees, and 60% of master's degrees in 2006. They particularly dominate in medicine and psychology, where women earned more than 72% of all doctoral degrees.[8]

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[6] U.S. Dep't of Labor, Women's Bureau, *Quick Stats*, *available at* http://www.dol.gov/wb/stats/main.htm (last visited Jan. 18, 2011).

[7] U.S. Dep't of Labor, Bureau of Labor Statistics, *2007 Current Population Survey: Table 11*, *available at* http://www.bls.gov/cps/wlf-table11-2008.pdf (last visited Jan. 18, 2011).

Thus while disparities between men and women do persist, it is simply unrealistic to believe that they are the result of systematic lack of opportunity. Remaining disparities are more readily explained by the different choices of diverse people pursuing diverse goals.

The allegations here are so general that the complaint is better seen as a "social justice" critique of Wal-Mart. But that critique cannot entitle the plaintiffs to legal relief, does not withstand scrutiny in philosophical terms, and finds no basis in broader social trends and statistics. If the plaintiffs wish to pursue individual claims of actual discrimination by Wal-Mart, they have that opportunity; but they may not use statistical imbalances to sue Wal-Mart over its institutional structure.

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[8] Nat'l Ctr. for Educ. Statistics, The Condition of Education, *Table 27-1: Degrees Earned By Women*, *available at* http://nces.ed.gov/programs/coe/2008/section3/table.asp?tableID=910 (last visited Jan. 19, 2011).

CONCLUSION

The decision of the Ninth Circuit should be *reversed*.

DATED: January, 2011.

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IN THE

Supreme Court of the United States

WAL-MART STORES, INC.,

Petitioner,

v.

BETTY DUKES, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., a national consumer-advocacy organization founded in 1971, appears on behalf of its approximately 225,000 members and supporters before Congress, administrative agencies, and courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen often represents the interests of its members in litigation and as amicus curiae.

Public Citizen has long been concerned with protection of the due-process rights of non-named class members in class actions. Public Citizen attorneys have, in many cases (including this Court's decision in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997)), represented class members who objected to settlement of their claims. Of particular concern to Public Citizen are cases where class counsel and defendants agree to a settlement under Rule 23(b)(1) or (b)(2) to resolve substantial damages claims while eliminating the opt-out rights of absent class members that are provided for in Rule 23(b)(3) and that, in some circumstances, are required by due process.

At the same time, Public Citizen understands that class actions are a critical tool for seeking justice where defendants have engaged in the same or similar unlawful conduct toward many people—consumers and employees especially—that have resulted in injuries that are large in the aggregate, but small on a per-person basis. In that situation, individual litigation is often impossible, and class actions offer the only means for both individual redress and classwide remedies, as well as deterrence of wrongful conduct. Of special relevance here, class actions have played a vital role in civil rights cases, where Rule 23(b)(2)'s authorization of class actions seeking declaratory and injunctive relief allows discrimination victims to enforce their statutory and constitutional rights.

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[1] Written consents from both parties to the filing of amicus curiae briefs in support of either party are on file with the Clerk. This brief was not authored in whole or in part by counsel for a party. No person or entity other than amicus curiae or its counsel made a monetary contribution to preparation or submission of this brief.

Protecting due process rights of individual class members and facilitating collective remedies are both important goals, and, if the right balance is struck, neither need be sacrificed to the other. However, Wal-Mart's broad arguments that monetary remedies are forbidden in Rule 23(b)(2) class actions both by Rule 23 itself and by due process concerns, and that Rule 23(b)(2) is not sufficiently flexible to provide for opt-out rights when due process demands them, would hinder the effective use of class actions that legitimately seek injunctive relief without aiding the absent class members whose rights Wal-Mart purports to be advancing.

SUMMARY OF ARGUMENT

Wal-Mart's argument that due process considerations prohibit certification of a class in this case under Federal Rule of Civil Procedure 23(b)(2) is misguided both as a matter of constitutional law and as an interpretation of Rule 23 itself. Due process is not offended either by the certification of a non-opt-out class seeking injunctive relief or by the inclusion in that class's claims for relief of some forms of monetary remedies. To the extent that due process may require opt-out rights for some forms of relief other than the injunctive relief that permits certification under subdivision (b)(2) of the rule, Rule 23 is flexible enough to offer a number of alternatives tailored to the particular circumstances of the case.

Those alternatives include bifurcated certification (that is, the certification of different claims for relief under different subdivisions of the rule) as well as the possible provision of notice and opt-out rights to members of the (b)(2) class. Contrary to Wal-Mart's argument, Rule 23 does not implicitly forbid opt-out rights in a (b)(2) class action. The Rule *requires* opt-out rights only in a class action under subdivision (b)(3), but its terms provide ample authority to a district judge to *permit* opt-out rights, if necessary or appropriate, in classes certified under other parts of the rule.

ARGUMENT

I. Neither Rule 23 Nor the Due Process Clause Prohibits Monetary Relief in a Non-Opt-Out Class Action Under Rule 23(b)(2).

A. Due Process Does Not Require Opt-Out Rights with Respect to Claims for Injunctive Relief.

This Court held in *Phillips Petroleum Co. v. Shutts* that due process requires that absent class members be given notice and an opportunity to opt out of a class action that may resolve claims predominately for substantial money damages. 472 U.S. 797, 811-12 (1985). The Court, however, noted that due process requirements in class actions seeking injunctive and other equitable relief might differ. *Id.* at 811 n.3.

The *Shutts* due process right to opt out of class resolution of substantial individual damages claims rests largely on what the Court has referred to as the "day-in-court ideal," *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999)—that is, the interest of an individual in controlling litigation primarily affecting his or her personal financial interests. At the same time, a defendant has a relatively insubstantial interest in uniform resolution of claims of individuals who seek judgments against it for money damages: Requiring a defendant to pay damages to one plaintiff but not another imposes no inconsistent obligations on the defendant. *See, e.g., Bates v. Dow AgroSciences LLC*, 544 U.S. 431, 445 (2005).

The Court's recognition in *Shutts* that actions seeking injunctive relief might involve due process entitlements different from those attaching to actions for substantial money damages reflects differences in the balance of interests of individual class members and defendants in such cases. Where a class seeks injunctive relief that necessarily will affect members of the class in the same way, individual members of the class have a reduced interest in excluding themselves from the action. An injunction regulating the defendant's conduct toward class members would benefit class members even if they did not want to participate in the action, so opting out is not a meaningful possibility. Nor is it realistic for each class member seeking injunctive relief that would affect the entire class to expect to control litigation aimed at obtaining such relief. Put another way,

> in cases for injunctive relief against institutional conduct, it is difficult to conceptualize an individual right of autonomy, even where we would

> no doubt recognize an individual's ability to bring a claim in court. In such circumstances, an individual may be an exemplar of the harm visited by allegedly wrongful institutional conduct, but that same individual cannot claim an autonomous right to separate control of the outcome of the legal challenge. To give but the most obvious example, a school desegregation challenge may or may not succeed, but if it does it will establish the wrongful conduct directed across a group of affected school children. In such cases, which are formed under Rule 23(b)(2), it would be nonsensical to claim that any one child has an autonomous right to an independent outcome of the litigation. While each aggrieved child is deemed to have standing to bring a claim for wrongful deprivation of a claimed right to integrated schools, no child has an individual stake in the outcome of that litigation separate from that of the other similarly situated children.

Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt out of Class Actions*, 77 Notre Dame L. Rev. 1057, 1058-59 (2002).

At the same time, the defendant and the judicial system itself have very powerful interests in avoiding multiple and potentially conflicting injunctions, each purporting to tell the defendant how to conduct itself toward the same group of affected parties. Thus, unlike in a typical damages action, where it is possible (if not always practical) for each plaintiff to pursue his or her individual claim independently of others who are similarly situated, in an action seeking injunctive relief affecting a defendant's conduct toward a class, it makes little sense to recognize a due-process-based right to opt out based on the interest of an individual class member in controlling litigation affecting her rights. For this reason, the due process right to notice and an opportunity to opt out of a class does not typically apply to claims for classwide injunctive relief.

Rule 23(b) reflects the different interests in, and effects of, the different types of claims. Thus, Rule 23(b)(2) does not require notice and an opportunity to opt out in all class actions seeking injunctive relief with respect to a class as a whole, while Rule 23(b)(3), which generally applies to money damages claims such as those at issue in *Shutts*, requires notice and an opportunity to opt out for all claims certified under its terms. Nonetheless, not all forms of injunctive relief are alike, and not all must affect a class as a whole. Thus, some cases presenting claims for injunctive relief might implicate the due process opt-out right recognized in *Shutts*. For example, relief in an action seeking specific performance of a product warranty could in some cases be tailored to apply only to consumers who did not opt out of the litigation, and a rational consumer might choose to exercise such an option if he preferred to seek some other form of available relief (such as significant damages) or otherwise thought he could do better in individual litigation than as part of the class action.

In this case, the injunction the plaintiff class seeks, which concerns corporate practices affecting all of Wal-Mart's female employees, is exactly the sort of truly unitary classwide injunctive relief for which Rule 23(b)(2) was designed. The recognition of a due-process opt-out right would make no sense here because relief affecting Wal-Mart's use of subjective criteria and its corporate-wide culture of discrimination against female employees could not realistically be tailored to affect only women who did not opt out of the class. Such injunctive relief is also exactly the kind of remedy that a defendant, such as Wal-Mart, has a powerful interest in having determined in a single case so that the defendant is not subjected to multiple injunctions telling it different things about how to conduct itself toward the same class of female employees.

B. Monetary Relief That Is Ancillary to or Concomitant with Injunctive Relief May, Consistent with Constitutional Demands, Be Sought Through a Non-Opt-Out Class Certified Under Rule 23(b)(2).

Rule 23(b)(2) permits an action to be maintained as a class action if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." On its face, subdivision (b)(2) is not limited to *claims* for injunctive and corresponding declaratory relief. Thus, its language does not prohibit certification where the action *also* presents claims for damages or other forms of monetary relief that, if brought by themselves, could be certified only under Rule 23(b)(3), with the accompanying requirements of notice and an opportunity to opt out. Indeed, nothing in Rule 23 expressly addresses the extent to which claims for monetary relief may be included in classes certified under Rule 23(b)(2) or whether they may be certified only under Rule 23(b)(3). "Put differently, Rule 23(b)(2) does not attempt to patrol the borderline between it and Rule 23(b)(3), the rule's non-mandatory subdivision." Brian Wolfman & Alan Morrison, *What the Shutts Opt-Out Right Is and What It Ought to Be*, 74 U.M.K.C. L. Rev. 730, 737 (2006).

The lower courts have thus generally agreed that the terms of Rule 23(b)(2) itself do not preclude certification of claims for monetary relief. They have, however, also held that the structure of the Rule—including Rule 23(b)(3)'s *requirement* that class members receive opt-out rights, which dovetails nicely with *Shutts*'s requirement of such rights where substantial money damages claims are at issue—suggests limits on the extent to which claims for money damages can be shoehorned into a Rule 23(b)(2) non-opt-out class action. As one court has stated, "[a] court should endeavor to select the most appropriate subsection, not just the first linguistically applicable one in the list. When substantial damages have been sought, the most appropriate approach is that of Rule 23(b)(3), because it allows notice and an opportunity to opt out." *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 898 (7th Cir. 1999).

Courts have reached different conclusions concerning the circumstances in which damages claims may be certified together with claims for injunctive relief in a non-opt-out class under Rule 23(b)(2). Borrowing a term used in the 1966 Advisory Committee Notes—but not in the text of Rule 23(b)(2)—the lower courts have framed the debate in terms of whether claims for injunctive relief "predominate" over those for money damages, but have adopted different standards for making that determination. *Compare Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998) (taking a narrow view of the circumstances in which monetary claims may be certified under Rule 23(b)(2)), *with Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 163-64 (2d Cir. 2001) (taking a much more permissive view).[7]

But all the lower courts have agreed that at least some forms of monetary relief may be certified on a non-opt-out basis consistent with both the terms of Rule 23 and the constitutional due-process principles of *Shutts*. In particular, when proof of the class's entitlement to classwide injunctive relief carries with it an entitlement to make-whole monetary relief that can be determined based on objective criteria, even courts taking a very restrictive view of Rule 23(b)(2)'s application to claims for monetary relief have permitted non-opt-out certification under subdivision (b)(2). *See Allison*, 151 F.3d. at 415; *see also In re Monumental Life Ins. Co.*, 365 F.3d 408, 418-21 (5th Cir. 2004). Back pay in a Title VII action—the form of monetary relief implicated by the certification order in this case insofar as it was affirmed by the Ninth Circuit—is the classic instance of a claim for monetary relief that satisfies the requirements of being "incidental to" or "concomitant with" the entitlement to injunctive relief, and capable of determination with regard principally to objective characteristics of class members. *See Allison*, 151 F.3d at 415; *see also Jefferson*, 195 F.3d at 896.

Due-process concerns are not strongly implicated by non-opt-out certification of back-pay claims in part for the same reason that non-opt-out certification of injunctive relief claims is permissible. An individual class member does not have a genuine property or autonomy interest in controlling the litigation of the injunctive claims (or at least no interest that outweighs the interest in having the entitlement to classwide injunctive relief decided in a single action). It follows that the same class member has little additional interest in controlling litigation that will determine the consequences that follow directly from the determination of the class's entitlement to injunctive relief.

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[7] In fact, "nothing in Rule 23 provides that one of the rule's subdivisions trumps another based on predominance," Wolfman & Morrison, *supra*, at 737, and it appears that the Advisory Committee borrowed the term from Rule 23(b)(3), where it is used in an entirely different context.

To be sure, this principle has limits. If, for example, a class consisted of a relatively small group of members, each of whom had very large claims for back pay (or if a small number of such members were subsumed within a larger class), those individuals would have a greater interest in conducting litigation over their own personal claims. Depending on the circumstances, their individual interests might require that they be provided an opt-out right, at least at some point in the litigation.[5]

By the same token, however, in many cases most class members' claims are not large enough to support individual litigation, and that circumstance reinforces the conclusion that where monetary relief flows directly from a classwide injunction, due process does not demand a right to opt out. *Cf. Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661(7th Cir. 2004) (noting that where unitary conduct allegedly caused small amount of damages to many people, "the *realistic* alternative to a class action" is not many individual suits, "but zero individual suits, as only a lunatic or a fanatic" sues in such circumstances). After all, it makes little sense to assert that absent class members' right to control their own litigation exists even in circumstances where, as a practical matter, it would not be realistically possible for them to mount the sort of proof of a classwide pattern or practice of discrimination necessary to prove their entitlement to a relatively insignificant sum of back pay. "In such cases, the 'negative value' of any individual claim defeats the prospect for meaningful individual enforcement of even well-established, meritorious claims." Issacharoff, *supra*, at 1059.

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[5] *Cf. Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1157-58 (11th Cir. 1983) (contemplating possibility of opt-outs from proceedings to determine individual back pay awards after determination of liability and classwide injunctive relief through a non-opt-out Rule 23(b)(2) class).

The point here is not that a small claimant lacks an ownership interest in "property" entitled to due process protection when her claim is put at risk of deprivation. To the contrary, a claim, no matter how small, is property entitled to such protection. *Parratt v. Taylor*, 451 U.S. 527, 536-37 (1981); *see also Phillips v. Washington Legal Fdn.*, 524 U.S. 156, 169-70 (1988). But "'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances," and it "calls for such procedural protections as the particular situation demands." *Gilbert v. Homar*, 520 U.S. 924, 929 (1997) (quoting *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 895 (1972) and *Morrissey v. Brewer*, 408 U.S. 471, 481 (1961)). Thus, where (1) a class representative has stepped up and shown the willingness to finance the litigation and run the rigors of Rule 23(a)(4)'s adequacy-of-representation inquiry, (2) the monetary relief sought flows directly from the establishment of an entitlement to classwide injunctive relief, and (3) each claimant's stake is insufficient to induce individual litigation, the process that is due is the right to ride the coattails of the court-approved class representative, subject to the district court's searching adequacy determination and the rights of participation in the case (and particularly in settlement) provided for by Rule 23. An individual opt-out is not constitutionally required in such cases.[4]

In sum, the suggestion that claims for monetary relief that flow directly from a classwide entitlement to injunctive relief cannot be joined in a non-opt-out certification under Rule 23(b)(2) fails both as a matter of constitutional law and under the terms of the Rule. With respect to claims for monetary relief, however, even in a (b)(2) class, due process may impose requirements in some cases. After establishment of liability for back pay, procedures for its computation and distribution would have to comport with due process, and the circumstances could call for notice and an opportunity for individual class members to be heard in some fashion with respect to the amounts due and possibly also for the opportunity to opt out of whatever proceedings were put in place for the determination of back pay. Moreover, if the class representatives settled a class action by trading away claims for monetary relief in return for injunctive relief of debatable value, due process might also counsel in favor of giving absent class members the opportunity to opt out. *Cf.* Fed. R. Civ. P. 23(e)(4) (settlement of a Rule 23(b)(3) class action may be conditioned on a new opt-out opportunity). Such possibilities are not, however, sufficient to preclude certification of a litigation class seeking injunctive relief and concomitant monetary relief.

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[4] Of course, Rule 23 provides for notice and opt-out rights in Rule 23(b)(3) class actions that seek money damages even when individual claims can be characterized as "negative value" claims. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-76 (1974). That fact shows only that it is possible Rule 23(b)(3) demands *more* than due process would require in some cases.

II. Rule 23 Is Flexible Enough to Accommodate Whatever Opt-Out Rights the Constitution May Require.

To whatever extent due process may require notice and opt-out rights for monetary claims made in an action that also meets the requirements for certification of injunctive claims under Rule 23(b)(2), Rule 23 provides the courts with ample means for protecting those rights. Wal-Mart's draconian view that no certification may be made under Rule 23(b)(2) in such circumstances—even as to the claims for classwide injunctive relief—badly misreads the rule.

To begin with, Rule 23's terms allow bifurcated certification, with some claims certified for mandatory class treatment under Rule 23(b)(2) and others certified on an opt-out basis under Rule 23(b)(3). Although Rule 23(b) speaks of the circumstances in which an "action" can be maintained as a "class action," other parts of the Rule expressly contemplate that class certification can encompass less than all of an "action." Thus, Rule 23(c)(4) provides: "When appropriate, an action may be brought or maintained as a class action with respect to particular issues." Rule 23(c)(1)(B) similarly provides that a class certification order must "define the class and the class claims, issues, or defenses"—wording that authorizes certification limited to particular claims.

If certification under one of the subdivisions of Rule 23(b) can be limited to particular claims so that an action may be a class action as to some claims or issues and an individual action as to others, as the Rule explicitly states, it follows that an action may also be a Rule 23(b)(2) class action as to some claims or issues and a Rule 23(b)(3) class action as to others. Certainly nothing in the Rule forbids that result. Not surprisingly, therefore, the lower courts have endorsed the possibility of such bifurcated certification.[5] This Court, too, should embrace that straightforward reading of the Rule.

Rule 23 also permits the provision of notice and opt-out rights in an action certified exclusively under Rule 23(b)(2) to the extent that due process requires it as to some or all of the class and some or all of the claims asserted. Wal-Mart's contrary assertion finds no support in the Rule, which nowhere states that opt-out rights may *not* be provided under Rule 23(b)(2). That opt-out rights are *required* in Rule 23(b)(3) actions, and not required in Rule 23(b)(2) actions, does not mean that opt-out rights are *forbidden* in Rule 23(b)(2) actions. The most natural reading of Rule 23(b)(2) is that it permits but does not require an opportunity to opt-out.

Other provisions of Rule 23 reinforce this reading. First, the textual source of the requirement for opt-out rights in Rule 23(b)(3) actions is not Rule 23(b)(3) itself, but Rule 23(c)(2)(B), which states that the court in an action certified under Rule 23(b)(3) *must* provide notice to the class, which notice *must* state "that the court will exclude from the class any member who requests exclusion." Fed. R. Civ. P. 23(c)(2)(B)(v). In other words, the opt-out right is framed as a component of the required notice.

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[5] *See, e.g.*, *Jefferson*, 195 F.3d at 898; *Allison*, 151 F.3d at 434 (statement on rehearing en banc); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 634-35 (9th Cir. 1982).

The companion provision of the Rule applicable to (b)(2) actions—Rule 23(c)(2)(A)—provides that in "any action certified under Rule 23(b)(1) or (b)(2), the court *may* direct appropriate notice to the class" (emphasis added). The Rule says nothing about the content of that notice or when it might be "appropriate." But when subdivisions (c)(2)(A) and (c)(2)(B) are read together, the implication is that any of the items listed in (c)(2)(B) as components of notice in a class action could, if "appropriate," be included in a notice under (c)(2)(A)—including notice that class members may be excluded upon request. Indeed, it would be odd if the court in providing notice under (c)(2)(A) were not expected to look to Rule 23(c)(2)(B), which sets forth the rulemakers' understanding of the components of notice under Rule 23.

Additional support for a court's authority to order opt-out rights in Rule 23(b)(2) actions when required by due process appears in Rule 23(d)(1)(B). That subdivision provides that, in the course of an action, a court may issue orders that "require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members" informing them of "the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action." Fed. R. Civ. P. 23(d)(1)(B)(iii). Although standing alone this provision might be insufficient authorization for an order notifying class members of an opportunity to exclude themselves from the action. Rule 23(d)(1)(E) provides catch-all authority for the court to issue orders to "deal with similar procedural matters" to those covered by the earlier subparts of 23(d)(1). Offering notice and an opportunity to opt out is, at a minimum, "similar" to providing an opportunity to signify whether class members consider their representation fair and adequate. (Indeed, giving class members the chance to vote with their feet is perhaps the surest way of allowing them to "signify" their views about the class representatives.) Allowing an opportunity to opt out also addresses a procedural matter similar to allowing an opportunity to "come into the action." Granting opt-out rights to class members in a Rule 23(b)(2) class action where necessary or appropriate thus falls well within a district court's "broad authority" under Rule 23(d)(1) "to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981).

Finally, permitting opt-out rights in a 23(b)(2) case when demanded by due process is part and parcel of one of the most basic obligations that the Rule imposes on a court conducting a class action: defining who is and who is not a member of the class. That requirement is so elemental that the Rule imposes it twice—first in Rule 23(c)(1)(B), which requires that a certification order "define the class," and second in Rule 23(c)(3), which provides that any judgment in a class action must "describe those whom the court finds to be class members." Fed. R. Civ. P. 23(c)(3)(A). The court's authority to define the class provides an additional basis for the power, in appropriate circumstances, to exclude from it members who have requested exclusion.

In short, the tools that Rule 23 gives a court to manage a class action, considered together, are more than sufficient to encompass the power to provide for notice and opt-out rights even in circumstances where the Rule does not *mandate* such rights, if in a given case the provision of such rights is appropriate—such as where due process requires them. If there were any doubt on the subject, however, it should be resolved in favor of construing the Rule to be consistent with constitutional requirements. This Court has repeatedly stated that Rule 23 must be read to effectuate the due process rights of class members and avoid tensions with other constitutional requirements. *Ortiz*, 527 U.S. at 845-48; *Amchem*, 521 U.S. at 628-29; *Eisen*, 417 U.S. at 173-77; *see also Gulf Oil*, 452 U.S. at 99. Adopting an interpretation of the Rule that would forbid opt-out rights in Rule 23(b)(2) cases even where due process required them would run headlong into that imperative.

CONCLUSION

The Court should affirm the judgment of the Ninth Circuit.

Respectfully submitted,

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WAL-MART STORES, INC.,

Petitioner,

v.

BETTY DUKES, ET AL.,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

◆

BRIEF OF *AMICI CURIAE* PUBLIC JUSTICE, P.C., THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES AND THE NATIONAL CONSUMERS LEAGUE IN SUPPORT OF RESPONDENTS

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Woods v. QC Finance Services, Inc., 280 S.W.3d 90 (Mo. Ct. App. 2008) 28

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OTHER AUTHORITIES

Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 4:36 (4th ed. 2002) 28

Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* (2009), http://www.unprotectedworkers.org/index.php/broken_laws/index 19

Bruce L. Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 Notre Dame L. Rev. 1377 (2000) 22, 23

Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U.L. Rev. 1357 (Oct. 2003) 32

Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulations*, 105 Colum. L. Rev. 319 (Mar. 2005) 19

David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 Comp. Lab. L. & Pol'y J. 59 (Fall 2005) 18

Daniel Pulliam, *Proposed EEOC Budget Cut Draws Congressional Scrutiny* (Mar. 24, 2006), http://www.govexec.com/dailyfed/0306/032406p1.htm 7

Deborah H. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (Rand Inst. for Civil Justice 2000) .... *passim*

TABLE OF AUTHORITIES – Continued

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Equal Employment Opportunity Commission, *Charge Statistics FY 1997 through FY 2010*, http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm 7, 13

Equal Employment Opportunity Commission, *Fiscal Year 2010 Performance and Accountability Report*, Performance Results (2010), http://www.eeoc.gov/eeoc/plan/2010par_performance.cfm 14

Equal Employment Opportunity Commission, *FY 2010 Congressional Budget Justification* (2010), http://www.eeoc.gov/eeoc/plan/upload/2010budget.pdf 14

Equal Employment Opportunity Commission, *Litigation Statistics FY 1997 through FY 2010*, http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm 7, 13

Federal Trade Commission, *Consumer Fraud in the United States* (Aug. 2004), http://www.ftc.gov/reports/consumerfraud/040805confraudrpt.pdf 17

Federal Trade Commission, *Consumer Sentinel Network Data Book for Jan. – Dec. 2009* (Feb. 2010), http://www.ftc.gov/sentinel/reports/sentinel-annual reports/sentinelcy2009.pdf 6

Federal Trade Commission, *Performance and Accountability Report* (2009), http://www.ftc.gov/opp/gpra/2009parreport.pdf 7

Page

Federal Trade Commission, *Thomas B. Leary Addresses Class Action Litigation Summit* (2003), http://www.ftc.gov/opa/2003/06/learyspeech.shtm 7

Joshua D. Blank & Eric A Zacks, *Dismissing the Class: A Practical Approach to the Class Action Restriction on the Legal Services Corporation*, 110 Penn. St. L. Rev. 1 (2005) 15

Juliet M. Brodie, *Post-Welfare Lawyering: Clinical Education and a New Poverty Law Agenda*, 20 Wash. U. J.L. & Pol'y 201 (2006) 21

Linda G. Morra, U.S. General Accounting Office, Gen. Accounting Office, GAO/T-HRD-93-30, *EEOC: An Overview* (1993), http://archive.gao.gov/d45t15/149741.pdf 13

Robert G. Bone & David S. Evans, *Class Certification and Substantive Merits*, 51 Duke L.J. 1251 (Feb. 2002) 32

Thomas E. Willging et al., *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (Fed. Judicial Ctr. 1996), http://ftp.resource.org/courts.gov/fjc/rule23.pdf 10, 31, 23

Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591 (2006) 32

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici curiae are national public interest and membership organizations representing the interests of workers and consumers, and particularly those of modest means. *Amici* advocate for the interests of workers and consumers who often cannot safeguard their rights without access to the class action device. *Amici* submit this brief in support of Respondents to emphasize that the arguments advanced by Petitioner Wal-Mart Stores, Inc. ("Wal-Mart") and its *amici*, if accepted by this Court, would dramatically undermine the ability of workers and consumers to vindicate their rights.

Public Justice, P.C. ("Public Justice"), is a national public interest law firm that specializes in precedent-setting and socially-significant civil litigation, and is dedicated to pursuing justice for the victims of corporate and governmental abuses. Public Justice prosecutes cases designed to advance consumers' and victims' rights, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless. Public Justice regularly represents both workers and consumers in class actions, and its experience is that class actions often represent the only meaningful way that individuals can vindicate important legal rights. Accordingly, Public Justice has a significant interest in the issues before this Court.

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[1] No counsel for a party wrote this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Only Cuneo Gilbert & LaDuca, LLP of Washington, DC, and *amici*, or their counsel, made a monetary contribution to this brief's preparation and submission. The parties have filed blanket consents to *amicus* briefs.

The National Association of Consumer Advocates ("NACA") is a nationwide non-profit association of more than 1,500 members who have represented hundreds of thousands of consumers victimized by fraudulent, abusive and predatory business practices. Its members are private and public sector attorneys, legal services attorneys, law professors and law students whose primary focus is the protection and representation of consumers' interests. NACA members provide counsel for consumers against banks, finance companies, car dealers and others who profit from taking unfair advantage of consumers. As an organization fully committed to promoting justice for consumers, NACA's members and their clients are actively engaged in promoting a fair and open marketplace that is based on our nation's fundamental sense of fairness, equity and honesty, and that forcefully protects the rights of consumers, especially those with modest incomes. As an organization representative of consumers throughout the nation, NACA is vitally interested in the resolution of the class action issues before the Court in this case.

The National Consumers League ("NCL"), founded in 1899, is the nation's oldest consumer organization.

The mission of the NCL is to protect and promote social and economic justice for consumers and workers in the United States and abroad. The NCL is a nonprofit advocacy group that provides government, businesses and other organizations with the individual's perspective on concerns including, *inter alia*, child labor, workers' rights and other workplace issues. On behalf of the general public, the NCL appears before legislatures, administrative agencies and the courts on a wide range of issues, and works for the enactment and effective enforcement of laws protecting workers. For more than 100 years, the NCL has vied to promote a fair marketplace for workers and consumers. This was the reason for the NCL's founding in 1899 and still guides it into its second century.

Amici are concerned that the Court's decision in this case could have far-reaching implications for the future of class action litigation generally and, in particular, could dramatically affect consumer and employment cases that are unlikely to be brought as individual actions due to a myriad of barriers to seeking individual relief. How this Court addresses and articulates the standards for class certification under Rule 23 of the Federal Rules of Civil Procedure may affect class actions in virtually every context, from discrimination and other employment issues to consumer protection and other statutorily-authorized litigation. The issues presented in this case thus are extremely important to the constituencies that *amici* represent.

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INTRODUCTION AND SUMMARY OF ARGUMENT

In the context of this case, Wal-Mart and its *amici* have launched a broad attack on the class action device. They argue for an overly restrictive interpretation of Rule 23 requirements that would gut class actions and effectively strip many workers and consumers of their ability to resolve claims collectively – which, in many cases, determines whether those claims will be asserted at all. Wal-Mart's *amici* decry class actions as bad for business, and they falsely portray class action litigators as blackmail artists who coerce defendants into lucrative settlements. In so doing, Wal-Mart's *amici* studiously ignore the value of class actions to providing effective redress to individuals, to the efficient resolution of multiple claims, and to the enforcement of important statutory rights where government agencies fall short. They fail to acknowledge that the mere possibility of individual actions provides no meaningful substitute for class actions, because there are often many barriers to seeking individual relief. And they repeatedly rely on hyperbole and outright falsehoods to make their case against class actions in general. The Court should reject Wal-Mart's and its *amici*'s attempt to raise the bar for prosecuting class actions to such a height that virtually no one will be able to hurdle it.

Pursuing aggregated claims through class action litigation allows comprehensive relief for widespread harms. As one district court observed in certifying a class action against a payday lender: "This is precisely the kind of case that class actions were designed for, with small or statutory damages brought by impecunious plaintiffs who allege similar mistreatment by a comparatively powerful defendant." *Van Jackson v. Check 'N Go of Ill., Inc.*, 193 F.R.D. 544, 547 (N.D. Ill. 2000). Without a class action, a defendant "might get away with piecemeal highway robbery by committing many small violations that were not worth the time and effort of individual plaintiffs to redress or were beyond their ability or resources to remedy." *Id.* Indeed, as recently as 2005, and consistent with this Court's jurisprudence, Congress made the judgment that "[c]lass action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm." Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(1) (2005).

In many cases, aggregate litigation affords the *only* effective means to compensate injured individuals and to sanction businesses engaged in misconduct. The consequences of imposing draconian standards for class certification, therefore, would be widespread and potentially disastrous to both individuals and society at large. Because individuals by themselves often lack the knowledge, incentive, or effective means to seek a recovery, widespread injuries would likely go without redress if a class cannot be certified. In both the marketplace and the workplace, for example, individuals often do not know about or understand the ways in which their rights are being violated. They may lack education or face language barriers. They may not be able to comprehend fully the complex provisions in dozens of consumer contracts they are forced to sign, or know about systemic pay disparities between comparable men and women. Even where individuals understand that their rights are being violated, the time and resources needed to pursue a legal claim, the complexity of the legal system, possible retaliation from an employer, the relatively small size of individual recoveries, and a lack of access to lawyers all make it extremely unlikely that most individuals will seek relief by way of individual actions.

Cash-strapped government agencies and public prosecutors do not have the capacity to take on enforcement actions against all illegal corporate conduct. "[I]n practice, public agencies lack sufficient financial resources to monitor and detect all wrongdoing or to prosecute all legal violations." Deborah H. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 69 (Rand Inst. for Civil Justice 2000). For example, in 2009, the Consumer Sentinel Network, an online database of consumer complaints made to the Federal Trade Commission ("FTC"), Better Business Bureaus, and other agencies, received more than 1.3 million consumer complaints – over 720,000 of them fraud-related. FTC, *Consumer Sentinel Network Data Book for Jan. – Dec. 2009*, at 3 & 5 (Feb. 2010), http://www.ftc.gov/sentinel/reports/

sentinel-annualreports/sentinelcy2009.pdf. The FTC, with its staff of only 1,100 employees, *see* FTC, *Performance and Accountability Report*, at III (2009), http://www.ftc.gov/opp/gpra/2009parreport.pdf, lacks the resources to investigate and respond to this volume of complaints, and depends on supplemental private enforcement. *See* FTC's Thomas B. Leary Addresses Class Action Litigation Summit (2003), http://www.ftc.gov/opa/2003/06/learyspeech.shtm ("The Federal Trade Commission is a relatively small agency with broad competition and consumer protection responsibilities. . . . We depend on private litigation to supplement our efforts. . . ."); *see also* Hensler, *Class Action Dilemmas, supra*, at 69-70 (citing examples of regulatory agencies explicitly relying on private actions to augment their efforts).

Public agencies charged with enforcing rights in the workplace are similarly challenged. The Equal Employment Opportunity Commission ("EEOC") has been plagued for years by staff shortages and budget shortfalls. *See, e.g.*, Daniel Pulliam, *Proposed EEOC Budget Cut Draws Congressional Scrutiny* (Mar. 24, 2006), http://www.govexec.com/dailyfed/0306/032406p1.htm. Of the more than 99,000 charges filed by individuals in 2010 alone, for example, the EEOC brought only 250 enforcement actions – an all-time low compared to the preceding 13 years. *See* EEOC, *Charge Statistics FY 1997 through FY 2010*, http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm; EEOC, *Litigation Statistics FY 1997 through FY*

2010, http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm.

Wal-Mart's *amici* argue that class actions should be weakened because they are expensive for businesses to litigate. Of course, they fail to acknowledge the valuable, deterrent effect that class actions have on illegal corporate behavior. In trumpeting the myth that class actions provide the means to hold corporations hostage, these *amici* ignore empirical evidence demonstrating that the settlement rate for certified class actions is similar to that of individual lawsuits. *See* Hensler, *Class Action Dilemmas*, *supra*, at 9, 119. Furthermore, it is simply not true that class actions are only expensive (and therefore, only coercive) for defendants. The cost of litigating a class action is at least equally borne by plaintiffs and their counsel, which makes the device hardly conducive to "strike suits." Indeed, a cursory review of employment class action settlements reveals the enormous time and resources plaintiffs can expend in pursuing a class case. Mostly, the complaints about class actions from Wal-Mart's *amici* fail to acknowledge the documented cost to individuals, and the cost to society, if businesses are allowed to continue to engage in unlawful conduct with impunity.

Courts should be careful in certifying class actions. *Amici* do not contend otherwise. That care, however, is built into Rule 23's existing requirements. Rule 23 was never intended to resolve the merits of a case – it is a procedural device, and an important one, to be used to aggregate similar claims of similarly-situated individuals. Rule 23 is routinely and correctly applied by district courts to allow aggregate litigation to proceed, and courts are well-equipped to determine when a class should be certified, to oversee class litigation, and to determine the fairness of class settlements.

At bottom, the arguments raised by Wal-Mart and its *amici*, if accepted by this Court, threaten to deny access to the judicial system to millions of individuals nationwide who have been injured by illegal corporate conduct. If the bar for class actions is placed too high for individuals to reach, then the enforcement of statutory protections will be stifled, leaving many workers and consumers without meaningful access to justice.

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ARGUMENT

I. CLASS ACTIONS ARE AN IMPORTANT AND NECESSARY DEVICE TO VINDICATE THE RIGHTS OF THOSE WHO OTHERWISE WOULD BE DENIED ACCESS TO THE COURTS.

A. Class Actions Play an Important Role in Society.

This Court has repeatedly recognized that class actions are a valuable tool for at least three reasons: they expand access to the courts, they serve judicial efficiency, and they supplement inadequate government enforcement.

1. Class Actions Play an Important Role in Expanding Access to the Courts for the Aggrieved. In this case, against the world's largest retailer, hourly class members are each seeking an annual back pay award averaging only $1,100. (J.A. 475a.) But for the collective prosecution of these claims, it is unlikely that they would be prosecuted at all. (*See* Section I.A(2), below.) As this Court stated over thirty years ago and has emphasized several times since then, "[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (noting that class actions overcome problem of modest recoveries "'by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor'"); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) ("Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually. . . . [M]ost of the plaintiffs would have no realistic day in court if a class action were not available."). The 1966 Advisory Committee notes to Rule 23 observe: "The interests of individuals in conducting separate lawsuits . . . may be theoretic rather than practical" because "the amounts at stake for individuals may be so small that separate suits would be impracticable." Fed. R. Civ. P. 23 Advisory Committee notes, 1966 Amendment; *see also* Thomas E. Willging et al., *Empirical Study of*

Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 7 (Fed. Judicial Ctr. 1996), http://ftp.resource.org/courts.gov/fjc/rule23.pdf ("Without an aggregative procedure like the class action, the average recovery per class member or even the maximum recovery per class member seems unlikely to be enough to support individual actions in most, if not all, of the cases studied."). The class action device, therefore, provides a practical means of redress where the cost of a lawsuit outweighs an individual recovery.

2. *Class Actions Are Uniquely Designed to Resolve Multiple Claims Efficiently and May Be Superior to Individual Actions.* Procedurally, the class action device concentrates litigation in a single forum, where it may be resolved more expeditiously and efficiently than could a series of suits. *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553-54 (1974). "One great advantage of class action treatment," as this Court has stated, "is the opportunity to save the enormous transaction costs of piecemeal litigation." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 860 (1999); *see also Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 & n.11 (1981) ("Class actions serve an important function in our system of civil justice" by addressing and disposing of common questions in a single lawsuit). Indeed, class actions may be superior to individual litigation insofar as they, unlike individual lawsuits, can afford systemic relief and court-ordered injunctions against future violations of class-wide rights. *See Paige v. California*, 102 F.3d 1035, 1039 (9th Cir. 1996)

(injunction providing class-wide relief requires a certified class).

3. Class Actions Play an Important Role in the Enforcement of Federal and State Laws Where Government Agencies Fall Short. "The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government." *Deposit Guar. Nat'l Bank*, 445 U.S. at 339. In the securities context, for example, this Court has emphasized that "private actions provide 'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [Securities and Exchange Commission] action.'" *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)); *see also Kessler v. Jacobson*, 149 F.R.D. 651, 657 (M.D.Fla.1992) ("[A]ttorneys who bring class actions . . . are vital to the enforcement of the securities laws.").

In the area of consumer protection, courts and public agencies themselves have repeatedly noted the scarce resources available for public enforcement of the law, and have espoused private enforcement as a necessary adjunct of public protection. *See Ting v. AT&T*, 182 F. Supp. 2d 902, 920 (N.D. Cal. 2002) (rejecting argument that Federal Communications Commission is forum before which class members can "effectively vindicate" right to recover damages from AT&T), *aff'd*, 319 F.3d 1126 (9th Cir. 2003); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 276 (Ill.

2006) (finding state attorney general's authority to bring action insufficient, given office's need to allocate "scarce resources to a variety of issues affecting consumers"); *Vasquez-Lopez v. Beneficial Or., Inc.*, 152 P.3d 940, 950 (Or. Ct. App. 2007) (noting "possibility of state action cannot reliably serve as a substitute for private actions," given attorney general's contention that amount of consumer fraud in state "far exceeds" government's ability to investigate and prosecute it); *Kwikset Corp. v. Super. Ct.*, ___ Cal. Rptr. 3d ___, 51 Cal. 4th 310, 2011 WL 240278, at *11 (Cal. 2011) ("That public prosecutors can . . . sue is of limited solace, given the significant role we have recognized private consumer enforcement plays for many categories of unfair business practices.").

Similarly, in the employment context, private enforcement is often critical to supplement the limited resources of public agencies. *See, e.g.*, *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 362-64 (1977) (quoting House Report acknowledging the EEOC's "burgeoning workload," "insufficient funds and a shortage of staff"); *Gentry v. Super. Ct.*, 165 P.3d 556, 569 (Cal. 2007) (rejecting argument that availability of enforcement by state labor commissioner is "adequate substitute" for pursuing class claims). The EEOC litigates less than 1% of all charges it receives each year. *See* EEOC, *Charge Statistics FY 1997 through FY 2010*, *supra*; EEOC, *Litigation Statistics FY 1997 through FY 2010*, *supra*; Linda G. Morra, U.S. Gen. Accounting Office, GAO/T-HRD-93-30, *EEOC: An Overview* 12 (1993), http://archive.gao.gov/d45t15/149741.pdf. In

2010, the EEOC filed a total of 250 enforcement lawsuits, with only 8% of them considered "systemic" lawsuits. EEOC, *Fiscal Year 2010 Performance and Accountability Report*, Performance Results (2010), http://www.eeoc.gov/eeoc/plan/2010par_performance.cfm. Moreover, the agency devotes far more resources to the processing of charges, than to its litigation program. In 2008, for example, the EEOC spent on litigation just 21% of its budget for private sector enforcement – where it focuses the bulk of its efforts – compared to the budget allocation of 60% on administrative charge processing. EEOC, *FY 2010 Congressional Budget Justification* 12 (2010), http://www.eeoc.gov/eeoc/plan/upload/2010budget.pdf. Its 2010 budget request reflected either a desire or need to allocate even less to litigation, and more to charge processing. *Id.* (outlining a budget dedicating 19% of private sector enforcement money to litigation, and 64% to the processing of charges).

B. Due to Substantial Barriers to Seeking Individual Relief, Class Actions Are Often the Only Way to Redress Wrongs and Hold Businesses Accountable.

When businesses have engaged in wrongful conduct that inflicts modest damages on individual consumers or workers, a class action may be the only way to obtain meaningful relief for scores of individuals, or to hold these businesses accountable.

1. Individuals Often Are Not Aware That They Have an Individual Claim. Class actions "enable even the unaware to be joined in lawsuits instituted on their behalf." Joshua D. Blank & Eric A. Zacks, *Dismissing the Class: A Practical Approach to the Class Action Restriction on the Legal Services Corporation*, 110 Penn. St. L. Rev. 1, 12 (2005). In the marketplace, consumers may find themselves unwittingly duped by schemes that cheat them out of small amounts of money that, in the aggregate, generate enormous unlawful sums for businesses. Indeed, the smaller the individual amount at stake, the "less likely [the harm is] to be recognized by those affected." Hensler, *Class Action Dilemmas*, *supra*, at 68. As the New Jersey Supreme Court observed, "without the availability of a class-action mechanism, many consumer-fraud victims may never realize that they may have been wronged." *Muhammad v. County Bank of Rehoboth Beach*, 912 A.2d 88, 100 (N.J. 2006); *accord Coady v. Cross Country Bank, Inc.*, 729 N.W.2d 732, 747 (Wis. Ct. App. 2007).

The Washington Supreme Court made a similar observation in ruling unconscionable a consumer contract that banned class actions. In that case, a class of consumers alleged that a telecommunications company had overcharged them each between $1 and $45 per month in hidden and illegal charges. The Court recognized that a class action "is often the only meaningful type of redress available for small but widespread injuries and without it, "many consumers may not even realize that they have a claim." *Scott v.*

Cingular Wireless, 161 P.3d 1000, 1007 (Wash. 2007); *see also Kinkel*, 857 N.E.2d at 268 (invalidating contract that prohibited class actions, and observing that "[t]he typical consumer may feel that such a charge is unfair, but only with the aid of an attorney will the consumer be aware that he or she may have a claim that is supported by law, and only with the aid of an attorney will such a consumer be able to make the merits of such a claim apparent in arbitration or litigation"); *Henry v. Cash Today, Inc.*, 199 F.R.D. 566, 573 (S.D. Tex. 2000) (finding class resolution superior because of "'inability of the poor or uninformed to enforce their rights, and the improbability that large numbers of class members would possess the initiative to litigate individually'").

In the workplace, workers are often unaware of their employers' unlawful acts or do not understand their rights. *Gentry*, 165 P.3d at 566. Standing alone, they may not be able to perceive a pattern or practice of discrimination. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977) (noting that companywide statistics may be the only way "'to uncover clandestine and covert discrimination by the employer or union involved'"). Low-wage workers, in particular, may lack higher education and sophistication and may have limited comprehension of English. These circumstances all act as barriers that prevent workers from understanding their rights are being violated and prevent them from pursuing relief individually. *See Wang v. Chinese Daily News, Inc.*, 231 F.R.D. 602, 614 (C.D. Cal. 2005) (in certifying Rule 23 class, noting the risks faced by non-English speaking immigrant class members if they had to proceed individually).

2. *Individuals Often Lack the Resources to Pursue Individual Claims.* Even if individuals are aware that their rights are being violated, they often lack the means to do anything about it. The legal system is challenging and time-consuming to navigate even for the well-educated or well-resourced. Low-income individuals in particular may have demands on their lives – rigid work schedules, burdensome overtime or second jobs, lack of childcare, or debts – that act as real-world barriers to pursuing litigation, particularly for small claims. *Reuter v. Davis*, No. 502001CA0011164, 2006 WL 3743016, at *4 (Fla. Cir. Ct. Dec. 12, 2006) ("[P]arents working from payday to payday with babysitting, transportation, and employment issues, do not necessarily think they can afford attorneys or, if they do, have difficulty keeping appointments."); *see Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 86 (S.D.N.Y. 2001) (due to transient nature of work, employees may lack the stability necessary to pursue claims). Thus, not surprisingly, of the nearly 25 million adults affected by consumer fraud in one year, only 8.4 percent complained to a federal, state, or local agency or Better Business Bureau, and only 2.4 percent consulted a lawyer or other professional. *See* FTC, *Consumer Fraud in the United States* ES-6, 80-81 (Aug. 2004), http://www.ftc.gov/reports/consumerfraud/040805confraudrpt.pdf. Consumers subjected to questionable practices such

as payday lending, mortgage scams, illegal billing and fee schemes, and abusive debt collection, to name but a few, have been able to vindicate their rights and force businesses to cease unlawful conduct only because they were able to aggregate their claims and pursue them collectively.

3. Individuals May Fear Retaliation from Employers if They Pursue Individual Relief. Workers, especially those who live paycheck to paycheck in an economy with persistent high unemployment, are understandably hesitant to challenge their employers when the result might be termination. *See, e.g., Bell v. Farmers Ins. Exch.*, 9 Cal. Rptr. 3d 544, 570 (Cal. Ct. App. 2004) ("[A] lawsuit means challenging an employer in a context that may be perceived as jeopardizing job security and prospects for promotion."). Workers depend on their employment for their livelihood and thus legitimately fear that, if they were to sue individually, their employers would retaliate and wreak severe economic consequences on their lives. *See Does I v. The GAP Inc.*, No. CV-01-0031, 2002 WL 1000073, at *8 (D. N. Mar. I. May 10, 2002); *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 701 (N.D. Ga. 2001). As this Court has stated, employers, "by virtue of the employment relationship, may exercise intense leverage." *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 240 (1978). "Not only can the employer fire the employee, but job assignments can be switched, hours can be adjusted, wage and salary increases can be held up, and other more subtle forms of influence exerted." *Id.; see also* David Weil &

Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace,* 27 Comp. Lab. L. & Pol'y J. 59, 83 (Fall 2005) (discussing studies suggesting that, despite explicit retaliation protections in the law, "being fired is widely perceived to be a consequence of exercising certain workplace rights").

Low-wage workers, who constantly face financial uncertainty and work in low-skilled jobs where employers consider them expendable, are especially vulnerable to retaliation. *See* Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* (2009), http://www.unprotectedworkers.org/index.php/broken_laws/index (43% of low wage workers surveyed who complained about violations of workplace standards were retaliated against, including by being fired, suspended or threatened with cuts in their hours or pay). Undocumented workers are even more reluctant to bring legal action, for fear of not just losing their jobs, but also criminal sanction and deportation. *See Flores v. Amigon,* 233 F. Supp. 2d 462, 465 n.2 (E.D.N.Y. 2002); *Ansoumana,* 201 F.R.D. at 86; Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulations,* 105 Colum. L. Rev. 319, 348 (Mar. 2005) (Undocumented workers' "fear of deportation exacerbates the usual fear of reprisals that silences many low-wage employees."). These individuals are particularly unlikely to file individual lawsuits. Class actions help ensure that workers can nevertheless have their rights protected.

4. *Individuals Often Lack Financial Incentive to Pursue Individual Claims.* Examples abound of businesses that profit when they engage in illegal consumer practices by stealing a little bit from a lot of people.[7] *See Discover Bank v. Super. Ct.*, 113 P.3d 1100, 1108-09 (Cal. 2005) ("damages in consumer cases are often small and because "'[a] company which wrongfully exacts a dollar from each of millions of customers will reap a handsome profit.'"). Certainly the average consumer who loses $1 – or even $100 – from an unscrupulous business practice, no matter the windfall to the business, is unlikely to track down and consult a lawyer and pursue individual litigation. Without class certification, these injuries would go without redress and the businesses never held accountable. *See Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."); *In re Prudential Ins. Co. of Am. Sales*

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[7] *See, e.g.*, *Homa v. Am. Express Co.*, 558 F.3d 225, 231 (3d Cir. 2009) (class members' claims for misrepresentation of credit-card rewards program implicated less than 5% of each cardholder's credit card balance); *Cohen v. Chicago Title Ins. Co.*, 242 F.R.D. 295, 296 (E.D. Pa. 2007) (class claims for overpayments on title insurance worth less than $200 per claim); *Dist. Cablevision Ltd. P'Ship v. Bassin*, 828 A.2d 714, 719 (D.C. 2003) (class claims for unlawful $5 cable service late fee); *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 572 (Fla. Dist. Ct. App. 1999) (wrongful $4.50 charge on long-distance calls); *Weinberg v. Hertz Corp.*, 499 N.Y.S.2d 693, 695 (N.Y. App. Div. 1986) (average $31 car-rental overcharge), *aff'd*, 509 N.E.2d 347 (N.Y. 1987).

Litig., 148 F.3d 283, 316 (3d Cir. 1998) (given the sheer volume of claims and the modest size of individual claims, a class action presented the "only rational avenue of redress for many class members"); *Scott*, 161 F.3d at 1006 ("Class actions are vital where the damage to any individual consumer is nominal"); *Lake v. First Nationwide Bank*, 156 F.R.D. 615, 626 (E.D. Pa. 1994) ("Given the relatively small amount recoverable by each potential litigant, it is unlikely that, absent the class action mechanism, any one individual would pursue his claim, or even be able to retain an attorney willing to bring the action."); *Muhammad*, 912 A.2d at 100 (noting that "[i]n most cases that involve a small amount of damages, 'rational' consumers may decline to pursue individual consumer-fraud lawsuits because it may not be worth the time spent prosecuting the suit, even if competent counsel were willing to take the case").

In the workplace, too, individuals cheated out of relatively small amounts are unlikely to be "willing to file individual lawsuits and incur the expenses of litigation for such a small award." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 183-84 (W.D.N.Y. 2005). In wage and hour cases of low-wage workers, for example, the individual claims "tend to involve relatively small dollar figures, prohibitively small for a private attorney."[3] Juliet M. Brodie, *Post-Welfare Lawyering:*

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[3] Although wage and hour claims under federal law may proceed collectively by way of an "opt-in" procedure, *see* 29 U.S.C. § 216(b), state wage and hour claims have been certified

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Clinical Education and a New Poverty Law Agenda, 20 Wash. U. J.L. & Pol'y 201, 248-49 (2006); *see also Scholtisek v. The Eldre Corp.*, 229 F.R.D. 381, 394 (W.D.N.Y. 2005) (certifying a state law wage and hour class under Rule 23 and noting that "individual class members' claims are probably relatively small, [and therefore] those persons could lack sufficient incentive to bring individual suits").

Aggregate litigation levels the playing field by enabling plaintiffs "to exploit the 'economies of scale' the defendant already naturally enjoys" due to the fact that it can make a large investment in issues that are likely to arise in multiple cases, and then continue to reap the fruits from such an investment in each individual case. Bruce L. Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 Notre Dame L. Rev. 1377, 1383 (2000); *see also Wang*, 231 F.R.D. at 614 (finding a class action "superior" to individual actions, in part because class members "would face an enormous [im]balance of resources if they were to take on the largest Chinese language newspaper in North America on an individual basis"). Because class counsel "can spread their investment over all of the claims – just as the defendant does – it becomes possible to make investments in the litigation that the plaintiffs could not make if the claims were

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for class treatment under Rule 23. *See, e.g.*, *Ervin v. OS Rest. Servs., Inc.*, No. 09-3029, 2011 WL 135708, at *1 (7th Cir. Jan. 18, 2011).

prosecuted separately." 75 Notre Dame L. Rev. at 1380-81. Class actions thus not only allow individuals to match the resources of corporate defendants, they also make the necessary investment of time and resources into a lawsuit an economically rational choice.

5. *Individuals Often Are Unable to Attract Counsel Where Their Individual Economic Harms Are Dwarfed by the Investment Necessary to Prosecute Cases.* The inability to attract competent counsel presents yet another substantial barrier to pursuing individual claims. Even if a plaintiff wants to pursue a case, attorneys are unlikely to be motivated to take the case on an individual basis if the cost of litigation outweighs the potential recovery. As the Court noted in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974): "A critical fact . . . is that petitioner's individual stake is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all." The claims by Wal-Mart's *amici* about the havoc wreaked upon businesses by class actions sidesteps this reality altogether. In their world, if a claim is not big enough to be pursued individually, it should not be pursued at all. In their world, businesses would be allowed to act with impunity where the economics make it impossible for injured individuals to find attorneys to prosecute modest-value cases on an individual basis.

When individual losses are small relative to the cost of litigation, it makes little economic sense for a competent attorney to take the case unless she can challenge the harm in the aggregate, on behalf of a class of injured persons. As one trial court explained:

> It is undisputed that the lawyers who represented the plaintiffs in these cases would not have taken them if the only claim they could have pursued was the claim of the individual plaintiff. The reasons for this are not hard to see. The actual damages sought by the named plaintiffs are relatively insubstantial. . . . Consequently, it would not make economic sense for an attorney to agree to represent any of the plaintiffs in these cases in exchange for 33 1/3% or even a greater percentage of the individual's recovery. . . . Simply put, the potential reward would be insufficient to motivate private counsel to assume the risks of prosecuting the case just for an individual on a contingency basis. While retaining counsel on an hourly basis is possible, in view of the small amounts involved, it would not make economic sense for an individual to retain an attorney to handle one of these cases on an hourly basis and it is hard to see how any lawyer could advise a client to do so. The net result is that cases such as the ones listed above will not be prosecuted even if meritorious.

Ting, 182 F. Supp. 2d at 918.

Similarly, in a case challenging payday loans, another court concluded that "[t]he chance that [plaintiff] could have obtained competent counsel absent the possibility of class action status or successfully recognized a potential claim that she could effectively pursue without benefit of counsel is *effectively zero*." *Reuter*, 2006 WL 3743016, at *5 (emphasis added). The court emphasized that among the 66,000 or more customers who obtained payday loans with usurious annual rates exceeding 45 percent, "none has brought an individual claim." *Id.* at *4. *See also Brewer v. Mo. Title Loans, Inc.*, 323 S.W.3d 18, 21-22 (Mo. 2010) (chances of finding attorney absent class device were "virtually nil" given the "small damages at issue," "complicated nature of the case," and "likelihood of a heavily defended defendant"); *Kristian v. Comcast Corp.*, 446 F.3d 25, 58 (1st Cir. 2006) (expert affidavits demonstrated that "without some form of class mechanism – be it class action or class arbitration – a consumer antitrust plaintiff will not sue at all," leading the court to conclude that it would be "completely unrealistic and impractical" for an individual plaintiff to retain expert witnesses, without whom a plaintiff's case would be "extremely compromised, and effectively precluded").

The outcome is no better in the context of workplace claims. In *Jarvaise v. Rand Corp.*, 212 F.R.D. 1 (D.D.C. 2002), for example, the district court certified a Rule 23 class of 260 female employees alleging discrimination. In finding certification appropriate, the court found that "a significant number of individuals [would be] deprived of their day in court because they are otherwise unable to afford independent representation." *Id.* at 4; *see also Scott v. Aetna Servs., Inc.*, 210 F.R.D. 261, 268 (D. Conn. 2002) (finding cost of individual litigation "prohibitive"). The same is true for the relatively modest claims of the victims of Wal-Mart's alleged employment discrimination: they are individually too small for an attorney to justify mounting expensive and time-consuming litigation.

The availability of court-awarded fees does not resolve the problem. Attorneys are unlikely to take cases where fees and costs are likely to dominate the recovery because there would be a substantial risk that they would not be fully compensated under fee-shifting statutes for their efforts in prosecuting the claim. *See Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) ("results obtained" factor an important consideration in determining attorney-fee award); *Kristian*, 446 F.3d at 59 n.21 ("In any individual case, the disproportion between the damages awarded to an individual consumer antitrust plaintiff and the attorney's fees incurred to prevail on the claim would be so enormous that it is highly unlikely that an attorney could ever begin to justify being made whole by the court."). As the New Jersey Supreme Court observed, the "availability of attorney's fees is illusory if it is unlikely that counsel would be willing to undertake the representation." *Muhammad*, 912 A.2d at 100; *see also Cooper v. QC Fin. Servs., Inc.*, 503 F. Supp. 2d 1266, 1289 (D. Ariz. 2006) (finding "no indication" that "'attorney fees are an adequate substitute'" for the class action mechanism); *Discover Bank*, 113 P.3d at 1109-10 ("[N]or are we persuaded by the rationale stated by some courts that the potential availability of attorney fees to the prevailing party in arbitration or litigation ameliorates the problem posed by such class action [bans]."); *Feeney v. Dell Inc.*, 908 N.E.2d 753, 764-65 (Mass. 2009) (availability of attorney's fees "not sufficient to ensure that a consumer or business with a small-value claim will be able to find an attorney willing to take the case absent the ability to aggregate claims").

In sum, if the ability to prosecute multiple claims together in a class action is overly restricted, many consumers and workers would be effectively left with no remedy – and corporations would be effectively immunized from liability for widespread violations of law.

II. *AMICI'S* HYPERBOLIC ATTACKS ON CLASS ACTIONS ARE WITHOUT MERIT.

A. A Robust Marketplace Needs Lawful Corporate Actors.

Several of Wal-Mart's *amici* contend that class actions hurt innovative businesses. (*See, e.g.*, Pac. Legal Found. Br. 1 (class actions "stifle entrepreneurialism and job creation"); Intel Corp. Br. 8-9 ("a class action threatens to destroy a defendant's reputation completely out of proportion to the merits of the claims").) In fact, the opposite is true. Class actions are a proven and effective means to encourage lawful corporate conduct. And, when one business cheats the system, it gains an unfair (and unlawful) financial advantage in the marketplace which leads to a race to the bottom in an effort for other businesses to compete. *Amici's* insistence that allowing the lower court's decision in this case to stand would have a "deleterious impact on the national economy" (*see* Global Automakers' Br. 7) is a gross distortion of reality.

Class actions "were designed not only to compensate victimized members of groups . . . , but also to deter violation of the law, especially when small individual claims are involved." Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 4:36, at 314 (4th ed. 2002); *see also Abels v. JBC Legal Group, P.C.*, 227 F.R.D. 541, 546 (N.D. Cal. 2005) (same). The deterrent effect of class actions on illegal corporate behavior is proven, and significant. *See, e.g.*, Hensler, *Class Action Dilemmas, supra*, at 9, 119. As one court recognized in addressing the legality of a consumer contract that prohibited class actions, the inability to pursue a class action potentially "gives defendant a virtual license to commit, with impunity, millions of dollars' worth of small-scale fraud." *Vasquez-Lopez*, 152 P.3d at 951; *see also Woods v. QC Fin. Servs., Inc.*, 280 S.W.3d 90, 98 (Mo. Ct. App. 2008) ("Individualizing each claim absolutely and completely insulates and immunizes [the company] . . . from scrutiny and accountability for its business practices and 'also serves as a disincentive for [the company] to avoid the type of conduct that might lead to class action litigation in the first place.'"); *Coady*, 729 N.W.2d at 747 ("the prospect of class-wide relief 'ordinarily has some deterrent effect on a manufacturer or service provider'"). The inability to bring a class action not only deprives individuals of what may be their only viable means of relief, it also eliminates incentives for businesses to comply with statutory protections for consumers and workers. Thus, the rhetoric of Wal-Mart's *amici* that class actions are not good for the economy ignores the real value that enforcement of statutory rights provides to our society.

Empirical research confirms that class action lawsuits shape corporate conduct. A study conducted by the Rand Institute for Civil Justice, for example, examined several consumer class action lawsuits and settlements involving small individual losses. *See* Hensler, *Class Action Dilemmas, supra*, at 527-29. Corporate representatives interviewed by researchers admitted that class actions had "played a regulatory role by causing them to review their financial and employment practices." *Id.* at 9, 119. Moreover, "some manufacturer representatives noted that heightened concerns about potential class action suits have had a positive influence on product design decisions." *Id.* These accounts corresponded with changes in business practices. In all six of the consumer cases studied, the litigation was associated with changes in practice, and in four of the six, "the evidence strongly suggest[ed] that the litigation, directly or indirectly, produced the change in practice." *Id.* at 431.

Class actions thus can operate as an effective sentry over corporate misconduct. This conclusion is grounded in both economics and common sense. Class action litigation can induce compliance with the law in a way that individual litigation often cannot: a profit-seeking entity would rather pay small sums to the few that can navigate the judicial system on their own than stop completely its unlawful practice that nets millions of dollars a year. As the California Supreme Court correctly observed in considering a class action ban in an employment agreement:

> While employees may succeed under favorable circumstances in recovering unpaid overtime through a lawsuit or a wage claim filed with the Labor Commissioner, a class action may still be justified if these alternatives offer no more than the prospect of "random and fragmentary enforcement" of the employer's legal obligation to pay overtime. . . . In other words, absent effective enforcement, the employer's cost of paying occasional judgments and fines may be significantly outweighed by the cost savings of not paying overtime.

Gentry, 165 P.3d at 567 (citations omitted). If it were not for the class action device, companies would often face little or no downside to violating the law. *See Carnegie*, 376 F.3d at 661.

B. The Prevalence of Blackmail Settlements Is a Fiction.

Wal-Mart's *amici* suggest that class actions help greedy attorneys and plaintiffs assert meritless claims to hold businesses hostage for high payouts. (*See, e.g.*, DRI Br. 20 (class actions force corporations to settle meritless claims); Global Automakers Br. 3 (class actions are a tool for plaintiffs to "sell the rights of absent class members for private gain"); Intel Br. 1 ("class certification almost always coerces an immediate settlement").) These false assertions ignore the reality that class action settle no more frequently than individual litigation, and that class settlements are often won only after hard-fought, lengthy and expensive lawyering on *both* sides. Indeed, if plaintiffs' class action lawyers were in the business of blackmail, they picked phenomenally risky, arduous, and expensive material with which to work. For example, to reach the certification decision now under review by this Court, plaintiffs and their counsel litigated for nearly nine years, *see Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 577 n.2 (9th Cir. 2010), participated in over 200 depositions, reviewed more than a million pages of documents, and prepared and filed 120 declarations from class representatives and class members. (Respondent's Br. at 6, 10-11.)

The assertion that class actions unfairly coerce businesses into unjustified settlements is flatly contradicted by empirical evidence. In a 1996 study of class action litigation in four federal district courts, and in later research as well, the Federal Judicial Center ("FJC") found that class and nonclass settlement rates were comparable, that class actions could not successfully be deployed as strike suits because defendants generally had a reasonably prompt chance to test the merits, and that there was no objective evidence that settlements were coerced even by class certification decisions. *See* Willging et al., *Empirical Study*, *supra*, at 7-10, 32-34, 60-62, 89-90; *see also*

Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591, 645-50 (2006). The FJC noted that defendants typically sought and, in at least a third of the cases, obtained judicial rulings on motions terminating the "litigation *without a settlement, coerced or otherwise.*" Willging et al., *Empirical Study, supra,* at 34 (emphasis added). More than two-thirds of the certified class actions examined had rulings on a motion to dismiss, motion for summary judgment, or both, leading the FJC to conclude that such dispositive motions coupled with active case management "greatly diminishes the likelihood that the certification decision itself, as opposed to the merits of the underlying claims, coerced settlements with any frequency." Willging et al., *Empirical Study, supra,* at 61. And, in a later study in 2005, almost a quarter of cases certified for trial did not result in an approved class-wide settlement. 81 Notre Dame L. Rev. at 647. The settlement rate for certified class actions was similar to that of conventional lawsuits, with approximately 70 percent of cases filed in federal court ending in pretrial settlement. Charles Silver, *"We're Scared to Death": Class Certification and Blackmail,* 78 N.Y.U.L. Rev. 1357, 1401-02 (Oct. 2003); Robert G. Bone & David S. Evans, *Class Certification and Substantive Merits*, 51 Duke L.J. 1251, 1285 n.129 (Feb. 2002).

Furthermore, even a cursory review of recent employment class action settlements demonstrates the difficulty and tremendous investment in time and out-of-pocket costs in litigating such cases. In *Velez v. Novartis Pharm. Corp.*, No. 04CIV09194 (CM), 2010 WL 4877852 (S.D.N.Y. Nov. 30, 2010), for example, a settlement of a gender discrimination class action described by the court as "excellent" and involving over 6,000 employees was reached only after seven years of litigation and a seven-week jury trial. *Id.* at *1, 28. In approving the settlement, the court noted that "[t]he road to this Settlement was long, arduous, risky and expensive." *Id.* at *28. In that case, plaintiffs' counsel worked nearly 40,000 hours and spent over $1.8 million in out-of-pocket costs. Moreover, as the court noted, the testifying witnesses "exposed themselves to professional risk and emotional upheaval, overcoming fears of possible scorn of friends and colleagues and, in some cases, the displeasure of family members." *Id.* at *3-4.

Similarly, in *Wright v. Stern*, 553 F. Supp. 2d 337 (S.D.N.Y. 2008), the plaintiffs, alleging race-based discrimination and retaliation, achieved a settlement for a class of 3500 workers only after nearly seven years of litigation, the exchange of thousands of documents, scores of depositions, multiple expert witnesses on both sides, a summary judgment motion, and $1 million in out-of-pocket costs expended by plaintiffs' counsel. *Id.* at 338-41 The court approved the settlement which included "extensive and concrete equitable relief" involving the formation of an advisory committee and substantial training for employees and managers, and the payment of over $11 million to class members. *Id.* at 339-42. The court also awarded attorneys' fees of $8 million which, the court noted, *excluded* approximately 2,000 hours expended by plaintiffs' counsel during the settlement process, for which they had agreed not to seek fees. *Id.* at 342. *See also Davis v. Eastman Kodak Co.*, ___ F. Supp. 2d ___, 2010 WL 5290067 (W.D.N.Y. Dec. 17, 2010) (settlement of race discrimination case, with fund of over $21 million to over 3,000 employees and fees for over 36,000 hours of work that plaintiffs' counsel had discounted by 34 percent).

Amici supporting Wal-Mart studiously avoid any acknowledgement of the real and daunting costs to plaintiffs and their counsel of mounting a class challenge to corporate conduct. They insist that "the actual costs of litigating thousands of claims simultaneously . . . exert pressure on defendants to settle" (Intel Br. 8), but fail to acknowledge the corresponding – and indeed greater – risk to plaintiffs and their counsel who do not have a deep-pocketed corporation available to pay the costs of dozens of depositions or multiple expert witnesses. Moreover, for all of *amici*'s inflamed rhetoric, they never explain how raising the bar for class certification will "curb" the supposed blackmail, other than to force plaintiffs with class claims – meritorious or not – not to bring them at all.

Finally, the oft-repeated "blackmail settlement" moniker also does a disservice to the trial and appellate courts that regularly and rigorously review class settlements to confirm that they are fair and reasonable, as required by Rule 23. It is the settlement of individual claims that escapes any court's watch –

not the resolution of the claims of absent class members which requires court approval. *See, e.g., Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 103, 117 (2nd Cir. 2005) (reviewing trial court approval of "the largest antitrust settlement in history" and concluding that "[t]here could not be any better evidence of procedural integrity than the aggressive litigation spanning nearly a decade and the impassioned settlement negotiations that produced an agreement on the brink of trial"); *Davis*, 2010 WL 5290067, at *1 (thoroughly reviewing and approving settlement of a class action that was "unusually complex and litigated aggressively but professionally by both sides"). In other words, the Federal Rules and Rule 23 itself contain mechanisms to identify and stop abuse, and require far more judicial scrutiny of class actions than of individual actions.

Rule 23 does not permit plaintiffs and their counsel to breeze into court with a mere suggestion of unlawful conduct and obtain a "blackmail" settlement. To the contrary, class certification is by no means certain, and class litigation is by no measure inexpensive. District courts routinely and faithfully apply Rule 23 to determine when a class should be certified, oversee class litigation and determine the fairness of class settlements. This Court should reject Wal-Mart's and its *amici*'s attacks on class actions and their attempt to raise the bar for certifying and pursuing class actions.

◆

CONCLUSION

The class certification order should be affirmed.

Respectfully submitted,

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No. 10-277

IN THE

Supreme Court of the United States

WAL-MART STORES, INC.,
Petitioner,
v.
BETTY DUKES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RETAIL LITIGATION CENTER, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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OTHER AUTHORITIES

Brief for the United States as *Amicus Curiae*, *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591 (2008) (No. 07-474), 2008 WL 859357 14

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BRIEF OF RETAIL LITIGATION CENTER, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Retail Litigation Center, Inc. ("RLC") is an organization comprised of the retail industry's top legal professionals. RLC works to identify legal proceedings that affect the industry so that retailers can weigh in on important legal questions and highlight for courts the potential industry-wide consequences of the issues pending before them. RLC's members represent retailers that employ tens of thousands of persons in numerous states, multiple regions, and myriad stores across the nation. Because these private employers take pride in their talented and diverse workforces, they have adopted and enforce voluntary policies forbidding discrimination on the basis of race, gender, and other grounds, while also implementing policies of strict compliance with anti-discrimination laws.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus*, its members, or its counsel made a monetary contribution to this brief's preparation or submission. The parties have consented to the filing of this brief.

The large size and national scope of many retailers make them attractive targets for putative class actions, even where the strength of the class representative's claim is questionable at best, and where class treatment of disparate individual claims is clearly inappropriate. Were the decision below and its expansive misinterpretation of the class action rules to stand, enterprising plaintiffs and their counsel could seek certification of classes that are as sprawling and gargantuan as they are unwarranted. Once certified, a class can exert tremendous leverage on the retailers to settle—particularly a class of unprecedented size such as the one here—simply because of the enormous cost of litigation. In today's fragile economy, RLC's members cannot afford to pay exorbitant settlements for class actions that should not have been certified in the first place. Nor should they have to.

SUMMARY OF ARGUMENT

In *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147 (1982), this Court interpreted Federal Rule of Civil Procedure 23(a)(2)'s commonality requirement in the context of certifying classes in cases alleging violations of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq*. ("Title VII"). Where, as here, class representatives allege that "an employer operated under a general policy of discrimination" that had adverse consequences with respect to disparate employment practices, commonality can exist *only* if there is *both* (1) "[s]ignificant proof" of the policy and (2) evidence that "the discrimination manifested itself in [the different] practices in the same general fashion, such as through entirely subjective decisionmaking processes." *Falcon*, 457 U.S. at 159 n.15.

The Ninth Circuit disregarded this Court's interpretation of Rule 23(a) in *Falcon* and erroneously affirmed class certification, which was based on a superficial and incorrect review of thin evidence. Moreover, its misreading of *Falcon*'s discussion of "subjective" decision-making processes will deter RLC's members from entrusting their on-site managers to make discretionary judgments to reward exemplary employees—to the detriment of employee and employer alike. Under the Ninth Circuit's view, such employment decision-making processes with both objective and subjective components could, when coupled with isolated claims of discrimination in other stores or facilities, subject the entire company to crippling class action exposure.

Notably, the United States, as a defendant in putative class actions under Title VII and other anti-discrimination laws, has interpreted *Falcon* exactly as Wal-Mart and RLC have in this case: Rule 23(a)(2)'s commonality requirement cannot be satisfied simply because an organization has entrusted its local supervisors and managers with some measure of discretion. Thus, the Ninth Circuit's overly broad reading of Rule 23(a) also could have adverse consequences beyond the private sector.

ARGUMENT

I. *FALCON* ESTABLISHES THE STANDARD FOR "COMMONALITY" WHERE PLAINTIFFS ALLEGE A COMPANY-WIDE POLICY OF DISCRIMINATION.

A. Claims Of Company-Wide Discrimination Generally Cannot Satisfy Rule 23(a)(2) As Interpreted By *Falcon*.

"The class-action device was designed as 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Falcon*, 457 U.S. at 155 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). A plaintiff may sue as a class representative only if the prerequisites of Federal Rule of Civil Procedure 23(a) are met, including the existence of "questions of law or fact common to the class . . . ." Fed. R. Civ. P. 23(a)(2). This requirement of commonality "serve[s] as [a] guidepost[] for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately be protected in their absence." *Falcon*, 457 U.S. at 157 n.13.[2]

The Court has explained that a "rigorous analysis" is required to determine whether the requirements of Rule 23(a) have actually been met. *Falcon*, 457 U.S. at 161. Otherwise, certification will serve neither judicial economy nor the interests of the absent class members. The appropriate judicial analysis often requires probing "behind the pleadings" and examining "'considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Id.* at 160 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978)). Here, the commonality inquiry requires a closer examination of the plaintiffs' allegations of discrimination in violation of Title VII.

Under Title VII, it is insufficient to show only that an employer has a *policy* of discrimination; rather, this alleged policy must be effectuated through some particular employment *practice*. *See Falcon*, 457 U.S. at 159 n.15; 42 U.S.C. § 2000e-2(a). While a single employee might support her own claim of discrimination by showing that she was denied a promotion on the basis of a statutorily prohibited criterion, such as gender, such a showing would not make her representative of every woman in her employer's workforce. Her individualized evidence of discrimination does not "justify the additional inferences" that *all* of the company's promotion decisions—or its other employment practices, such as wage-setting—have been similarly motivated by gender discrimination. *Falcon*, 457 U.S. at 158. Because one employee's claim that she was denied a promotion on discriminatory grounds says nothing about whether there exists a class of people who have suffered "the same injury," an individual employee's own evidence of discrimination does not establish "common questions of law or fact" justifying class treatment. *See id.* at 157.

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[2] Because Rule 23(a)'s requirements of commonality, typicality, and adequacy of representation "tend to merge," *Falcon*, 457 U.S. at 157 n.13, *amicus* has focused its discussion on the commonality requirement.

Nor would be it enough for that employee to supplement her individualized evidence with mere allegations that the company has a general policy of discriminating against women "across-the-board." *See Falcon*, 457 U.S. at 158-59. Otherwise, a single allegation of discriminatory treatment, coupled with an unsupported allegation of a company-wide policy of discrimination, could turn every Title VII case into "a potential companywide class action." *Id.* at 159. For this reason, this Court found in *Falcon* that it was improper to presume that a Mexican-American employee's individual claim of national origin discrimination had anything in common with other claims that might be brought by other Mexican-American employees. *Id.*

As interpreted in *Falcon*, Rule 23(a)(2) is not satisfied where a putative class action merely *alleges* a company-wide policy of discrimination. Rather, where, as here, class representatives allege that "an employer operated under a general policy of discrimination" that had adverse consequences with respect to disparate employment practices, commonality can exist *only* if there is *both* (1) "[s]ignificant proof" of the policy and (2) evidence that "the discrimination manifested itself in [the different] practices in the same general fashion, such as through entirely subjective decisionmaking processes." *Falcon*, 457 U.S. at 159 n.15. Thus, just as Rule 23 creates a narrow exception to the general rule against letting one party litigate on another's behalf, *see id.* at 155, plaintiffs claiming "across-the-board" discrimination generally cannot show commonality except under the limited circumstances described by *Falcon*.

B. The Plaintiffs Have Not Met *Falcon's* High Bar.

Certification in this case grossly disregards the Court's admonishment in *Falcon* that "[t]he mere fact that an aggrieved private plaintiff is a member of an identifiable class of persons of the same race or national origin is insufficient to establish his standing to litigate on their behalf." *Falcon*, 457 U.S. at 159 n.15. The record shows that the only common features among the six class representatives and the 1.5 million putative class members are their gender and the fact of their past or present employment at some Wal-Mart facility.

1. "Significant proof"

The Ninth Circuit failed to apply *Falcon's* "significant proof" standard to evaluate whether the plaintiffs had shown that Wal-Mart had a company-wide "policy" of discrimination against women. Although the Ninth Circuit's majority conceded that it cannot "shrug[] . . . off" this Court's statements in *Falcon* simply "because they were not a holding," Pet. App. 42a n.15 (internal edits and quotation marks omitted), the court essentially did just that. The majority criticized the requirement of "significant proof" as "an unusually high standard that Plaintiffs here need not meet because they did not present the distinct legal theories of recovery that the *Falcon* plaintiffs, both employees and applicants, had pursued together in one class." *Id.* at 42a. This weak distinction hardly supports rejecting outright this Court's *only* analysis of the standard for class certification in Title VII cases where the plaintiffs allege improperly subjective employment decision-making.

Even more confusingly, the Ninth Circuit's majority later suggested that it was, in fact, applying *Falcon's* standard, because it concluded—without any support in the record—that "Plaintiffs here have introduced 'significant proof' of Wal-Mart's policies . . . ." Pet. App. 46a. Yet the opposite is true: Wal-Mart has myriad company-wide policies forbidding discrimination and promoting diversity. *See* Pet. App. 195a; J.A. 1576a-1596a. And as the Ninth Circuit recognized, the plaintiffs' expert "failed to identify a specific discriminatory policy at Wal-Mart." Pet. App. 55a; *see also id.* at 59a. Indeed, the plaintiffs have not linked Wal-Mart's processes for making employment decisions to a discriminatory intent.

Instead, the plaintiffs attempted to infer a company-wide policy of discrimination from a hodge-podge of anecdotes, sociological theory, and questionable statistics. As explained by Judge Ikuta's dissent from the decision below, the district court's analysis of the plaintiffs' evidence was deeply flawed. A rigorous review of their evidence shows that they wholly failed to establish a company-wide policy of discrimination that affected a class of 1.5 million employees. *See* Pet. App. 124a-128a (Ikuta, J., dissenting). For example, one of the plaintiffs' experts claimed that statistical evidence suggested a trend of discrimination at Wal-Mart's stores, even though he failed to analyze data at the level of each *store*, and instead drew his conclusions from data aggregated at the higher level of entire *regions* of Wal-Mart's retail operation. *Id.* at 130a-132a & n.12. The district court dismissed Wal-Mart's objections to this statistical evidence, incorrectly suggesting that Wal-Mart's concerns prematurely raised questions that went to the merits of the case. *Id.* at 128a-129a. Such a "superficial examination," *id.* at 129a, is hardly the kind of "rigorous analysis" required by *Falcon*, which recognized that the class certification analysis must often examine legal and factual issues that are "enmeshed" in merits issues. *See* 457 U.S. at 160-61.

2. "Entirely subjective decisionmaking processes"

The Ninth Circuit also misinterpreted the second prong of the standard established by this Court in *Falcon*. In order to meet the commonality requirement, an alleged policy of discrimination must be manifested in a way that affects all class members "in the same general fashion, such as through *entirely* subjective decisionmaking processes." 457 U.S. at 159 n.15 (emphasis added). The Ninth Circuit concluded that "'[s]ubjective decisionmaking processes' are exactly what the Plaintiffs allege here and what the Supreme Court's hypothetical expressed concern with in *Falcon*." Pet. App. 46a (quoting 457 U.S. at 159 n.15). Again, the Ninth Circuit is incorrect.

Falcon did not suggest that "subjective decisionmaking processes" are impermissible as a general matter. Rather, this Court has indicated that the opposite is true. "[A]n employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct." *Watson v. Fort*

Worth Bank & Trust, 487 U.S. 977, 990 (1988). Using subjective criteria is a perfectly legitimate and effective means of making employment decisions, because "employment decisions are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify." *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 604 (2008).

Thus, *Falcon* observed that "*entirely* subjective decisionmaking processes" may become problematic *where there is significant proof of a general policy of discrimination*. 457 U.S. at 159 n.15 (emphasis added). This is because an *entirely* subjective process could permit a discriminatory policy to be effected throughout the company without constraint by any objective considerations. Even if there were a company-wide policy of discrimination, commonality would not be demonstrated by decision-making processes that are only "partly" subjective.

While the record shows that Wal-Mart's individual store managers had some discretion to set wages and award promotions, *see* Pet. App. 177a-183a, the undisputed evidence also shows that this discretion was not without significant limits. The district court acknowledged that these decisions were not "made totally in isolation," because Wal-Mart's "centralized corporate policies" constrain "the degree of managerial discretion over in-store personnel decisions." Pet. App. 192a. The constraints on managerial decision-making include uniform guidelines regarding salary ranges and eligibility for bonuses and merit increases, *see, e.g.*, J.A. 1498a-1511a, as well as objective standards and guidelines for promotions to managerial and supervisory positions that rely upon an employee's discipline, tenure, and performance history. *See, e.g.*, J.A. 373a-396a. Because Wal-Mart's wage-setting and promotion processes are not "entirely" subjective, the Ninth Circuit was wrong to suggest that the company's delegation of pay and promotion discretion may give rise to an inference of a company-wide policy of discrimination that might justify certifying a massive class of employees.

II. THE NINTH CIRCUIT'S APPROACH WOULD CHILL EMPLOYERS' LEGITIMATE AND NECESSARY USE OF PARTLY SUBJECTIVE PROCESSES TO MAKE WORKFORCE DECISIONS.

Like Wal-Mart, many private retailers set wages and promote workers after accounting for both objective and subjective considerations. A partly subjective process lets employers identify and reward employees whose creativity, diligence, ambition, and other intangible qualities are essential to the company's growth, but might otherwise go undetected through standardized methods of evaluation. *See Watson*, 487 U.S. at 999 ("It is self-evident that many jobs, for example those involving managerial responsibilities, require personal qualities that have never been considered amenable to standardized testing."). In addition, many retail companies with nationwide operations delegate these and other employment decisions to on-site managers who are closest to workers and who can best identify the most deserving employees whose advancement is also in the company's own interests.

Instead of accepting the legitimacy of partly subjective hiring procedures, the Ninth Circuit disparaged them. The majority relied on the opinions of one of the plaintiffs' experts, sociologist William

Bielby, who claimed that "substantial decision-maker discretion tends to allow people to seek out and retain stereotyping-confirming information and ignore or minimize information that defies stereotypes." Pet. App. 54a (internal quotation marks omitted). Yet this same expert "conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking." *Dukes v. Wal-Mart, Inc.*, 222 F.R.D. 189, 192 (N.D. Cal. 2004) (denying motion to strike Bielby's declaration).

By casting aspersions on subjective decision-making generally and ignoring that *Falcon* was concerned with *entirely* subjective determinations, the Ninth Circuit sent a clear and chilling message to RLC's members and other large nationwide employers: if they entrust their on-site managers with discretion to identify and reward promising employees, then a few isolated claims of discrimination in other stores or facilities could expose the entire company to class action liability. Such legal exposure will likely discourage companies from allowing on-site supervisors to consider subjective factors when setting wages and promoting workers. As a result, companies would be less willing to incentivize and reinforce employees with intangible traits such as loyalty, creativity, leadership, and ambition, to the detriment of employee and employer alike.[3]

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[3] *Amicus*'s fears are compounded by the fact that the Ninth Circuit's disregard for *Falcon*, if left to stand, could infect other courts' consideration of Rule 23's commonality requirement in the context of other underlying causes of action.

III. THE UNITED STATES HAS EMBRACED PETITIONER'S READING OF *FALCON* WHEN OPPOSING CLASS CERTIFICATION AS A DEFENDANT IN DISCRIMINATION SUITS.

If affirmed, the Ninth Circuit's overly broad reading of Rule 23(a) also could have adverse consequences beyond the private sector. Like RLC's members, the United States is often named as a defendant in suits brought as putative class actions under Title VII and other anti-discrimination laws. The United States has made the very arguments that Wal-Mart and RLC make now: Rule 23(a)(2)'s commonality requirement cannot be satisfied simply because an organization has entrusted its local supervisors and managers with some measure of discretion.

In one putative class action alleging racial discrimination by the U.S. Department of Commerce, the United States moved to strike the class claims, in part because they did not satisfy Rule 23(a). *See* Def.'s Mot. to Dismiss at 63-83, *Howard v. Gutierrez*, 474 F. Supp. 2d 41 (D.D.C. 2007) (No. 05-CV-1968), 2006 WL 1032612. When arguing that the plaintiff's claims lacked commonality, the government noted that "there is nothing inherently suspect about the use of some subjective criteria in hiring and promotion decisions." *Id.* at 72 (citing *Watson*, 487 U.S. at 999). In a similar action against the U.S. Air Force, the government successfully opposed certification before the district court and observed on appeal that

> subjective evaluations . . . are often critical to the decision making process, and if anything, are becoming more so in our increasingly service-oriented economy . . . . It is inconceivable that Congress intended

> anti-discrimination statutes to deprive an employer of the ability to rely on important criteria in its employment decisions merely because those criteria are only capable of subjective evaluation.

Br. for Appellee at 37, *Hines v. Widnall*, 334 F.3d 1253 (11th Cir. 2003) (No. 02-13267), 2002 WL 32179880 (quoting *Denney v. City of Albany*, 247 F.3d 1172, 1185-86 (11th Cir. 2001)) (internal quotation marks omitted).[4]

The United States has also advised this Court that subjective employment decision-making, without more, is routine, necessary, and entirely proper:

> A large proportion of personnel decisions involve . . . comparisons between individual employees (*e.g.*, who should be hired or promoted) or between an individual and a relevant group (*e.g.*, whether the employee is performing at the expected level). Personnel decisions often turn on factors that are both individualized and subjective or are based on intangible criteria that may be hard to quantify with exact precision. To maintain a functioning workplace, public employers, no less than private employers, must make distinctions among similar employees . . . .

Br. for United States as *Amicus Curiae* at 10, *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591 (2008) (No. 07-474), 2008 WL 859357.

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[4] In *Hines* and *Howard*, the courts granted the relief requested by the United States without reaching the question of whether Rule 23(a)(2) was satisfied. *Hines*, 334 F.3d at 1258 (affirming on typicality grounds); *Howard*, 474 F. Supp. 2d at 57 n.10 (striking class claims for inexcusable failure to comply with deadlines under local rules).

Two additional and related high-profile cases exemplify how the United States has asserted the same interests as private employers in delegating discretion to its local officials. In *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999), *aff'd*, 206 F.3d 1212 (D.C. Cir. 2000), the U.S. District Court for the District of Columbia entered a consent decree settling class claims that the U.S. Department of Agriculture had long discriminated against black farmers in administering federally funded loan and benefit programs. Soon after, Hispanic and female farmers filed separate class action suits similarly alleging that the agency had discriminated against them. *See* Class Action Compl., *Garcia v. Veneman*, 224 F.R.D. 8 (D.D.C. 2004) (No. 00-CV-2445) (filed Oct. 13, 2000); Class Action Compl., *Love v. Veneman*, 224 F.R.D. 240 (D.D.C. 2004) (No. 00-CV-2502) (filed Oct. 19, 2000).

In *Garcia* and *Love*, the plaintiffs alleged that the Department had a policy of discrimination and that it gave its local loan officials excessive discretion in reviewing applications. The United States opposed certification, arguing in part that *Falcon* made clear that "commonality is not established simply because a decisionmaking process contains some subjective factors." Def.'s Opp'n to Pls.' Mot. for Class Certification ("Def.'s Opp'n") at 11, *Garcia v. Veneman*, 224 F.R.D. 8 (D.D.C. 2004) (No. 00-CV-2445), 2002 WL 34484128. The district court agreed, denying the certification motions; the D.C. Circuit also accepted the government's arguments when affirming the district court. *See Garcia*, 224 F.R.D. at 11-15, *aff'd*, 444 F.3d 625, 633-34 (D.C. Cir. 2006); *Love*, 224 F.R.D.

at 243-44, *aff'd*, 439 F.3d 723, 727-32 (D.C. Cir. 2006).[5]

In both *Garcia* and *Love*, the government emphasized that the challenged processes for determining eligibility and approving loans were not "entirely subjective," and therefore they did not fall within *Falcon's* narrow exception to the rule against finding commonality in suits claiming across-the-board discrimination. *See* Def.'s Opp'n at 12-18, *Garcia*; Def.'s Opp'n to Pls.' Mot. for Class Certification ("Def.'s Opp'n") at 19-21, *Love v. Veneman*, 224 F.R.D. 240 (D.D.C. 2004) (No. 00-CV-2502), 2004 WL 3623698. The United States criticized courts that found that a partly subjective decision-making process was enough to establish commonality, because these courts "ignore[d] the qualifier used by the Supreme Court" in *Falcon*. Def.'s Opp'n at 13 n.2, *Garcia*; *see also* Def.'s Mot. to Dismiss at 72, *Howard* ("Plaintiffs cannot possibly show that the Department's personnel decision-making processes were *entirely* subjective.").

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[5] Certification was granted in a third related case brought by Native American farmers, but that class was certified under Rule 23(b)(2) only "for purposes of declaratory and injunctive relief," as the plaintiffs sought only equitable relief. *Keepseagle v. Veneman*, No. 99-CV-3119, 2001 WL 34676944, at *13 (D.D.C. Dec. 12, 2001). *But see In re Veneman*, 309 F.3d 789, 795 (D.C. Cir. 2002) (denying government's motion for interlocutory appeal of certification order, but raising question about district court's decision to "certify a (b)(2) class solely for purposes of equitable relief without first determining if plaintiffs' claims for monetary relief predominate over their equitable claims"). By contrast, the relief requested in *Garcia* and *Love* was predominantly monetary in nature. *See Garcia v. Veneman*, 211 F.R.D. 15, 23 (D.D.C. 2002) ("[I]n this case the monetary relief plaintiffs seek predominates [over equitable relief] under any applicable test."); *Love*, 224 F.R.D. at 245 ("In this case, as in the *Garcia* case, money damages are far from incidental." (citation omitted)).

The United States also rejected the suggestion that delegating some discretion to the local officials who can best assess the facts on the ground is somehow improper in and of itself:

> Some form of local decisionmaking seems inevitable in loan programs of this type, which require, *inter alia*, assessments of the likely productivity of each farm and whether that farm will generate sufficient cash flow to meet all anticipated expenses. Indeed, absent local decisionmaking, the quick turnaround on credit applications that is an absolute necessity for family farms would be impossible.

Def.'s Opp'n at 10 n.6, *Love* (citation omitted); *see also* Def.'s Mot. to Dismiss at 75, *Howard* (arguing that "the decentralization of personnel authority among Commerce's various bureaus" was analogous to other situations where courts "declined to certify class actions sought to be maintained" on behalf of workers "employed at different facilities with decentralized decision-making"). In *Garcia*, the government further noted that the plaintiffs' emphasis on local officials' decision-making power "actually confirms that there is no possible claim of commonality," because courts routinely hold that "a class may not be based on discrimination occurring in different departments, involving different decision makers." Def.'s Opp'n at 21-22 & nn.4-5, *Garcia* (internal formatting, citations, and quotation marks omitted).

In its briefing before the D.C. Circuit, the United States elaborated that where a decision-making process consists of both subjective and objective criteria, the process cannot "serve as a common issue because the existence of non-subjective criteria cuts against the inference that there was a common policy of discrimination that pervaded all of the challenged decisions." Br. for Appellee at 29, *Love v. Johanns*, 439 F.3d 723 (D.C. Cir. 2006) (No. 04-5449), 2005 WL 2672961 (internal quotation marks and ellipses omitted). Thus, the government argued, even though the agency's loan regulations "were necessarily framed in general terms" to give local officials "sufficient flexibility" to account for local conditions, the regulatory criteria "plainly did *not* confer the sort of unbridled discretion, resulting in 'entirely subjective decisionmaking,' which might simply mask 'a general policy of discrimination.'" Br. for Appellee at 32-33, *Garcia v. Johanns*, 444 F.3d 625 (D.C. Cir. 2006) (No. 04-5448), 2005 WL 2673689 (quoting *Falcon*, 457 U.S. at 159 n.15).

Accordingly, the United States and its agencies routinely assert, as petitioner and RLC do in this case, that a properly "rigorous analysis" is necessary to determine whether a putative class action has satisfied Rule 23(a)(2). *See Falcon*, 457 U.S. at 161. The Ninth Circuit has failed to undertake that analysis, in disregard of this Court's interpretation of the commonality requirement in *Falcon*.

CONCLUSION

The decision of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

39

No. 10-277

In The
Supreme Court of the United States

◆

WAL-MART STORES, INC.,

Petitioner,

v.

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA,
KAREN WILLIAMSON, DEBORAH GUNTER,
CHRISTINE KWAPNOSKI, CLEO PAGE, on behalf
of themselves and all others similarly situated,

Respondents

◆

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

◆

BRIEF OF SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

◆

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STATEMENT OF INTEREST[1]

The Securities Industry and Financial Markets Association (SIFMA) represents the shared interests of hundreds of securities firms, banks, and asset managers. SIFMA supports a strong financial industry, investor opportunity, capital formation, job creation, and economic growth, while building public trust and confidence in the financial markets. SIFMA members have over 800,000 employees throughout the United States.

The outcome of this case will affect SIFMA and its members because companies in the financial sector unavoidably apply individualized, discretionary assessments as a component in making employment decisions, including pay and promotion decisions, across a multitude of jobs and diverse locations. The Ninth Circuit's ruling in this case—that commonality and typicality can be established merely by proffering some evidence that an employer uses what it reductively terms "subjective decision making" to make pay and promotion decisions—undermines the ability of the financial services industry to manage its workforce and fulfill its regulatory and legal obligations to the public.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner and Respondents have filed with the Clerk of the Court letters granting blanket consent to the filing of *amicus* briefs.

◆

SUMMARY OF ARGUMENT

Employers in the financial services industry consistently apply numerous discretionary factors in making decisions about competence, performance, and employee potential. Punishing employers for applying such nonquantitative criteria could be potentially hobbling for many employers in this sector.

There is nothing wrong with applying some subjective criteria to personnel decisions. Almost three decades ago, in *General Telephone Co. v. Falcon*, 457 U.S. 147, 159 n.15 (1982), this Court noted that an employer cannot be subjected to class certification just because it applies some level of subjective criteria.[1] The focus of the analysis must be on an identifiable discriminatory purpose, not the mere application of nonquantitative or subjective factors. Contrary to this Court's guidance in *Falcon*, the Ninth Circuit has significantly lowered the burden of proof at the certification stage and undermined the exercise of discretionary, nondiscriminatory decision making. The Ninth Circuit decision allows plaintiffs to file broad class actions for plaintiffs in multiple facilities and geographic locations who are managed by different decision makers based on little to no evidence of a general company policy to discriminate. The resulting fear of broad class-wide liability based on so-called subjective factors is likely to inhibit employers from making essential, job-related discretionary assessments of employee performance and potential. This would create a disincentive to the financial services industry in fulfilling its regulatory and compliance responsibilities in overseeing its workforce.

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[1] Indeed, the Court reinforced this general principle six years later in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988) ("[A]n employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should *itself* raise no inference of discriminatory conduct." (emphasis added)).

◆

ARGUMENT

I. THE FINANCIAL SERVICES INDUSTRY MUST APPLY NONQUANTITATIVE, DISCRETIONARY JUDGMENT, ALONG WITH OBJECTIVE FACTORS, IN PERSONNEL DECISION MAKING TO SATISFY REGULATORY AND COMPLIANCE OBLIGATIONS.

"Discretion," "subjective," and "individualized" are not dirty words. They are necessary features of employee evaluation in many sectors, including the financial services sector. As this Court has recognized, in many sectors employers must evaluate "a wide array of factors that are difficult to articulate and quantify," including "individual personalities and interpersonal relationships," "personality conflicts," and "the varied needs and interests involved in the employment context." *Engquist v. Ore. Dep't of Agric.*, 553 U.S. 591, 604 (2008); *see also Scott v. Parkview Mem. Hosp.*, 175 F.3d 523, 525 (7th Cir. 1999) ("[N]o formulary of approved answers can replace a nuanced evaluation of [professional] candidates."); *Rogers v. Int'l Paper Co.*, 510 F.2d 1340, 1345 (8th Cir. 1975) ("[I]n all fairness to applicants and employers alike, decisions about hiring and promotion in supervisory and managerial jobs cannot realistically be made using objective standards alone."), *vacated and remanded on other grounds*, 423 U.S. 937 (1990). This Court has even cautioned against over-reliance on objective criteria that might spur disparate impact suits. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 433 (1971).

Discretionary judgments are especially important when financial institutions evaluate employee performance. To be sure, most financial services jobs are not subject to purely subjective criteria, and it would caricature employment decision making in any workforce requiring steadily increasing data utilization, technological, and telecommunications skills to dismiss the discretionary evaluation of performance and potential in those areas as merely "subjective." Moreover, in many financial industry jobs, revenue generation statistics are certainly a factor necessarily considered. Initiative, efficiency, and productivity also typically have objective components, as does the appropriate use of technological resources. But other crucial qualities and characteristics that defy quantification often are as important as, or even outweigh, such objective factors. Investment bankers, personal bankers, loan officers, financial advisors, traders, and investment advisors all interact with public investors and/or corporate clients. Employees in those diverse jobs typically need a sophisticated, and ever-changing skill set, not subject to ready evaluation by purely objective factors, to properly perform their jobs.

Take, for example, the job of financial advisor. Financial advisors help clients develop detailed strategies for meeting their financial goals. Typically, they must be registered as representatives with the Financial Industry Regulation Authority (FINRA), "the largest independent regulator for all securities firms doing business in the United States." *About FINRA*, http://www.finra.org/AboutFINRA/ (last visited Jan. 6, 2011). FINRA imposes a "fundamental responsibility for fair dealing." FINRA Conduct Rule IM-2310-2. These requirements, and other requirements imposed on other employees in financial services by law and regulation, mean that employees must do more than satisfy objective and quantitative performance criteria. They must also demonstrate integrity, an understanding of their diverse clients' needs and interests, and the good judgment necessary to handle the core risk-management and fair-dealing responsibilities of their jobs. Their employers must evaluate their judgment, appropriate risk tolerance, integrity, regulatory sensitivity, and customer focus—all of which defy objective quantification and entail holistic assessments of each employee's individual strengths and weaknesses. This includes evaluating how they interact with co-workers, regulators, clients, and potential clients, and how they determine priorities and exercise judgment as they initiate activities or respond to a range of idiosyncratic real-life scenarios.

Investment bankers and other capital markets experts—who provide high-level financial advisory and capital-raising services to assist individuals, start-up companies, multi-billion dollar corporations, and governments—play a much different role. *See* United States Department of Labor, Bureau of Labor Statistics, *Securities, Commodities, and Financial Services Sales Agents*, OCCUPATIONAL OUTLOOK HANDBOOK, 2010-11 Edition, *available at* http://www.bls.gov/oco/ocos122.htm (last visited Jan. 11, 2011). Successful performance of their jobs requires strong analytical and strategic skills and the exercise of good judgment. Investment bankers must cultivate strong relationships with their clients to understand their goals while acting in compliance with a complex array of legal and regulatory obligations. They use their specialized training and developed expertise to analyze the performance of various financial instruments and markets, seasoned by the exercise of solid judgment, the ability to bring an engagement to closure, and an understanding of legal and regulatory requirements applicable to different products, services, and markets. Evaluation of these attributes, too, unavoidably requires substantial components of holistic, discretionary assessment. They are not readily susceptible to quantitative measurement, nor are they applicable in the same way to all such employees.

Even within a particular financial institution, certain discretionary factors could count differently depending upon the particular job and employee. A personal banker may need stronger "people skills" than an investment banker who needs to understand sophisticated financial models. In fact, even within the same job position, one person's unique skills and attributes may propel that individual through the organization more rapidly than another. For instance, one financial advisor may develop unique, personal ties to an untapped client base in the local community, developing "relationships" and engendering "trust" in a way that is particularly valuable to his or her future success and to the institution. Those skills can only be measured with discretionary and subjective judgment.

Evaluations of everyone in a financial organization, from entry level hourly employees to highly compensated salaried professionals, will unavoidably include some subjective and discretionary components. The Ninth Circuit's acceptance of the plaintiffs' theory would allow broad class litigation of discrimination claims wherever "disparities" can be identified notwithstanding the innumerable and varying determinants of employee pay and promotion in different positions.

II. THE NINTH CIRCUIT DECISION WILL DETER EMPLOYERS FROM USING APPROPRIATE AND UNAVOIDABLE DISCRETIONARY ASSESSMENTS.

Precisely because discretionary criteria play out differently across different job titles, personnel, managers, and locations, an employer's resort to "discretionary" criteria is not legitimately characterized as or reduced categorically to the application of the standardless "subjectivity" the *en banc* decision implies, nor is it properly treated as a unitary test that affects all employees the same. As this Court explained in *General Telephone Co. v. Falcon*, it is perfectly natural to certify a class of employees where an employer "used a biased testing procedure to evaluate both applicants for employment and incumbent employees." 457 U.S. 147, 159 n.15 (1982). In that context, Federal Rule of Civil Procedure 23(a)'s commonality and typicality requirements are satisfied because the general policy appears to affect every applicant or employee the same way.

But the same is not true just because an employer uses some subjective or discretionary criteria to evaluate many employees. Since there is nothing inherently discriminatory about applying subjective criteria, the mere fact that an employer allows different managers in different offices to evaluate employees based upon some subjective or discriminatory criteria cannot provide sufficient commonality or typicality to justify certifying a class based on that fact alone. As this Court suggested in *Falcon*, plaintiffs must show that they have much more in common than that. Plaintiffs can "conceivably" satisfy the requirements for a class action in that context if they present *"[s]ignificant proof* that an employer *operated under a general policy of discrimination"* where *"the discrimination manifested itself* in hiring and promotion practices *in the same general fashion."* *Id.* (emphasis added). But where different decision makers apply different criteria in different ways to different employees, they are affecting the employees differently and the employees do not have enough in common to justify placing them in the same class.[3]

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[3] The Court's concern applies not only at the Rule 23(a) stage, but also when determining whether a class—as the Ninth Circuit approved here—can be certified under Rule 23(b)(2). Rule 23(b)(2) requires that "the party opposing the class has acted or refused to act on grounds generally applicable to the class." This is a more traditional type of class action than a Rule 23(b)(3) class action, which requires a showing that common questions "predominate," since a 23(b)(2) action is directed at remedying, through binding injunctive relief, discrimination where it is infeasible to identify all particular plaintiffs. For that reason, there is no requirement that plaintiffs be permitted to opt out of the class. A primary question under Rule 23(b)(2) is, therefore, whether there is a generally applicable discriminatory policy that applies to each class member in the same way and that forms the basis for liability as to each class member. As that question is applied to subjective decision making, it merely mimics the Rule 23(a) inquiry formed by *Falcon*: Is there significant evidence of a discriminatory policy that affects all persons in the class in the same way? Hence, *Falcon* requires that the class members must "possess the same interest and suffer the same injury." *Id.* at 156.

The Ninth Circuit ran afoul of these principles in certifying a class with no common boundaries merely because all members share a protected characteristic and decision making with respect to pay and promotion was influenced by some subjectivity. If that is enough to satisfy *Falcon's* requirement of "significant proof" of a company-wide common policy to discriminate, employers like those in the financial services industry who must necessarily exercise discretion and apply non-objective factors to the performance evaluation of their employees will face company-wide class action after class action that would seriously impede the fulfillment of their obligations to regulators and to the public.

A. The Ninth Circuit's Standard of Proof for Rule 23(a) Means Little to No Evidence of Commonality or Typicality Is Required.

Under the Ninth Circuit's commonality test, the fact that employees are evaluated with some subjective components all but creates a presumption that a wide-scale class will be certified—even where different managers in different locations apply different subjective components to different jobs to yield different results.[4]

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[4] Other courts have rightfully found differently. As one district court has noted:

> Geographically widespread facilities make proving a pattern and practice of disparate treatment difficult.

(Continued on following page)

> Employees who were from different departments, were supervised by different people, worked different shifts, and were at different levels within the company hierarchy have grievances that are not susceptible to generalized proof or defenses.

Jones v. GPU, Inc., 234 F.R.D. 82, 92 (E.D. Pa. 2005) (citing *Vinson v. Seven Seventeen HB Philadelphia Corp. No. 2*, No. 00-5334, 2001 U.S. Dist. LEXIS 25295, at *66 (E.D. Pa. Oct. 31, 2001) (collecting cases)); *see also Serrano v. Cintas Corp.*, No. 04-40132, 2009 U.S. Dist. LEXIS 26606, *16 (E.D. Mich. Mar. 31, 2009) (denying class certification when "thousands of Cintas managers at hundreds of Cintas facilities" made hiring decisions based on "widely differing circumstances at each facility," thereby precluding a finding of commonality); *Sperling v. Hoffmann La Roche, Inc.*, 924 F. Supp. 1346, 1363 (D.N.J. 1996) ("[A] decision by a company to give managers the discretion to make employment decisions, and the subsequent exercise of that discretion by some managers in a discriminatory manner, is not tantamount to a decision by a company to pursue a systemic, companywide policy of intentional discrimination."). Indeed, district courts within the Ninth Circuit have been persuaded by the common sense of such reasoning, although the Ninth Circuit has rejected it. *See Grosz v. Boeing Co.*, No. SACV-02-71-CJC (MLGx), 2003 U.S. Dist. LEXIS 25341, **14-17 (C.D. Cal. Nov. 7, 2003) ("The putative class that Plaintiffs seek spans the operations of different heritage companies, multiple physical locations, and countless localized compensation practices. Although Plaintiffs allege that women were discriminated against because of their gender at Boeing's Southern California facilities, they have not identified any company-wide policy or practice that might have caused the alleged salary disparities between men and women working for Boeing. . . . Plaintiffs' answer to this enormous diversity is the claim that all of Boeing's operations are infected by 'excessive subjectivity.' *'Excessive subjectivity,' however, is a criticism, not an actual company-wide policy or practice.* Without some evidence of the class-wide use of common decisional criteria or practices, Plaintiffs have failed to show the

(Continued on following page)

Once the court sees evidence of subjective decision making, the likelihood of certification is high despite the significant diversity in treatment among employees. Though subjective decision making may not be discriminatory by itself, the Ninth Circuit suggests that plaintiffs can bridge the gap with threadbare evidence in three main categories. First, plaintiffs need only show aggregate statistics reflecting that employees in a protected class are adversely affected regardless of differing duties, locations, employment decision-making hierarchies, conditions of employment, market or client circumstances, product characteristics, etc. That is enough to warrant class-wide treatment under the Ninth Circuit's test even if the plaintiffs' statistics ignore the absence of disparities in particular job categories or in many company locations.

Second, plaintiffs must simply present anecdotal evidence of sporadic discrimination—one allegation against a manager in South Carolina, another allegation against a different manager in Texas, and one more against yet another in California.

The final category requires even less—just that plaintiffs point to a "common culture" within a large employer, such as a nationwide financial institution. Pet. App. 78a. This category is satisfied, the Ninth Circuit held, even with respect to matters

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requisite commonality and typicality." (italics added)), *aff'd*, 136 F. App'x 960 (9th Cir. 2005).

that have no direct connection with employment decision making and even if the culture emphasizes only plainly desirable attributes. Any financial employer that presents itself as having a focus on integrity, good judgment, and conservative personalized investment principles will make certain that focus is reflected throughout its operations. If that is sufficient, a "common culture" will certainly be established.

As a consequence, a nationwide class of employees, regardless of job classification or conditions of employment, will almost inevitably be certified because of the use of some discretionary criteria in promotion or pay practices; the availability of aggregate and undifferentiated statistics; a few elicited anecdotes from diverse and far-flung environments; and a "common culture" that may be animus-neutral or actually affirmatively opposed to invidious discrimination. In sum, under the Ninth Circuit *en banc* majority's rationale, even though jobs are different, the skills required of employees are different, and the determinations by managers on questions of promotion and pay are different, common questions of fact and law predominate to satisfy Rule 23(a). That is a dangerous precedent at odds with *Falcon*'s "significant proof" requirement, and it flies in the face of the requirement that the court conduct a "rigorous analysis" of whether the Rule 23 requirements are met. *Falcon*, 457 U.S. at 161.

B. The "Significant Proof" Requirement Does Not Mean That Subjective Decision Making Is Always Immune from Class Treatment.

To reject the Ninth Circuit's exceedingly liberal policy is not to insulate all subjective decision making from class treatment. Obviously, as *Falcon* indicated, where a plaintiff presents "*[s]ignificant proof* that an employer operated under a general policy of discrimination" and transparently veils the discrimination in criteria that are "entirely subjective," class treatment might be appropriate. For example, plaintiffs would almost certainly be able to certify a class if they adduced significant evidence that an employer implemented a general policy of directing its managers to hire and promote only "barracudas" and "macho" employees, with the attendant result that all or most hired or promoted are men.

Subjective decision making could also be the basis for a class action when there is significant proof that the subjective determinations were all made by the same decision maker or within the same chain of decision makers. As one court noted:

> Commonality is relatively easily satisfied when a single individual or a small, centralized group makes decisions. . . . On the other hand, a decentralized hiring procedure, which allows decisionmakers to consider subjective factors, supports individual claims of discrimination but cuts against the assertion that an employer engages in a pattern or

> practice of discriminatory hiring as a standard operating procedure.

Ellis v. Elgin Riverboat Resort, 217 F.R.D. 415, 424 (N.D. Ill. 2003) (citing *Stastny v. S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 279 (4th Cir. 1980)). A class action might be appropriate if, for example, a financial institution headquartered in Illinois anointed a single manager to make all promotion decisions for all financial advisors in California, there is significant evidence that this regional manager applies a common policy or practice and there is a disparate impact against women in the region. In that context, the plaintiffs might be able to present common questions of discrimination.

In each of these examples, the class action depends not just on the employer's use of some subjective or discretionary factors, but on concrete proof of a discriminatory policy or practice affecting all members in the class in the same way. It is also an approach where the decision making process contains not just some discretionary elements, but one where the evidence shows that the process is standardless and unfettered by anything other than whim or caprice. But that is not the way in which employment decision making typically operates in large, complex business organizations. The Ninth Circuit *en banc* majority's approach thus sweeps far too wide. Without the "significant proof" of a broad policy or practice of discrimination required by *Falcon*, subjective decision making is too varied and too individualized to meet Rule 23(a) commonality and typicality requirements.

III. THE NINTH CIRCUIT DECISION ACTUALLY IMPEDES ROBUST EFFORTS TOWARDS REGULATORY COMPLIANCE AND COMPANY-WIDE DIVERSITY INITIATIVES.

The Ninth Circuit's exceedingly low threshold for class certification undermines public policy by imposing absurd and unworkable demands on all employers.

An employer who wants to insulate itself from the risk of such enormous class actions has very few options—none of them palatable. One option would be to base employment decisions on solely objective measures. If that were even possible, it would be inadvisable for many employers. Determining whether an employee has the right mix of skills to be a leader—such as teamwork, organizational acumen, empathy, attentiveness to investor interests and regulatory obligations, and the like—cannot be based on objective criteria alone, especially in the financial services industry. Another alternative would be to try to limit the exercise of subjective decision making to only a few individuals who could be monitored to ensure that they did not abuse their subjectivity. But that would mean essentially doing away with any lower- or mid-level management, and it would force decision making upwards in the organization to levels where managers have progressively less information about the performance and capabilities of the employees they are judging. This, of course, is not the way most businesses operate. It certainly would not work for an industry like financial services, which requires a decentralized management structure and careful oversight to ensure regulatory compliance and appropriate investor relations. If every business decision requiring some sort of subjectivity had to be made by a few high-level employees, the day-to-day operations of American industry would grind to a halt.

Equally troubling is the impact the Ninth Circuit's approach will have on efforts to foster a corporate culture dedicated to eradicating and remedying invidious discrimination. The Ninth Circuit's standard does not distinguish in any way between a culture of discrimination and all others. The Ninth Circuit approach tars with the same brush any effort to create a common culture—as long as it is sufficiently uniform and pervasive. Paradoxically, a culture of integrity—and even a culture of diversity and *non*-discrimination—can be as damning as a culture of discrimination. All the plaintiff needs to do is find a few rogue managers who ignore the employer's policies against discrimination to find a platform for a broad class action. Pet. App. 55a. Any large institution tries to instill common values and mores in its employees. It is a very hard challenge to which employers devote considerable resources. Their efforts should be encouraged, not deterred with enhanced exposure to potentially crushing class action suits.

◆

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 10-277

IN THE

Supreme Court of the United States

WAL-MART STORES, INC.,
Petitioner,
v.
BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, KAREN WILLAMSON, DEBORAH GUNTER, CHRISTNE KWAPNOSKI, CLEO PAGE, on behalf of themselves and all others similarly situated,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* SOCIETY FOR HUMAN RESOURCE MANAGEMENT AND HR POLICY ASSOCIATION IN SUPPORT OF PETITIONER

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TABLE OF AUTHORITIES

CASES Page(s)

Albemarle Paper Co. v. Moody,
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Burlington Industries, Inc. v. Ellerth,
524. U.S. 742 (1998) 18

Denney v. City of Albany,
247 F.3d 1172 (11th Cir. 2001) 9

Dukes v. Wal-Mart Stores, Inc.,
222 F.R.D. 137 (N.D. Cal. 2004) 5, 16

Dukes v. Wal-Mart Stores, Inc.,
603 F.3d 571 (9th Cir. 2010) (en banc) .... *passim*

EEOC v. Black Gaming LLC and Casa Blanca Resort & Casino,
Case No. 2:10-cv-02216 (D. Nev. 12/21/10) 20

EEOC v. Crothall Healthcare,
Case No. 4:10 CV 1221 (E.D. Ark. 12/23/10) 20

EEOC v. Haven Manor,
Case No. 4:10-CV-03108 (D. Neb. 12/28/10) 21

EEOC v. Omnicare, Inc.,
Case No. 10 cv 364 (W.D. Wisc. 12/21/10) 20

Engquist v. Oregon Dep't of Agric.,
553 U.S. 591 (2008) 9, 11

Faragher v. City of Boca Raton,
524 U.S. 775 (1998) 18

TABLE OF AUTHORITIES—Continued

Page(s)

Kolstad v. American Dental Assoc.,
527 U.S. 526 (1999) .... *passim*

Martel v. Cnty of Los Angeles,
56 F.3d 993 (9th Cir. 1995) (en banc), *cert. denied*, 516 U.S. 944 (1995) 9

Martin v. Franklin Cap. Corp.,
546 U.S. 132, 139 (2005) 10

Sperling v. Hoffman-La Roche, Inc.
924 F. Supp. 1346 (D.N.J. 1996) 9

Watson v. Fort Worth Bank & Trust,
487 U.S. 977 (1988) 8, 17

STATUTES AND REGULATIONS

29 C.F.R. § 1604.11(f) 20

RULES

Fed. R. Civ. P. 23(a) 3

OTHER AUTHORITIES

Ronald L. Adler & Tom Coleman, *Job Performance Management Profile: Example Audit of HR Function*, SHRM White Paper, 4/1/99 at 5 13

James T. Austin & Peter Villanova, *The Criterion Problem: 1917-1992*, 77 J. Applied Psychol. 836 (1992) 11

Susan Bissom-Ramp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 Berk. J. Emp. & Lab. L. 1 (2001) 19

Page(s)

Peter L. Bye, *Realizing Full Potential of Diversity and Inclusion As a Core Business Strategy*, *SHRM* White Paper, 6/1/07 21

Frank Dobbin *et al.*, *Diversity Management in Corporate America*, 6 Contexts (2007) 21

EEOC "Best Practices for Employers and Human Resources/EEO Professionals." *Available at* wwl.eeoc.gov//eeoc/ initiatives/ e-race/bestpracticesemployers.cfm?renderforprint=1 .... 12, 13, 19

EEOC "Best Practices: How to Prevent Race and Color Discrimination." *Available at* wwl.eeoc.gov//eeoc/initiatives/e-race/bestpracticesemployers.com 20

Encyclopedia of Business and Finance (Gale Publishing, 2d ed. 2006) 12, 14

Robert L. Greene, *Effective Performance Appraisal: A Global Perspective*, SHRM White Paper 4/1/05 12

Alexandra Kalev *et al.*, *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policy*, 71 American Soc. Rev. 589 (2006) 21

Ziva Kunda & Steven J. Spender, *When Do Stereotypes Come to Mind and When Do They Color Judgment? A Goal-Based Theoretical Framework for Stereotype Activation and Application*, 129 Psychol. Bull. 522 (2003) 22

Frank J. Landy, *Stereotypes, Bias, and Personnel Decisions: Strange and Stranger, 1 Industrial & Org'l Psychol.: Perspectives on Sci. & Practices*, 379, 3832 (2008) 22

Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 Psychol. Bull. 255 (1999) 21

Kevin Oakes, *"Six Steps to Improve Diversity Iniatives,"* Diversity Magazine (Sept. 17, 2008), *available at* http://www.diversityexectuive.com/article.php?article=241 21

Roger Parloff, *The War Over Unconscious Bias*, 156 Fortune 90 (Oct. 15, 2007) 6

Society for Human Resource Management, *Managing Employee Performance, SHRM Research Article* 6/15/09 13

Society for Human Resource Management, *"2000 Performance Management Survey" available at* http://www.personneldecisions.com.sg/learning/pdfs/research_PerfMgmt.pdf 9, 12, 13, 14

Page(s)

Society for Human Resource Management, *Weekly Online Survey: March 15, 2005* 14, 15

Society for Human Resource Management, *Workplace Diversity Practices: How Has Diversity and Inclusion Changed Over Time? A Comparative Examination: 2010 and 2005* 22

Jeffrey R. Spence & Lisa M. Keeping, *The Impact of Non-performance Information on Ratings of Job Performance: A Policy-capturing Approach*, 31 J. Org'l Behav. 587 (2010) 11

Philip E. Tetlock & Gregory Mitchell, *Implicit Bias and Accountability Systems: What Must Organizations Do to Prevent Discrimination?* 29 Res. Org'l Behv. 3 (2009) 21

Warren Thorngate *et al.*, *Judging Merit* (Psychology Press 2009) 12

Barbara D. Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 Yale L.J. 1408 (1978) 10, 11

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BRIEF OF *AMICI CURIAE* SOCIETY FOR HUMAN RESOURCE MANAGEMENT AND HR POLICY ASSOCIATION IN SUPPORT OF PETITIONER

INTERESTS OF *AMICI CURIAE*[1]

Amicus curiae Society for Human Resources Management ("SHRM" or the "Society") is the world's largest association devoted to human resource ("HR") management. SHRM represents over 250,000 human resources professionals who make up its membership. The purposes of the Society, as set forth in its bylaws, are to promote the use of sound and ethical human resources management practices in the profession, and (a) to be a recognized world leader in human resources management; (b) to provide high-quality, dynamic, and responsive programs and service to its customers with interests in human resources management; (c) to be the voice of the profession on human resources management issues; (d) to facilitate the development and guide the direction of the human resources profession; and (e) to establish, monitor, and update standards for the profession. As an influential voice, the Society advances the human resources profession to ensure that human resources is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 575 affiliated chapters within the United States and members in more than 140 countries.

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[1] Pursuant to Rule 37.6 of this Court, *amici curiae* certify that no counsel for any party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici*, their members, and their counsel made such a monetary contribution. The parties' letters consenting to the filing of this brief have been filed with the Clerk.

Amicus curiae HR Policy Association represents the chief human resources officers of over 300 of the largest employers doing business in the United States. Representing every major industrial sector, HR Policy Association's principal mission has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to the realities of the workplace. To that end, the HR Policy Association provides its members, policy-makers, courts, agencies and the public with in-depth information, analysis, and opinion regarding current situations and emerging trends in labor and employment policy.

Amici's expertise and widespread knowledge of human resources practices in the United States provides them with a unique interest in, and perspective on, the human resources practices that underlie the Ninth Circuit decision below—specifically, individualized performance reviews and the impact of organization-wide diversity programs on internal culture—topics that were misunderstood, misjudged, and ignored by the Ninth Circuit here.

BACKGROUND

In granting certiorari, the Court directed the parties to address whether the certification order "was consistent with Rule 23(a)," which requires that the party seeking class certification demonstrate the existence of questions of fact or law common to the entire class. The Ninth Circuit majority found this element was satisfied despite the admitted "absence of a specific discriminatory policy promulgated by Wal-Mart" applicable to the 500,000-plus class members employed in the Company's 3,400 stores around the country. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 603 (9th Cir. 2010) (en banc).

The Ninth Circuit majority instead concluded Plaintiffs had demonstrated "a common legal or factual question regarding whether Wal-Mart's policies or practices are discriminatory" by a combination of evidence that the Company had established centralized policies and a strong corporate culture coupled with "[e]vidence" of "excessive subjectivity in personnel decisions" made at the local level. *Id.* at 600. Those combined factors, the Ninth Circuit concluded (without considering the Company's strong corporate diversity policy and program), "provides a wide enough conduit for gender bias to potentially seep into the system." *Id.* at 601.[2]

In reaching this conclusion, the Ninth Circuit ignored the Company's reasons for its localized decision-making and its corporate-wide diversity policy and practices. Instead, the Ninth Circuit relied heavily on the testimony of Plaintiffs' sociological expert, Dr. William Bielby, who opined that "Wal-Mart has and promotes a strong corporate culture, a culture that *may* include gender stereotyping." *Id.* at 601 (emphasis added). However, Dr. Bielby never opined, and the Ninth Circuit never found, that Wal-Mart had ever adopted a policy encouraging gender stereotyping, or had ever intentionally encouraged or enabled such stereotyping. In fact, Wal-Mart's corporate-wide diversity policies and programs were directly contrary to that claim. *Id.*

Rather, Dr. Bielby opined that "gender stereotypes are especially likely to influence personnel decisions when they are based on non-formulaic factors, because substantial decision-maker discretion tends to allow people to seek out and retain stereotyping information and ignore or minimize information that defies stereotypes." *Id.* Because Wal-Mart's in-store managers make individualized pay and promotion decisions, Dr. Bielby concluded the Company's pay and promotion decisions are therefore "vulnerable to gender bias." *Id.*

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[2] The Ninth Circuit also concluded Plaintiffs had shown "expert statistical evidence of class-wide gender disparities attributable to discrimination," *Dukes*, 603 F.3d at 600, a conclusion it reached even though "over 90 percent of Wal-Mart's stores showed no statistical difference in the hourly pay rates between men and women associates with similar work-related characteristics." *Id.* at 637 (Ikuta, J. dissenting). The gross methodological errors in the statistical analysis of the Ninth Circuit majority are discussed in Wal-Mart's merits brief as well as in other *amicus* filings.

The Ninth Circuit expressly endorsed Dr. Bielby's theory. *Id.* at 601-03. It did so even though, as Plaintiffs had conceded and the District Court acknowledged, Dr. Bielby "cannot definitively state how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart," and thus could not say that gender stereotyping occurred 95% or 0.5% of the time. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 154, 192 (N.D. Cal. 2004).

The Ninth Circuit paid mere lip service to the Company's systematic efforts to create and perpetuate a "strong corporate culture," *Dukes*, 603 F.3d at 597 n.18, 600-01, 612, as it never described the supposed contours of that culture. Thus, it never discussed the Company's formal diversity policy or its extensive diversity initiatives, both of which originated with senior management and were repeatedly stressed in training sessions for all employees. The Ninth Circuit simply mentioned in passing that Dr. Bielby had purported to identify unspecified "deficiencies" in those programs. *Dukes*, 603 F.3d at 601.

Likewise, the District Court never examined the contours of the Company's "corporate culture" in any meaningful way. Thus, while it acknowledged the Company "has increased its emphasis on diversity issues in the past few years," it appeared to discount those efforts, noting Dr. Bielby had criticized the utility of those efforts. *Id.* at 153-54. And while it acknowledged "Wal-Mart has earned national diversity awards . . . [and] has diversity goals. . . ," *id.* at 154, it never assessed the impact of those diversity initiatives on the Company's "corporate culture" or on its personnel decisions.

SUMMARY OF ARGUMENT

The finding of commonality that the Ninth Circuit endorsed to justify this massive class action rests largely on the following supposition: the Company (a) has a "strong corporate culture" that "may include gender stereotyping" (b) allowing in-store managers to make individualized pay and promotion decisions (c) from which it follows that its personnel decisions are "vulnerable" to discrimination. *Dukes*, 603 F.3d at 601. In other words, the Ninth Circuit endorsed the theory that the combination of centralized, company-wide culture and decentralized, individualized, non-formulaic personnel decision-making can be inherently discriminatory.

The "subjectivity leads to bias" theory, which plaintiffs' experts have employed widely in an array of class action litigation against numerous companies,[3] ironically is based on stereotyping of the very type that the federal employment laws themselves condemn. The theory assumes not only that all local decision-makers are inherently biased, but that all (men and women alike) suffer from the exact same bias—which here supposedly caused them to discriminate against women without even knowing they were doing so.

The premises underlying this theory of commonality are at odds with common sense, as well as with human resources experience and literature. First, far from being universally criticized, individualized decision-making is frequently essential, an insight borne out by this Court's decisions, the relevant literature, and every-day life. Indeed, virtually every United States organization relies heavily on the exercise of individual judgments by supervisors in making personnel decisions—precisely because that input is necessary, valuable, and reliable.

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[3] *See* Roger Parloff, *The War Over Unconscious Bias*, Fortune, Oct. 15, 2007, at 94 ("[*Dukes*] is no aberration; it's an epitome. It shares a common skeletal structure with almost every employment discrimination action today and thus opens a telling window on a looming litigation threat to corporate America.").

Second, this Court's decisions, the EEOC's recommended "Best Practices," and human resources literature all recognize the key role company-wide diversity policies play in creating and reinforcing a culture of inclusion. The Ninth Circuit, however, concluded Wal-Mart's culture rendered its personnel decisions "vulnerable" to discrimination without even considering the influence of Wal-Mart's diversity policies and programs in shaping that culture. Contrary to Dr. Bielby's and the Ninth Circuit's view, Wal-Mart's "corporate culture" was, because of its diversity initiatives, inclusive and not "vulnerable" to insidious discrimination.

There was no sound reason on this record for the Ninth Circuit to conclude that the countless individualized personnel decisions made by thousands of in-store managers over the years constituted a single, inherently discriminatory policy. That is because the Company never "promulgated" "a specific discriminatory policy," but rather had supplemented its anti-discrimination policies with a robust company-wide diversity policy to create a culture of inclusion. Thus, the Company's individualized, "subjective" personnel judgments therefore were not inherently discriminatory, but rather represented a sound and fair form of evaluation.

Moreover, the Ninth Circuit's decision "is directly contrary to the purposes underlying Title VII."

Kolstad v. American Dental Assoc., 527 U.S. 526, 545 (1999). As this Court has explained, "those purposes are "advanced where employers are encouraged to adopt antidiscrimination policies and to educate their personnel on Title VII's prohibitions." *Id.* But by certifying a massive class without even considering the impact of Wal-Mart's diversity policies on its culture and decision-making, the certification Order underestimates the value of such programs and weakens the incentives to create or maintain voluntary diversity programs.

ARGUMENT

I. INDIVIDUALIZED, DISCRETIONARY PERSONNEL DECISIONS MADE AGAINST THE BACKDROP OF A COMPANY-WIDE DIVERSITY POLICY ARE NOT INHERENTLY DISCRIMINATORY, BUT REFLECT SOUND HUMAN RESOURCES PRACTICES

A. As This Court And The Human Resources Literature Have Recognized, Individualized Personnel Decisions Are Not Inherently Discriminatory

Contrary to the Ninth Circuit's strong suspicion of decentralized, discretionary personnel decisions made by direct managers of employees, this Court has recognized that "an employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988). On the contrary, "it may be customary and quite reasonable simply to delegate employment decisions to those employees who are most familiar with the jobs to be filled and with the candidates for those jobs." *Id.*

Indeed, "[e]mployment decisions are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify." *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 604 (2008). Simply put, "[s]ubjective evaluations of a job candidate are often critical to the decisionmaking process, and . . . can be just as valid as objective reasons." *Denney v. City of Albany*, 247 F.3d 1172, 1185-86 (11th Cir. 2001).[4] *See also, Martel v. Cnty. of Los Angeles*, 56 F.3d 993, 995 (9th Cir.) (en banc) (reversal of discretionary trial decisions, such as denial of continuance, permissible "only upon the clearest showing") *cert. denied*, 516 U.S. 944 (1995).

Federal courts are not alone in recognizing the value of decentralized, decision-making that features discretionary judgment. Indeed, one can find the reliability of such decision-making confirmed in social sciences literature, human resources literature, and day-to-day life experiences. Further confirming the validity of discretionary exercise of personal managerial judgment is SHRM's survey evidence, which reports that "[a]cross all job levels, the direct supervisor had the most input into [individual employee] performance evaluation[s]," and that 96% of corporations rely heavily on input from direct supervisors in conducting employee job performance appraisals.

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[4] *See also, e.g., Sperling v. Hoffman-La Roche, Inc.* 924 F. Supp. 1346, 1363 (D.N.J. 1996) ("giv[ing] managers the discretion to make employment decisions . . . is not tantamount to a decision by a company to pursue a systematic, companywide policy of intentional discrimination").

SHRM *"2000 Performance Management Survey,"* at 12.[5]

1. The Ninth Circuit, like Plaintiffs' experts, all but treat "subjectivity" as if it were inherently inappropriate. It is not. "Subjective" does not mean "whimsical," "capricious" or "biased." On the contrary, it refers to a decision-making process that relies on informed individualized judgment rather than the mechanical application of seemingly objective criteria. *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 139 (2005) ("Discretion is not whim.")

Social science literature recognizes that a fundamental distinction exists between decision-making models that rely on the "use of individualized judgment" (also referred to generally as clinical decision-making, and which Plaintiffs disparage as involving merely "subjective judgment") and those models that rely on "formulas that assign fixed weights to predetermined characteristics of the applicant (or statistical decision-making models)." Barbara D. Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 Yale L.J. 1408 (1978). This "distinction arises not only in the context of prediction, but also in any other fact-finding process," *id.* at 1423 n.41, including personnel decisions.

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[5] SHRM publishes several types of papers and research cited in this brief. SHRM's published surveys report on the results of professionally conducted surveys polling the views of a statistically significant sample of human resources professionals. white papers typically are created by human resources professionals or attorneys with expertise in the subject matter, and then peer reviewed by a panel of human resources professionals with relevant subject matter expertise and/or a member of SHRM's staff. Most of the SHRM documents cited in this brief may be found on the SHRM website, www.shrm.org, while the others may be obtained from counsel upon request.

Certain criticism of decision-making based on individualized judgment—similar to that urged by Plaintiffs here—is that such a "decisionmaker can respond only to a finite number of characteristics, and he inevitably weights them in accordance with . . . either []his own experience or [] a larger body of received experience." *Id.* at 1423. One powerful response to this criticism is that frequently it is impossible to anticipate by rule all the variables that will be important to any given decision, and that a decision-maker who relies on individualized judgment is therefore "free to respond to individual differences whose relevance" could not be "anticipated." *Id.*; *see also Enquist*, 533 U.S. at 604.

A great deal of research has addressed the comparative individualized and statistical decision-making models. Some studies favor one model, while others favor the other. But the fair conclusion is that neither model can be deemed superior, let alone exclusively appropriate, in all circumstances. Underwood, 88 Yale L. J. at 1423-25.

In fact, as industrial organizational psychology recognizes, it is virtually impossible to construct a complex decision-making process that does not include a measure of subjectivity. James T. Austin & Peter Villanova, *The Criterion Problem: 1917-1992*, 77 J. Applied Psychol. 836 (1992). Even if seemingly objective decision-making criteria could be identified and isolated, the process of inputting and evaluating so-called objective data is inherently influenced by subjective factors. Jeffrey R. Spence & Lisa M. Keeping, *The Impact of Non-performance Information* *on Ratings of Job Performance: A Policy-capturing Approach*, 31 J. Org'l Behav. 587, 588 (2010).

Even more specifically, it is impossible to identify completely objective decisional criteria for use in making comparative personnel decisions. That is because relative merit or job performance cannot be reduced solely to objective criteria that require no individualized analysis. Warren Thorngate et al., *Judging Merit*, (Psychology Press, 2009).

2. Every employer utilizes some form of employee performance appraisal system in making hiring, pay, and promotion decisions. As the human resources literature indicates, these systems—from creation to implementation—necessarily include evaluative components that Plaintiffs would characterize as "subjective."

To begin with, companies use many different methodologies for conducting performance appraisal reviews. Simply put, one size does not fit all. Rather, "a company must design the evaluation process carefully" and "determine which aspects of performance to evaluate." Most companies tailor their appraisal systems to their own specific needs and industry. *Encyclopedia of Business and Finance*, (Gale Publishers, 2d ed.) at 584; SHRM "*2000 Performance Management Survey*," at 8-12.

The literature has identified, however, certain fundamental characteristics that appear in virtually any sound performance appraisal system. First, as informed commentators widely agree, the appraisers must be adequately trained. *E.g.*, Robert L. Greene, *Effective Performance Appraisal: A Global Perspective*, SHRM White Paper 4/1/05 at 3.

Second, the performance review appraisal should be tailored to the specific job and job performance. *Id.* This insight appears in the EEOC's guide to "Best Practices for Employers and Human Resources/EEO Professionals," which states that performance appraisals should be based on "job-related qualification standards related to [the job's] duties, functions and competencies."[6]

Focusing the performance review on job performance specifically also may play a critical role in eliminating potential bias from the appraisal process. As one commentator notes, "It is easy for managers to allow their impressions of employees or their personal feelings about them to dominate the performance rating process. Focusing on the specific job and predetermined criteria and standards is the best tool for avoiding bias." *Managing Employee Performance*, SHRM Research Article, 6/15/09 at 8.

A third element of some performance appraisals is to evaluate, "employees . . . by members of management most familiar with the employees' job tasks and performance objection," which typically "means that an employee's immediate supervisor should conduct the performance appraisal." Ronald L. Adler & Tom

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[6] Available at wwl.eeoc.gov//eeoc/initiatives/e-race/bestpracticesemployers.cfm?renderforprint=1. The "Best Practices" guide recommends that such job-related standards be "objective." From the context of the recommendations, it is evident that the EEOC is using "objective" standards to mean "job-related" standards, and conversely uses "subjective" standards to mean personal biases. That is not the same way in which those terms are used in the social sciences literature or in this brief, where "subjective" decision-making is used to refer to an individualized judgmental process that considers all relevant (i.e., job-related) factors.

Coleman, *Job Performance Management Profile: Example Audit of HR Function*, SHRM White Paper, 4/1/99 at 5. SHRM's research confirms that "[a]cross all job levels, the direct supervisor had the most input into [individual employee] performance evaluation[s]." SHRM "*2000 Performance Management Survey*," at 12.

The reasons for heavy reliance on performance input from direct supervisors are obvious. Supervisors "usually are in the best position to know and observe the employees job performance" and "are also responsible for employees' work." *Encyclopedia of Business and Finance*, at 584. Moreover, "[t]heir evaluation is a powerful tool in motivating employees to achieve successful and timely completion of tasks." *Id.* Their knowledge of job requirements, direct observation of performance, and daily contact with employees thus place them in an ideal position to make sound subjective (i.e., informed by all relevant data) appraisals of individual employee performance.

Again, this conclusion should come as no surprise. Presumably, the Members of this Court would not evaluate the performance of their law clerks based solely on objective metrics such as the number of hours worked. The Justices would more likely focus on individualized assessments of factors—such as quality of analysis, quality of writing, initiative, and collegiality—that cannot readily be measured quantitatively. Thus, what the Ninth Circuit and Plaintiffs would call a "subjective" appraisal is, in fact, one that is informed by all relevant information.

Subjective evaluation is also an inevitable and necessary component in hiring. In a recent SHRM survey, 55% of responding human resources professionals report that their employers utilize behavioral interviews based on job-specific interview questions. SHRM *Weekly Online Survey: March 15, 2005*, at 3. In contrast, most organizations choose not to employ highly objective hiring techniques; 83% do not employ scoreable job applications in which numeric values are placed on experience, skills, etc. *Id.* at 4, 6.

3. In daily life we value the necessity of informed clinical judgment, which Plaintiffs would disparage as "subjective decision-making." The need for this judgment in making complex decisions is obvious. To take but one example, we naturally expect our physicians to conduct those tests that yield essential objective data. But we also know that complex diagnoses often cannot be made from objective metrics alone. Rather, we count on our physicians to exercise sound clinical judgment based on their informed, but inherently subjective, evaluation of all relevant factors.

The same is true of parenting. Many parents have a well-developed philosophy of parenting, possibly acquired from experience or reading, which they employ in making day-to-day parental decisions. But virtually all parents also know that frequently, if not daily, they must make decisions on factors that cannot be reduced to objective formula. Rather, informed, individualized decision-making is required. The same is true in the workplace.

4. The Ninth Circuit certified the massive class here because it concluded that Wal-Mart's strong corporate culture, coupled with "[e]vidence" of "excessive subjectivity in personnel decisions," "provides a wide enough conduit for gender bias to potentially seep into the system." *Dukes*, 603 F.3d at 601. But as just shown, the Ninth Circuit's sweeping suspicion of

decentralized, subjective decision-making is at odds with this Court's prior pronouncements, with relevant literature from the social sciences and the human resources field, and with our collective experiences in daily life.

It also makes no sense on this record. Given the widespread reliance on supervisor input throughout American business, it is neither surprising nor troublesome that Wal-Mart relies on in-store managers and supervisors to make pay and promotion decisions. That reliance flows naturally from Wal-Mart's longstanding and highly successful business philosophy of "push[ing] down to the manager of the facility level, the responsibility to run those stores right." *Dukes*, 222 F.R.D. at 148.

Moreover, in exercising their discretionary authority, the Company's managers focus on job-related factors necessary to the success of their particular store or department. Thus, Wal-Mart has introduced declarations from numerous managers who made clear that in making discretionary pay or promotion decisions they considered only job-related factors such as the following: "additional experience, education, or special skills," "competitive market factors," "supervisory experience with a competitor," "experience in a particular department or . . . supervisory experience with a competitor," "experience, productivity, supervisor recommendations, and attendance," and "the associate's skills and prior experience." 1609a, 1616a, 1627-28a, 1635-36a, 1644a, and 1650a; *see also* J.A. 1576a-1596a (Porter Decl.); C.A.App. 677-683 (Diversity statement); 699-818 (Management Policy Workshop booklet).

Thus, it was entirely unwarranted for the Ninth Circuit to conclude that the thousands of "subjective" personnel decisions made by Wal-Mart supervisors were inherently "vulnerable" to discrimination solely because Wal-Mart has a centralized firm-wide culture. Such employment practices are not the hallmarks of a discriminating employer, but rather of a progressive, nondiscriminatory employer. Indeed, an employer's most obvious alternatives to exercising individualized judgment—mechanically applying "objective" scoring to judge employee performance or establishing quotas to prevent charges of discrimination—are themselves "far from the intent of Title VII." *Watson*, 487 U.S. at 993.

Thus, good public policy and common sense demand the conclusion that there is nothing inherently suspect about employment decision-making that relies upon the decision-makers' individualized judgment about an employee or applicant. Such "subjective" decision-making is not only inevitable, but sound and fair.

B. Organization-Wide Diversity Policies Play A Key Role In Creating And Reinforcing A Culture Of Inclusion

The Ninth Circuit characterized Wal-Mart's strong, centralized culture as the "nexus" supporting its conclusion that Wal-Mart's decentralized, discretionary personnel decisions were inherently gender-biased. *Dukes*, 603 F.3d at 612. The Ninth Circuit concluded, in other words, that something in the Company's culture permitted an inference that its managers were likely to discriminate against women.

The Ninth Circuit never explained the basis for this belief, beyond quoting with approval Plaintiffs' expert's view that the Company's culture "may include gender stereotyping" because "gender stereotypes are especially likely to influence personnel decisions when they are based on subjective factors." *Dukes*, 603 F.3d at 601. The Ninth Circuit never discussed or evaluated the systematic, company-wide policies and initiatives the Company has undertaken to promote diversity as part of its corporate culture. This omission is significant, since this Court, the EEOC, and human resources professionals have all recognized the key role that organization-wide diversity policies and initiatives play in creating and reinforcing a culture of inclusion.

1. This Court has strongly emphasized the importance of diversity programs and training to achieve the purposes underlying Title VII. The Court has long recognized that the statute's "primary objective" is "a prophylactic one," *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975), and that Title VII aims chiefly "not to provide redress but avoid harm." *Kolstad*, 527 U.S. at 545.

In the specific context of harassment, this Court has explained that "Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms." *Burlington Industries, Inc. v. Ellerth*, 524. U.S. 742, 764 (1998). Concluding that judges must therefore "give credit . . . to employers who make reasonable efforts to discharge their duty to affirmatively prevent violations," this Court held a plaintiff "who unreasonably failed to avail herself of the employer's preventive or remedial apparatus" may not recover damages for workplace harassment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 805-06 (1998).

This Court has likewise recognized the need to encourage employer-created diversity training programs. As it has explained, "the purposes underlying Title VII are similarly advanced where employers are encouraged to adopt antidiscrimination policies *and to educate their personnel on Title VII's prohibitions*." *Kolstad*, 527 U.S. at 545 (emphasis added). Thus, to avoid "[d]issuading employers from implementing programs or policies to prevent discrimination in the workplace," the Court held that punitive damages may not be assessed against employers for those discriminatory decisions of managerial employees that "are contrary to the employer's good-faith efforts to comply with Title VII." *Id.*

Nonetheless, some sociologists, such as Dr. Bielby, Plaintiffs' expert here, tend to dismiss "diversity training [as] mere window-dressing." *See, e.g.*, Susan Bissom-Ramp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 Berk. J. Emp. & Lab. L. 1, 23-24 (2001). This view denigrates not only the view of human resources professionals discussed in Part B-2 below, but also this Court's recognition of the importance of encouraging employers "to adopt antidiscrimination policies and to educate their personnel on Title VII's prohibitions." *Kolstad*, 527 U.S. at 545.

2. Such views are also out of step with the EEOC. The EEOC has published what it considers "Best Practices for Employers and Human Resources/EEO Professionals." See n. 6, *supra*. Several of its specific recommendations as to "how to prevent race and color discrimination" center on the creation and implementation of company-wide diversity programs:

— "Train Human Resources managers and all employees on EEO laws;

— "Implement a strong EEO policy that is embraced at the top levels of the organization;

— "Train managers, supervisors and employees on its contents, enforce it, and hold them accountable;

— "Promote an inclusive culture in the workplace by fostering an environment of professionalism and respect for personal differences; and

— "Foster open communication and early dispute resolution."

EEOC "Best Practices: How to Prevent Race and Color Discrimination."

The EEOC's regulations likewise emphasize the value of employer-initiated efforts to avoid discrimination: "Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods sensitive to all concerned." 29 C.F.R. § 1604.11(f).

Consistent with its stated position, the EEOC requires diversity training in consent decrees, as recent cases described on the EEOC's website exemplify: *e.g., EEOC v. Black Gaming LLC and CasaBlanca Resort & Casino*, Case No. 2:10-cv-02216 (D. Nev. Dec. 21, 2010) (company must provide annual age discrimination training for supervisory and human resources staff); *EEOC v. Omnicare, Inc.*, Case No. 10 cv 364 (W.D. Wisc. Dec. 21, 2010) (mandatory sexual harassment training for employees); *EEOC v. Crothall*

Healthcare, Case No. 4:10 CV 1221 (E.D. Ark. Dec. 23, 2010) (mandatory training for managers and supervisors plus semi-annual compliance reports); and *EEOC v. Haven Manor*, Case No. 4:10-CV-03108 (D. Neb. Dec. 28, 2010) (mandatory training for management and supervisory employees). Available at www.eeoc.gov/eeoc/newsroom/index.cfmc.

3. A substantial secondary literature likewise encourages the adoption of organization-wide diversity programs and training. *E.g.* Peter L. Bye, *Realizing Full Potential of Diversity and Inclusion As a Core Business Strategy*, *SHRM* White Paper, 6/1/07, at 5-8. *See also Six Steps to Improve Diversity Initiatives*, Diversity Magazine, Sept. 17, 2008 (recommending "enlist[ing] top leadership" and creating "a system of accountability").

4. The value of such diversity programs is not open to principled doubt. As the EEOC's inclusion of mandatory training and other diversity-promoting measures in consent decrees underscores, diversity programs can transform corporate culture with consequent diversity gains. *E.g.*, Alexandra Kalev *et al.*, *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policy*, 71 American Soc. Rev. 589 (2006); Frank Dobbin *et al.*, *Diversity Management in Corporate America*, 6 Contexts (2007). Such programs can influence the culture by introducing such discrimination-disabling norms as process accountability and performance appraisals focused on job-performance criteria.[7] And

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[7] *See generally* Philip E. Tetlock & Gregory Mitchell, *Implicit Bias and Accountability Systems: What Must Organizations Do to Prevent Discrimination?*, 29 Res. Org'l Behv. 3, 16-18 (2009); Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 Psychol. Bull. 255 (1999).

sociological literature indicates that having information about the talents and abilities of a particular employee has a greater impact on managerial judgments and decisions than having information about that employee's race or gender.[8]

5. Consistent with the foregoing, many American organizations have implemented organization-wide diversity programs for various reasons, including "improv[ing] public image," "decreas[ing] complaints and litigation," and "ret[aining] . . . a diverse workforce." SHRM, *Workplace Diversity Practices: How Has Diversity and Inclusion Changed Over Time? A Comparative Examination*: 2010 and 2005, at 5. That same SHRM survey indicates that "in 2010, 68% of organizations indicated that they have practices in place that address workplace diversity." *Id.* at 4, 7. And, diversity training is an increasingly important component of such diversity initiatives. SHRM's 2010 survey discloses that "among companies with diversity practices in place, the percentage offering training opportunities increased slightly from 67% in 2005 to 71% in 2010." *Id.* at 4.

6. In sum, by changing the contours of the corporate culture, diversity programs and training can discourage discrimination in day-to-day decision-making. Thus, it is inexplicable that the Ninth Circuit characterized Wal-Mart's culture as "vulnerable" to discrimination without even considering the

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[8] Ziva Kunda & Steven J. Spender, *When Do Stereotypes Come to Mind and When Do They Color Judgment? A Goal-Based Theoretical Framework for Stereotype Activation and Application*, 129 Psychol. Bull. 522 (2003); Frank J. Landy, *Stereotypes, Bias, and Personnel Decisions: Strange and Stranger*, 1 Industrial & Org'l Psychol.: Perspectives on Sci. & Practices, 379, 382-83 (2008).

impact of its company-wide diversity program on that culture.

Wal-Mart's longstanding diversity policy and program, expressly premised on respect for the individual, is representative of the programs that Title VII and this Court's decisions contemplate. Wal-Mart's anti-discrimination stance is clearly stated, and without qualification. 1577-1580a ¶¶ 4, 9-11. Wal-Mart's message has gone out to all employees in numerous documents that expressly identify the policy as emanating from senior management. 1580-1585a ¶¶ 12-24.

Moreover, in implementing its diversity policy, Wal-Mart's senior management set specific, measurable diversity goals. To follow up on its plan, Wal-Mart then employed management-performance report cards to track progress in achieving diversity goals; trained all in-coming employees on diversity goals; frequently discussed diversity throughout the company in regular "culture" sessions; and encouraged employees to bring any discrimination concerns to their supervisors, who in turn were directed to be responsive. 1585-1594a ¶¶ 25-27. Not surprisingly, the Company's diversity policy has won many awards. 1578a ¶ 8, 1584 ¶18.

This Court has made clear that "dissuading employers from implementing programs or policies to prevent discrimination in the workplace is directly contrary to the purposes underlying Title VII." *Kolstad*, 527 U.S. at 545. Rather, those purposes are "advanced where employers are encouraged to adopt antidiscrimination policies and to educate their personnel on Title VII's prohibitions." *Id.*

For Title VII to realize its full potential, strong uniform diversity policies should be encouraged. But by certifying an immense class without even considering the impact of Wal-Mart's diversity policies on its culture and decision-making, the Ninth Circuit Order does just the opposite. The certification Order effectively teaches that the maintenance of an organization-wide diversity program—no matter how strong—is not relevant to potentially ruinous class litigation. The Order thus weakens the incentives to implement and maintain such programs and grossly underestimates their value, "directly contrary to the purposes underlying Title VII." *Kolstad*, 527 U.S. at 545.

CONCLUSION

For the reasons stated above, the class certification Order should be reversed.

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AMICUS
CURIAE
BRIEF

No. 10-277

IN THE
Supreme Court of the United States

WAL-MART STORES, INC.,
Petitioner,
v.
BETTY DUKES, ET AL.,
Respondents.

**On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit**

BRIEF OF *AMICI CURIAE* U.S. WOMEN'S CHAMBER OF COMMERCE, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, AND CALIFORNIA WOMEN LAWYERS IN SUPPORT OF RESPONDENTS

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ARTICLES AND BOOKS

ROY D. ADLER, WOMEN IN THE EXECUTIVE SUITE CORRELATE TO HIGH PROFITS (2001) 5

AFL-CIO & INST. FOR WOMEN'S POL'Y RES., EQUAL PAY FOR WORKING FAMILIES: NATIONAL AND STATE DATA ON THE PAY GAP AND ITS COSTS (1999) 12

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Francine D. Blau & Lawrence M. Kahn, *Gender Differences in Pay*, 14 J. ECON. PERSP. 75 (2000) 11

Francine D. Blau & Jed DeVaro, *New Evidence on Gender Differences in Promotion Rates: An Empirical Analysis of a Sample of New Hires*, INDUS. REL., July 2007 11

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CATALYST, 2008 CATALYST CENSUS OF WOMEN CORPORATE OFFICERS AND TOP EARNERS OF THE FORTUNE 500 (2008) 11

Catalyst, Women in U.S. Management (2010) 10

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Donald Deere, *Conduct a Pay Equity Study to Mitigate Litigation Risks*, Society for Human Resource Management, Sept. 7, 2010 .... 9, 18

Judy Goldberg Dey & Catherine Hill, Behind the Pay Gap (2007) 11

Does Your Company Have Internal Pay Equity?, PayScale for Employers: Compensation Today, June 31, 2009 6

Jesse Ellison, *Shattering Glass Ceilings*, Newsweek, June 15, 2010 24

Fed. Glass Ceiling Comm'n, U.S. Dep't of Labor, Good for Business: Making Full Use of the Nation's Human Capital (1995) 5

Cheryl Francis & Sheila Penrose, *Getting More Women to the C-Suite*, HUM. RESOURCE EXEC. ONLINE, Feb. 7, 2011 8

Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659 (2003) 14

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Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 AM. SOC. REV. 208 (2009) 4

SYLVIA ANN HEWLETT, OFF-RAMPS AND ON-RAMPS: KEEPING TALENTED WOMEN ON THE ROAD TO SUCCESS (2007) 14, 24

HR Specialist, *How Not to Manage HR: Forget about Formal Hiring and Promotions Processes*, BUS. MGMT. DAILY, June 10, 2010 9

INST. FOR WOMEN'S POL'Y RES., THE GENDER WAGE GAP: 2009 (2010) 10

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Orly Lobel, *Big-Box Benefits: The Targeting of Giants in a National Campaign to Raise Work Conditions*, 39 CONN. L. REV. 1685 (2007) 24

MCKINSEY & CO., WOMEN MATTER 2010 (2010) 5

Research Makes a Business Case for Diversity, FED. HUM. RESOURCES WK., Sept. 24, 2001 4

THE SHRIVER REPORT: A WOMAN'S NATION CHANGES EVERYTHING (Heather Boushey & Ann O'Leary eds., 2009) 12

SOC'Y FOR HUM. RES. MGMT., 2007 STATE OF WORKPLACE DIVERSITY MANAGEMENT (2008) 6, 7

Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001) 6

Davia Temin, *Making the Business Case for Gender Equality*, FORBES, Nov. 9, 2010 7

U.S. Gov't Accountability Off., Women in Management: Female Managers' Representation, Characteristics, and Pay (2010) 11

Steve Watkins, The Black O: Racism and Redemption in an American Corporate Empire (1997) 15, 16

Theresa M. Welbourne, *Wall Street Likes Its Women: An Examination of Women in the Top Management Teams of Initial Public Offerings* (Cornell Univ. Ctr. for Advanced Hum. Res. Working Paper Series, Paper No. 99-07, 1999) 5

Stephen C. Yeazell, *Brown, the Civil Rights Movement, and the Silent Litigation Revolution*, 57 Vand. L. Rev. 1975 (2004) 13

Miscellaneous

Coca-Cola Co., *Diversity: Our Progress* (2011), http://www.thecoca-colacompany.com/citizenship/our_progress.html 18

Declaration of Marc Bendick, Jr., Ph.D. in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003), App. 448a Wal-Mart Stores, Inc. v. Dukes, No. 10-277 11

U.S. Chamber of Commerce and U.S. Chamber Institute for Legal Reform, Statement on The Class Action Crisis and S. 1712 – "The Class Action Fairness Act" (July 31, 2002) 23

U.S. Chamber Institute for Legal Reform, Class Action Toolkit, http://www.legalreformnow.com/images/stories/documents/pdf/ClassActionToolkit.pdf 23

U.S. Department of Labor, Bureau of Labor Statistics, Women's Earnings and Employment by Industry, 2009 11

Transcript of Proceedings Held on Nov. 19, 2010 before Judge Colleen McMahon, *Velez v. Novartis Pharm. Corp.*, No. 04 Civ. 09194 (CM), 2010 U.S. Dist. LEXIS 125945 (S.D.N.Y. Nov. 30, 2010) 19

STATEMENT OF INTEREST

The following *amici* submit this brief, with the consent of the parties,[1] in support of Respondents' argument that the order of class certification was consistent with Rule 23 of the Federal Rules of Civil Procedure. Specifically, the *amici* submit this brief to highlight the business benefits of fair pay and promotions, the impact of persistent disparities, and the role of class actions in providing systemic reform to address unlawful discrimination.

The U.S. Women's Chamber of Commerce ("Women's Chamber") is the preeminent national women's chamber of commerce network, representing 500,000 individuals, business owners, career professionals, women's organizations, economic development organizations and leadership organizations. Its mission is to develop leaders, accelerate economic growth, and promote economic opportunity for women at every level of the U.S. economy. It is specifically concerned with issues of economic discrimination against women.

The National Partnership for Women & Families (formerly the Women's Legal Defense Fund) is a national advocacy organization that develops and promotes policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. Since its founding in 1971, the National Partnership has worked to advance equal employment opportunities through several means, including by challenging discriminatory employment practices in the courts.

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[1] Counsel for *amici* authored this brief in its entirety. No person or entity other than *amici*, their staff, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with Clerk of the Court pursuant to Supreme Court Rule 37.3.

California Women Lawyers (CWL) represents a broad range of lawyers throughout California. Throughout its thirty-year history, CWL has promoted its mission of advancing women's interests, extending universal equal rights, and eliminating bias. In pursuing its values of social justice and gender equality, CWL often joins amici briefs challenging discrimination by private and governmental entities, weighs in on proposed California and federal legislation, and implements programs fostering the appointment of women and other qualified candidates to the bench.

SUMMARY OF ARGUMENT

Although women have made great strides since the passage of Title VII of the Civil Rights Act of 1964, disparities and discrimination persist in many workplaces. When recalcitrant employers fail to address systemic discrimination and ignore internal calls for reform, employees are more likely to turn to class litigation to obtain compliance with the law. While class litigation is relatively infrequent, such litigation can provide appropriate relief for harms that would otherwise go unremedied.

Indeed, class actions have played a critical role in changing discriminatory business practices and promoting systemic reforms that comply with the law, industry standards and best practices. These reforms have proven to be carefully-tailored to the corporations' own needs and infrastructures and to have long lasting effects. Such reforms have served to carry out the legislative intent of our civil rights laws, to the benefit of both employees *and* employers.

ARGUMENT

I. Fair compensation and promotion practices serve the bottom line.

Research has shown that business benefits from compensating and promoting women fairly. When companies adopt equal pay and promotion practices, they attract more and better-qualified female workers, boost employee loyalty and productivity, and improve their public image[2] — all of which translates into dollars and cents. Businesses with greater levels of gender diversity average $644.3 million in revenues per year, compared to only $45.2 million for businesses with low levels of gender diversity.[3] Additionally, businesses with high levels of gender diversity are more likely to report above average profitability and market share.[4]

Indeed, success in today's business world demands diverse competencies and a diverse workforce *at all levels*. The representation of women in top management and executive positions also correlates with financial performance. Fortune 500 companies with a high number of female executives exceed the industry median on multiple measures of profitability.[5] In fact, Fortune 500 companies with the highest representation of women on their top management teams significantly outpace those with the lowest representation with respect to both return on equity and total return to shareholders.[6] Firms with a higher percentage of women in upper management experience better short-term performance, higher three-year growth in stock price, and higher growth in earnings per share following an initial public offering.[7] Another study of Standard & Poor's 500 companies showed that firms that succeed in shattering their own glass ceilings racked up stock-market records that were nearly two and a half times better than otherwise-comparable companies.[8]

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[2] Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. REV. 367, 426 (2008); *Research Makes a Business Case for Diversity*, FED. HUM. RESOURCES WK., Sept. 24, 2001.

[3] Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 AM. SOC. REV. 208, 215-16 (2009).

[4] *Id.*

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[5] Roy D. Adler, Women in the Executive Suite Correlate to High Profits 4 (2001), http://www.women2top.net/download/home/adler_web.pdf.

[6] Catalyst, The Bottom Line: Connecting Corporate Performance and Gender Diversity 2 (2004), http://www.catalyst.org/file/44/the%20bottom%20line%20connecting%20corporate%20performance%20and%20gender%20diversity.pdf.

[7] Theressa M. Welbourne, *Wall Street Likes Its Women: An Examination of Women in the Top Management Teams of Initial Public Offerings* 2 (Cornell Univ. Ctr. for Advanced Hum. Res. Working Paper Series, Paper No. 99-07, 1999), http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1105&context=cahrswp; *see also* McKinsey & Co., Women Matter 2010 7 (2010), http://www.mckinsey.com/locations/paris/home/womenmatter/pdfs/Women_matter_oct2010_english.pdf (finding that companies with the highest share of women executives significantly outperform companies with no women in terms of return on equity and operating results).

[8] *See* Fed. Glass Ceiling Comm'n, U.S. Dep't of Labor, Good

Increasingly, businesses recognize that compensating women at the same rate as men enhances profitability. As one company has observed, "internal pay equity makes good business sense because being known as a responsible, considerate employer not only improves retention of your current top performers, but also increases your chances at hiring the top talent in your industry."[9] In contrast, wage discrimination "create[s] a negative workplace," thereby damaging employee morale and increasing turnover costs.[10]

Furthermore, businesses and human resources professionals are increasingly aware that moving women up the career ladder is a necessary part of sustaining an organization's competitive position in the marketplace.[11] These industry

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for Business: Making Full Use of the Nation's Human Capital 14 (1995).

[9] *Does Your Company Have Internal Pay Equity?*, PayScale for Employers: Compensation Today, June 31, 2009, http://blogs.payscale.com/compensation/2009/03/importance-of-internal-pay-equity.html#more; *see* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458, 498 (2001) (Deloitte & Touche's CEO in 1991, Mike Cook, "credits his firm's thirty percent growth rate in 1999, the best among the 'Big Five,' to lower turnover. Deloitte's success has attracted attention and awards, and has itself become an effective recruitment tool.")

[10] Gavin S. Appleby, *Protect Yourself Against Common Discrimination Mistakes*, Entrepreneur, Mar. 1, 2008, http://www.entrepreneur.com/management/legalcenter/legalcenter/article191772.html.

[11] Soc'y for Hum. Res. Mgmt., 2007 State of Workplace Diversity Management 9 (2008), *available at* http://www.bus.iastate.edu/emullen/mgmt472/shrmdiversityrep

leaders appreciate that gender diversity improves decision-making and lowers unnecessary risk-taking;[12] brings forth greater creativity and innovation;[13] and enhances companies' market share, marketability, and their competitive advantage.[14]

In *Grutter* v. *Bollinger*, 539 U.S. 306 (2003), and *Gratz* v. *Bollinger*, 539 U.S. 244 (2003), sixty-five prominent American companies submitted an amicus brief to attest that diversity was a "critical component of their business, culture and planning" and that they "need[ed] the talent and creativity of a workforce...as diverse as the world around it."[15] Indeed, research has shown that diverse teams solve problems more effectively.[16]

Like large corporations, small businesses also benefit from the economic advantages of diversifying

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ort2007.pdf.

[12] Davia Temin, *Making the Business Case for Gender Equality*, FORBES, Nov. 9, 2010, http://www.forbes.com/2010/11/09/gender-gap-business-case-diversity-forbes-woman-leadership-harvard-women-public-policy.html

[13] SOC'Y FOR HUM. RES. MGMT., *supra* note 11, at 9.

[14] BNA HR DECISION SUPPORT NETWORK, DIVERSITY & INCLUSION: MOVING FROM CELEBRATING DIFFERENCES TO MAKING THE BUSINESS CASE FOR DIVERSITY 8 (2009).

[15] Brief for 65 Leading American Businesses as Amici Curiae Supporting Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), and Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516).

[16] Douglas E. Brayley & Eric S. Nguyen, *Good Business: A Market-Based Argument for Law Firm Diversity*, 34 J. LEGAL PROF. 1, 3 (2009).

their workforces. One study of over two hundred small business concluded that firms with more diverse workforces experience greater increases in revenue than firms with less diverse work forces.[17]

Similarly, in the legal profession, the data demonstrates that highly diverse firms generate greater revenue per lawyer and turn higher profits per partner.[18] The data strongly suggest that diversity is good for business, because highly diverse firms are outperforming their peers.[19]

The diversity in talent and creativity needed in today's business world cannot be obtained in the absence of fair pay and promotions for women. In the words of corporate executives writing about the importance of inclusive policies and practices, "retaining and advancing high-potential women [is] a strategic imperative that makes good business sense."[20]

Many employers have implemented policies and procedures that prevent discriminatory bias and that promote gender equity in the workplace. A number of straightforward policies and practices have proven effective in preventing or rooting out discrimination. For example, the Society for Human Resource Management advises employers that "[c]onducting a well-designed and well-executed pay equity study using well-maintained and complete data is a good business practice that serves as an important tool in managing the risk associated with allegations of pay discrimination."[21] Other widely accepted practices that can help employers protect against wage disparities include linking pay ranges to neutral, relevant factors; developing tracking tools and processes to monitor compensation criteria and decisions; and creating defined benchmarks for measurement.[22] Similarly, businesses can avoid discriminating in promotions by creating "job descriptions, including a list of essential functions, so managers know what characteristics they're looking for when interviewing applicants," and by adopting policies and processes because "[e]mployers that rely on management recommendations alone risk having decision-making tainted by managerial bias."[23]

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[17] Linda S. Hartenian & Donald E. Gudmundson, *Cultural Diversity in Small Business: Implications for Firm Performance*, 5 J. DEVELOPMENTAL ENTREPRENEURSHIP, 209, 209, 211 (2000).

[18] Brayley & Nguyen, *supra* note 16, at 2.

[19] *Id.* at 3.

[20] Cheryl Francis & Sheila Penrose, *Getting More Women to the C-Suite*, HUM. RESOURCE EXEC. ONLINE, Feb. 7, 2011, http://www.hreonline.com/HRE/story.jsp?storyId=533329411.

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[21] Donald Deere, *Conduct a Pay Equity Study to Mitigate Litigation Risks*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT, Sept. 7, 2010, http://www.shrm.org/hrdisciplines/compensation/Articles/Pages/PayEquityStudy.aspx.

[22] CHI. AREA P'SHIPS, PATHWAYS AND PROGRESS: BEST PRACTICES TO ENSURE FAIR COMPENSATION 9-10 (2003), http://www.womenemployed.org/docs/best_practices_to_ensure_fair_compensation_report.pdf.

[23] HR Specialist, *How Not to Manage HR: Forget about Formal Hiring and Promotions Processes*, BUS. MGMT. DAILY, June 10, 2010, http://www.businessmanagementdaily.com/articles/22449/1/How-not-to-manage-HR-Forget-about-formal-hiring-and-promotions-processes/Page1.html#.

Practices like these have helped working women make significant gains since the passage of equal employment opportunity laws like Title VII of the Civil Rights Act of 1964. Though a significant pay gap persists, women working full-time, year-round earn 18 cents more on the dollar than they did thirty years ago.[24] Representation as corporate officers in Fortune 500 companies has nearly doubled since 1995.[25] Businesses that adhere to the latest industry standards deserve much of the credit for the growth in opportunities for working women. However, some employers have failed to adopt policies that can help to root out or prevent discrimination, in violation of Title VII mandates.[26]

II. Persistent disparities in compensation and advancement impact working women, their families, and the nation's economy.

Despite the significant gains noted above, many women workers continue to face significant disparities in pay and promotions. Women working full-time, year-round still are paid only 77 cents for every dollar paid to men.[27] Women's earnings lag behind men's in every industry, and the pay gap in the wholesale and retail trade industry is larger than most.[28] Even when researchers control for occupational choices and "human capital" factors such as education and years of experience, a substantial gender wage gap remains that can be attributed to discrimination.[29]

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[24] INST. FOR WOMEN'S POL'Y RES., THE GENDER WAGE GAP: 2009 (2010), http://www.iwpr.org/publications/pubs/ the-gender-wage-gap-2009/at_download/file.

[25] CATALYST, WOMEN IN U.S. MANAGEMENT (2010), http://www.catalyst.org/file/308/qt_women_in_us_management.pdf.

[26] *See* 29 C.F.R. § 1608.1 (2011) (calling on employers "to modify employment practices and systems which constitute[...] barriers to equal employment opportunity.").

[27] INST. FOR WOMEN'S POL'Y RES., *supra* note 24.

Research also shows that the glass ceiling still prevents many women from advancing in their careers, in light of evidence that men are promoted at a higher rate than equally qualified women.[30] To date, women comprise only 40 percent of managers across all industries.[31] At the uppermost levels, women's representation is even thinner: a mere one-sixth of corporate officers in the Fortune 500 companies are female.[32]

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[28] U.S. Department of Labor, Bureau of Labor Statistics, Women's Earnings and Employment by Industry, 2009, http://www.bls.gov/opub/ted/2011/ted_20110216.htm.

[29] *See, e.g.*, Judy Goldberg Dey & Catherine Hill, Behind the Pay Gap 3 (2007), http://www.aauw.org/learn/research/upload/behindPayGap.pdf; Francine D. Blau & Lawrence M. Kahn, *Gender Differences in Pay*, 14 J. Econ. Persp. 75, 82 (2000).

[30] Francine D. Blau & Jed DeVaro, *New Evidence on Gender Differences in Promotion Rates: An Empirical Analysis of a Sample of New Hires*, Indus. Rel., July 2007, at 511, 544.

[31] U.S. Gov't Accountability Off., Women in Management: Female Managers' Representation, Characteristics, and Pay 6 (2010), http://www.gao.gov/new.items/d10892r.pdf; *see also* App. 448a, Declaration of Marc Bendick, Jr., Ph.D. in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) (describing that the rate of women in management at the 20 largest comparable retailers is 55%).

[32] Catalyst, 2008 Catalyst Census of Women Corporate

Discrimination against women impacts not only working women, but also their families and the nation's economy. With four in ten mothers acting as primary breadwinners and another 25 percent contributing a significant portion of their household income,[33] women's earnings are crucial to the well-being of American families. If women received the same compensation as their male counterparts, poverty rates among their families would fall by more than half.[34] Because women make 80 percent of purchase decisions by consumers, lost earnings for women due to discrimination carry detrimental effects for the nation's economy.[35]

While market forces should provide ample incentive to eradicating gender discrimination in the workplace, discrimination persists. Although the nation's businesses have made significant progress in closing gender disparities, work remains to be done. Countless corporations and executives have

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OFFICERS AND TOP EARNERS OF THE FORTUNE 500 (2008), http://www.catalyst.org/file/241/08_census_cote_jan.pdf.

[33] THE SHRIVER REPORT: A WOMAN'S NATION CHANGES EVERYTHING 19 (Heather Boushey & Ann O'Leary eds., 2009), http://www.americanprogress.org/issues/2009/10/pdf/awn/a_womans_nation.pdf.

[34] AFL-CIO & INST. FOR WOMEN'S POL'Y RES., EQUAL PAY FOR WORKING FAMILIES: NATIONAL AND STATE DATA ON THE PAY GAP AND ITS COSTS 14 (1999).

[35] THE SHRIVER REPORT, *supra* note 33, at 199. In fact, recent calculations suggest that if women and men were compensated at equitable rates, this country's gross domestic product would increase by 9 percent. Jessica Bennett & Jesse Ellison, *Tracking the Wage Gap*, NEWSWEEK, Apr. 20 2010, http://www.newsweek.com/2010/04/19/tracking-the-wage-gap.html.

committed to addressing such disparities by implementing policies and procedures to root out discrimination. However, too often, evidence of persistent gender discrimination goes ignored even by well-intentioned employers.

This problem is heightened in circumstances where corporations, executives, and managers are steeped in bad habits and reliant on bad practices. The simple fact is that far too often executives and corporations are either unable or unwilling to see or acknowledge gender disparities in the workplace.[36] When recalcitrant employers refuse to adopt inclusive policies and practices and refuse to acknowledge internal calls for reform, they not only open the door for bias and stereotypes to take hold in the workplace but also make it more likely that victims of unlawful discrimination will turn to class litigation as a last resort.

III. Class actions have played a positive role in promoting change and correcting persistent disparities.

There is a long and honorable history of class actions acting as both instigators and mechanisms of structural reform.[37] The most notable of these examples is the *Brown* v. *Board of Education* litigation.[38] Improvements to public education stemming from the *Brown* litigation continue to benefit the nation's corporations and the community as a whole.[39] Again, we can boast of those improvements only because of privately initiated class action litigation.

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[36] Brief for the Institute for Women's Policy Research et al. as Amici Curiae Supporting Respondents, Wal-Mart Stores, Inc. v. Dukes, No. 10-277 (U.S. filed Mar. 1, 2011).

[37] *See, e.g.*, Stephen C. Yeazell, *Brown, the Civil Rights Movement, and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975, 1978 (2004); Harry Kalven Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U.

Class litigation in the employment arena also has served an integral role. Courts have long recognized the role of class actions in righting the wrongs perpetuated by systemic, discriminatory employment practices. Furthermore, such litigation has provided important guidance on the proper development of workplace policies, procedures, and institutional structures.[40] An early example of

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CHI. L. REV. 684 (1941).

[38] 347 U.S. 483 (1954).

[39] The integration of public schools paved the way for the diverse workforce we now have – a diverse workforce that was eloquently defended in the amicus briefs for *Grutter v. Bollinger*. *See, e.g.*, Brief for 65 Leading American Businesses as Amici Curiae Supporting Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), and Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516); Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae Supporting Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), and Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516).

[40] As Sylvia Ann Hewlett, Director of the Gender and Policy Program at Columbia University's School of International and Public Affairs, has observed "lawsuits can be surprisingly effective in forcing change...they cannot be concealed or ignored." SYLVIA ANN HEWLETT, OFF-RAMPS AND ON-RAMPS: KEEPING TALENTED WOMEN ON THE ROAD TO SUCCESS 93 (2007). For an academic discussion through the legal lens, *see generally* Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659,

effective class action employment discrimination litigation is *Haynes* v. *Shoney's*.[41] The 1989 *Shoney's* class action made headlines when it revealed smoking-gun evidence of racial discrimination and ultimately resulted in a settlement benefiting approximately 200,000 rejected applicants and current and former African-American employees.[42]

The *Shoney's* litigation resulted in the institution of a number of reforms intended to root out discrimination. Notable best practices included the designation of Equal Employment Opportunity Managers "to investigate and process complaints of employment discrimination, harassment and/or retaliation and to assist in the implementation of the fair employment and affirmative action provisions of this Decree;"[43] and the codification and posting of the minimum requirements for each job title,[44] which allowed employees to better self-identify readiness for a position. The positive effects of these reforms are evident in the hard numbers. Before the lawsuit, only 3% of dining room supervisors, 5% of assistant managers and 1.8% of managers at Shoney's were African-Americans; three years after the settlement, those numbers had risen to 13% of dining room

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671-705 (2003); Levit, *supra* note 2.

[41] *Haynes v. Shoney's, Inc.*, No. 89-30093-RV, 1993 U.S. Dist. LEXIS 749 (N.D. Fl. Jan 25, 1993).

[42] *Id.* at *11 ("Over 225,000 actual notices or requests [from class members] have been handled by the parties."); *see also* STEVE WATKINS, THE BLACK O: RACISM AND REDEMPTION IN AN AMERICAN CORPORATE EMPIRE (1997) (exploring in detail the case, its development, and its effects).

[43] *Haynes*, 1993 U.S. Dist. LEXIS 749, at *59.

[44] *Id.* at *80.

supervisors, 21% of assistant managers, and 12% of managers.[45]

Just as the *Shoney's* class litigation and resulting consent decree popularized best practices in the late 80's that are now commonplace, subsequent class employment litigation has generated similar results with ever increasing sophistication. Examples abound of equitable relief packages laying forth policies and procedures that are now standard best practices utilized by corporations across industries.[46]

Most extensively documented is the equitable relief package resulting from the class action against Coca-Cola, *Ingram* v. *Coca-Cola Co.*, originally filed in 1999.[47] The *Coca-Cola* settlement included best practices that echoed the *Shoney's* settlement, but it also laid out more advanced mechanisms to address virtually every aspect of the corporation's policies and procedures, including modifications to staffing, compensation, performance evaluation, and career development systems.[48]

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[45] WATKINS, *supra* note 42, at 231.

[46] Brief for the Institute for Women's Policy Research et al. as Amici Curiae Supporting Respondents, Wal-Mart Stores, Inc. v. Dukes, No. 10-277 (U.S. filed Mar. 1, 2011).

[47] 200 F.R.D. 685 (N.D. Ga. 2001).

[48] Central to these sophisticated reforms was the independent task force that worked to both direct and oversee the reform efforts. *See* ALEXIS M. HERMAN ET AL., FIFTH ANNUAL REPORT OF THE TASK FORCE (2006), http://www.thecoca-colacompany.com/ourcompany/task_force_report_2006.pdf. [hereinafter TASK FORCE REPORT].

Key amongst the *Coca-Cola* reforms was the revision of the performance evaluation process away from excessively subjective measurements to a system based on "specific, job-related measurements."[49] Moving away from undirected exercises of managerial discretion,[50] the performance review process was changed to "emphasize[] the linkage between performance objectives and business unit goals" by simplifying what would be measured and "revising the rating scale to clarify performance expectations."[51] These modifications to the *Coca-Cola* performance review system were tailored to the specifics of the company's operations and were designed to fit fluidly into the existing infrastructure. As such, the performance reforms informed and coincided with, for example, reforms to the compensation system.[52] Another notable component of Coca-Cola's compensation reforms was the implementation of pay equity studies, a practice recommended by the Society for Human Resources Management.[53]

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[49] *Id.* at 25.

[50] Nothing in this section should be taken to suggest that all managerial discretion is inappropriate. To the contrary, managerial discretion is a necessary and appropriate part of good business management. However, there are both proper and improper ways in which that discretion can be utilized. Discretion should be given within the confines of properly tailored parameters, detailed guidance on the exercise of that discretion, and concurrent oversight by more senior leadership. In fact, the Coca-Cola settlement provided for just that sort of exercise of discretion. *See id.* at 34 ("Key to the successful continuation of its ongoing compensation programs are the communication tools provided by the Company for managers and employees to better understand and execute the compensation process and the ongoing data monitoring systems by which the Company tracks the fairness of compensation decisions. As in the past, managers are given some flexibility and discretion in making compensation decisions, but the Company actively monitors these decisions to ensure fairness and managers are held accountable for their decisions.").

[51] *Id.* at 25.

As a result of the litigation-initiated reforms, policies and procedures at Coca-Cola came in line with industry standards[54] and the corporate climate improved with significant and measurable results.[55] The equitable relief in the *Coca-Cola* litigation applied to both the non-salaried and salaried workforces was by no means a crude, one-size-fits-all quick-fix. Instead, the *Coca-Cola* class litigation led to the sophisticated and careful application of industry best-practices to Coca-Cola's particular business model — an application that ultimately positioned Coca-Cola as a leader on anti-discrimination efforts in the workplace.[56]

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[52] *Id.* at 34-35.

[53] Deere, *supra* note 21.

[54] *See, e.g.*, CHI. AREA P'SHIPS, *supra* note 22, at (explaining that good practices include creating benchmarks for measurement that are defined clearly up front; linking pay ranges to neutral, relevant factors; developing tracking tools and processes to monitor compensation criteria and decisions; and routinely auditing the outcomes of compensation systems against legal and fairness standards).

[55] TASK FORCE REPORT, *supra* note 48, at 21-22.

[56] In the last two years alone, Coca-Cola has won numerous awards including being named one of the Top 50 Companies for Diversity by DiversityInc., one of the 40 Best Companies for Diversity by Black Enterprise Magazine, and America's Top Corporation for Women Business Enterprises by Women Business Enterprises National Council. *See* Coca-Cola Co., Diversity: Our Progress, http://www.thecoca-

The 2010 resolution of the class litigation *Velez v. Novartis Pharmaceuticals Corporation* provides the most recent example of class litigation generating significant and refined reforms for a nationwide corporation.[57] Filed in 2004 and tried in 2010, the *Novartis* case involved claims regarding gender discrimination in compensation and promotions, along with pregnancy discrimination. The case settled after the plaintiffs prevailed on all counts at trial.[58]

In approving the equitable relief package in the settlement, the judge commented:

> the noneconomic side of the settlement has a great deal to commend it, not the least of which is that I truly believe that *Novartis is on the verge of becoming the company that it said it was* but that the jury plainly believed that it was not. The noneconomic terms of the settlement reflect, in my judgment, *a sincere and deeply felt commitment on behalf of this company to look at itself seriously and to make itself a place where women as well as men can be proud to work*, knowing that it truly is an equal opportunity employer in the marketing area.[59]

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colacompany.com/citizenship/our_progress.html (last visited Feb. 28, 2011).

[57] *Velez* v. *Novartis Pharm. Corp.*, No. 04 Civ. 09194 (CM), 2010 U.S. Dist. LEXIS 125945 (S.D.N.Y. Nov. 30, 2010).

[58] *Id.* at *10-11.

[59] Transcript of Proceedings Held on Nov. 19, 2010 before Judge Colleen McMahon, *Velez* v. *Novartis Pharm. Corp.*, No. 04 Civ.

The court's comments on the settlement contain two important observations: first, that the settlement fostered reforms that the company previously would have rejected as unnecessary, and second, that the class litigation had generated a true and lasting change in the corporation's commitment to non-discrimination. Thus, the *Novartis* class litigation had precisely the sort of effect envisioned by Congress when it passed Title VII: an effect that, although originating from external private litigation, is tailored to bring about meaningful and lasting change to the company's culture, systems, and practices.[60]

Indeed, history teaches us that class litigation can have positive effects that long outlast the litigation. The external pressures of class litigation can force an internal reexamination of executive attitudes and corporate culture for which parallels cannot be found in individual litigation. For example, after the litigation was filed but *before* the

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09194 (CM), 2010 U.S. Dist. LEXIS 125945 (S.D.N.Y. Nov. 30, 2010) (emphasis added).

[60] The reforms in the *Novartis* settlement include changes to the company's management development process that made it more transparent, self-guided, consistent and accessible; changes to the performance management system to make the evaluations more closely tied to the actual job duties being performed by the corporation, and changes to the compensation system to ensure that the discretion exercised by managers in deciding employees' compensation is directed by corporate guidelines and reviewed by higher management. In addition, the monetary relief included full backpay awards to the entire class. *Velez* v. *Novartis Pharm. Corp.*, No. 04 Civ. 09194 (CM), 2010 U.S. Dist. LEXIS 125945 (S.D.N.Y. Nov. 30, 2010).

class litigation was settled in *Roberts v. Texaco, Inc.*,[61] Texaco's senior management initiated an independent internal investigation that led to the conclusion "that the time was right for [Texaco] to declare total war on intolerance," including not only race *but also gender* discrimination.[62] To that end, Texaco hired the Honorable A. Leon Higginbotham, former Chief Judge of the U.S. Court of Appeals for the Third Circuit, to work with Texaco to "transform our Company to be a model of fairness, without discrimination in the workplace."[63] The corporate leadership was galvanized by large-scale litigation in two ways—first to address systemic problems with race that the litigation targeted, and second to implement beneficial reforms that far exceeded the scope of the litigation.[64] Similarly, reforms implemented by Coca-Cola to address race problems also yielded benefits to female employees, with a 68% increase in female leadership at the company over the five-year period of the settlement.[65]

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[61] 979 F. Supp. 185 (S.D.N.Y. 1997).

[62] Cathy Cronin-Harris & David M. White, NEGOTIATING ENDURING CORPORATE CHANGE: A CASE STUDY ON THE TASK FORCE ON EQUALITY AND FAIRNESS IN *ROBERTS V. TEXACO INC.* 14 (2005) (citing an interview with Texaco Vice Chairman Allen Krowe), http://www.dmwlawfirm.com/resources/Texaco%20Case%20Study.pdf.

[63] *Id.* at 15 (citing a November 26, 1996 press release issued by Texaco CEO Peter I. Bijur).

[64] *Id.*

[65] TASK FORCE REPORT, *supra* note 48, at 6.

In sum, class action litigation can serve as a wake-up call for recalcitrant corporations. That wake-up call often leads to real and meaningful change in the corporate cultures at issue. The centerpiece of class action relief is the set of systemic reforms that provide practical steps to bring about necessary long-term changes. Historically, such systemic reforms represent carefully-tailored applications of the business community's best practices. As such, class actions provide an appropriate remedy for those corporations that suffer from persistent, institutionalized discrimination.[66]

IV. Class actions can provide businesses with more efficient alternatives to individual litigation.

Class actions also provide an efficient mechanism to address disparities arising from discrimination for both employees and employers. Indeed, the business sector has long acknowledged the efficiencies of class actions. For example, in support of the Class Action Fairness Act of 2005,[67] the U.S. Chamber of Commerce took the position that "[c]lass action litigation is a necessary part of our legal system because it can bring efficiency and fairness to situations involving many people with similar claims."[68] The Chamber asserted that federal lawsuits "ensure an evenhanded forum for bringing large, interstate class actions."[69] And in a recent amicus brief before this Court, the Chamber acknowledged that there is an "enormous societal interest in preventing serial litigation."[70]

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[66] As these cases demonstrate, not all class actions are without merit. Where there is merit to the claims, equitable relief in the form of backpay and in the form of systemic reform is not only appropriate but laudable.

[67] Pub. L. No. 109-2, 119 Stat. 4 (2005).

Indeed, the common sense nature of this observation is borne out by history. The *Shoney's* settlement resolved the claims of approximately 200,000 individuals, the *Coca-Cola* settlement resolved the claims of 2,200 individuals, the *Texaco* settlement resolved the claims of 1,300 individuals, and the *Novartis* settlement resolved the claims of 6,200 individuals.[71] Rather than burdening corporations (and courts) with nearly 210,000 individual actions, these claims were resolved through just four actions.[72] Just as the court system benefits from the administrative efficiencies of a class action, so do the corporations that resolve claims through class actions.

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[68] U.S. Chamber of Commerce and U.S. Chamber Institute for Legal Reform, Statement on The Class Action Crisis and S. 1712 – "The Class Action Fairness Act" (July 31, 2002), http://www.uschamber.com/issues/testimony/2002/class-action-fairness-act.

[69] U.S. Chamber Institute for Legal Reform, Class Action Toolkit, http://www.legalreformnow.com/images/stories/documents/pdf/ClassActionToolkit.pdf (last visited Feb. 23, 2011).

[70] Brief for the Chamber of Commerce of the U.S. as Amicus Curiae Supporting Respondent, Smith v. Bayer Corp., No. 09-1205 (U.S. argued Jan. 18, 2011).

[71] *Haynes* v. *Shoney's, Inc.*, No. 89-30093-RV, 1993 U.S. Dist. LEXIS 749 (N.D. Fl. Jan 25, 1993); *Ingram* v. *Coca-Cola Co.*, 200 F.R.D. 685 (N.D. Ga. 2001); *Roberts* v. *Texaco, Inc.*, 979 F. Supp. 185 (S.D.N.Y. 1997); *Velez* v. *Novartis Pharm. Corp.*, No. 04 Civ. 09194 (CM), 2010 U.S. Dist. LEXIS 125945 (S.D.N.Y. Nov. 30, 2010).

Aside from the obvious efficiencies in resolving the multitude of claims at one time, class actions can provide future benefits. Systemic reforms help to insulate businesses from unfounded claims of discrimination going forward.[73] Corporations that have adopted systemic reforms are better positioned to demonstrate that they have taken proper steps to ensure nondiscrimination.[74]

In addition, where a corporation makes significant modifications to its policies and procedures, particularly as a highly visible and public response to class litigation, those changes can have widespread effects "on corporate employment practices—even for smaller employers who pattern after the larger shops."[75] Innovations adopted by larger corporations not only are more visible by virtue of the size of the employer but also suggest a level of reliability that invites smaller companies to rely on the larger corporations' vetting process. While it is impossible to know precisely how many executives called for internal analysis of gender and race disparities after the resolution of cases like *Shoney's*, *Texaco*, *Coca-Cola*, or *Novartis*, good business practice dictates that one learns from both the mistakes and advances of its competitors. Thus, good business practices adopted because of a class action in order to comply with the law can have a domino effect, reaching down to the smaller businesses that follow suit.

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[72] Of course, other employment discrimination class actions that are not discussed here have also resulted in the successful resolution of hundreds of thousands of additional claims.

[73] For example, the *Roberts v. Texaco* case is, again, informative. *See* Levit, *supra* note 2, at 394 n.187.

[74] *Id.* at 394 n.187 (discussing Texaco's subsequent litigation history), 405 n.261 (discussing Coca-Cola's subsequent litigation history).

[75] HEWLETT, *supra* note 39, at 370; Orly Lobel, *Big-Box Benefits: The Targeting of Giants in a National Campaign to Raise Work Conditions*, 39 CONN. L. REV. 1685, 1688 (2007) (discussing how labor relations norms established with the "Big Three" auto manufacturers set industry standards); Jesse Ellison, *Shattering Glass Ceilings*, NEWSWEEK, June 15, 2010, http://www.newsweek.com/2010/06/15/shattering-glass-

The benefits of class litigation, both those directly linked to compliance with Title VII and the efficiency benefits described above, therefore, are not limited to the individual corporation subject to a meritorious suit. Instead, the benefits extend to the business community as a whole—to employees and employers alike.

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ceilings.html (discussing how the Novartis verdict would lead to employers examining their own policies and practices more closely).

CONCLUSION

For the above reasons, the *amici* respectfully suggest that the judgment of the Ninth Circuit should be AFFIRMED.

Respectfully submitted,

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IN THE

Supreme Court of the United States

WAL-MART STORES, INC.,
Petitioner,
v.
BETTY DUKES, *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND CHANGE TO WIN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

The United Food and Commercial Workers International Union ("UFCW"), the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") and Change to Win ("CtW") file this brief *amici curiae* in support of Respondents.[1] The UFCW is an international labor organization with a total membership of

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[1] Pursuant to Supreme Court Rule 37.3, Petitioner and Respondents have each filed with the Clerk of Court a letter granting blanket consent to the filing of *amicus* briefs. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici*, made a monetary contribution to the preparation or submission of this brief.

1.3 million working men and women. The AFL-CIO is a federation of 57 national and international labor organizations with a total membership of 12.2 million working men and women. CtW is a federation of 4 national and international labor organizations with a total membership of 5.5 million working men and women. The UFCW, the AFL-CIO and CtW are each deeply committed to the eradication of all forms of unlawful discrimination in the American workplace, including gender discrimination.

SUMMARY OF ARGUMENT

I.

Our submission on the Rule 23(a)(2) commonality requirement issue presented in this case is that to satisfy this requirement in a Title VII class action lawsuit such as the one at bar, the named plaintiffs must make a sufficient factual showing to raise a "plausible" common question of law or fact as to whether the employer has an employer-wide policy or practice of discrimination against the employee members of the named plaintiffs' defined, statutorily-protected class, with the term "plausible" to be given the meaning ascribed to it by the Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. __, 129 S. Ct. 1937 (2009). *Infra* pp. 4-5.

That proposed legal standard for satisfying the Rule 23(a)(2) commonality requirement in this context: (a) is in accord with Rule 23(a)(2)'s language and manifest gate-keeping function; (b) is supported by the recognition that Rule 23 as drafted—like Rules 8 and 12(b)(6) construed in *Twombly* and *Iqbal*—was designed to strike a balance between the legitimate litigation rights and interests of plaintiffs and defendants; and (c) provides a more than sufficient safeguard against the fear so vigorously expressed by Wal-Mart and its *amici* that certification of what they term "insubstantial" class action cases exerts inordinate settlement pressures on class action defendants. *Infra* pp. 5-10.

II.

A. There is no merit in either of Wal-Mart's efforts, at the threshold, to dismiss the named plaintiffs' factual showing as inadequate as a matter of law.

First, Wal-Mart takes the Ninth Circuit's statement that Wal-Mart has not "promulgated" a "specific discriminatory policy" entirely out of context. In context, the court below simply was making the point that the Rule 23(a)(2) commonality requirement issue presented here is whether the named plaintiffs have adduced sufficient "reliable evidence" to raise the "common question" of whether Wal-Mart's "policy of decentralized, subjective employment decision making"—though neutral *on its face*—does *in practice* "operate to discriminate against female [store] employees." *Infra* pp. 10-11.

Second, Wal-Mart's argument based on footnote 15 of *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147, 159 (1982), that only "*entirely* subjective decisionmaking process[es]" are subject to attack through a Title VII class action lawsuit is utterly belied by this Court's later decision in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988). *Infra* pp. 11-14.

B. On the issue of whether the named plaintiffs' factual showing at the class certification stage was sufficient to meet the "plausibility" standard that we have shown is appropriate here, Wal-Mart does not acknowledge, much less attempt to deal with, the specifics of the named plaintiffs' robust statistical evidence, and that head-in-the-sand approach is unsurprising under the circumstances.

The named plaintiffs' evidence of a statistically-significant, gender-based pay disparity of between 5% and 15% in each and every one of the dozens of separate in-store job classifications within each and every one of Wal-Mart's 41 separate regions across the country more than suffices to raise a "plausible" common question as to whether Wal-Mart has a Wal-Mart-wide policy or practice of discrimination against female store employees in pay determinations. *Infra* pp. 15-17.

Likewise, the named plaintiffs' evidence that, on a company-wide basis, there is a statistically significant shortfall of women being promoted into each and every one of the in-store management classifications—taken together with the named plaintiffs' evidence that Wal-Mart promotes women to in-store managerial positions at a rate dramatically lower than that of its twenty closest competitors—more than suffices to raise a "plausible" common question as to whether Wal-Mart has a Wal-Mart-wide policy or practice of discrimination against female store employees in promotion determinations. *Infra* pp. 17-19.

ARGUMENT

I. The Proper Rule 23(a)(2) Legal Standard

As the parties recognize, the threshold Rule 23(a)(2) issue presented in this case is the proper legal standard for determining whether, in a Title VII class action lawsuit such as the one at bar, the named plaintiffs have made a sufficient factual showing at the class certification stage to satisfy Rule 23(a)(2)'s commonality requirement. Our submission on this Rule 23(a)(2) commonality requirement issue is this:

In order to satisfy the Rule 23(a)(2) commonality requirement in a Title VII class action lawsuit such as the one at bar, the named plaintiffs must make a sufficient factual showing to raise a "plausible" common question of law or fact as to whether the defendant employer has an employer-wide policy or practice of discrimination against the employee members of the named plaintiffs' defined, statutorily-protected class, with the term "plausible" to be given the meaning ascribed to it by the Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. __, 129 S. Ct. 1937 (2009). To put the *Iqbal* Court's formulation of the applicable legal standard in terms that apply here:

> To [meet the Rule 23(a)(2) commonality requirement, the named plaintiffs must make a factual showing] that allows the court to draw *the reasonable inference* that the defendant [employer has an employer-wide policy or practice of discrimination against the employee members of the named plaintiffs' defined, statutorily protected class]. The plausibility standard is *not* akin to a "probability requirement," but it asks for more than a sheer possibility . . . . [129 S. Ct. at 1949 (emphasis added) (citations omitted).]

A. As an initial matter, we note that Wal-Mart's Brief to this Court suggests that the Rule 23(a)(2) commonality requirement in a Title VII class action lawsuit such as the one at bar is what the *Iqbal* Court termed "a 'probability requirement'"—*i.e.*, a requirement that the named plaintiffs make a factual showing at the class certification stage that the plaintiffs probably will prevail on the merits of their class claim that the defendant employer has an employer-wide policy or practice of unlawful discrimination. *See* Pet. Br. 18-21 (positing a "significant proof" requirement in this context). That suggestion is fundamentally unsound.

It is abundantly clear from Rule 23's text that the district court's office at the class certification stage is to determine whether a proposed class action case "may be maintained" as such, *see* Rule 23(b), and *not* to conduct any kind of mini-trial on the merits or make any kind of a decision on the merits for or against the claims that the named plaintiffs seek to bring on behalf of the proposed class—whether styled a "probable" decision, a "preliminary" decision, or otherwise. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) ("We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action"); Advisory Committee Notes to the 2003 Amendments to Rule 23(c)(1) ("[A]n evaluation of the probable outcome on the merits is not properly part of the certification decision.").

2. In contrast to a "probability" standard, the *Twombly/Iqbal* "plausibility" standard that this Court has crafted as the proper standard for determining the sufficiency of a complaint attacked by the defendant through a Rule 12(b)(6) motion to dismiss is well suited—both in its rationale and in its operative terms—to be the standard for determining the maintainability of a class action case that a defendant, like Wal-Mart, has attacked at the certification stage as failing to satisfy the Rule 23(a)(2) commonality requirement.

The Court adopted the "plausibility" standard in *Twombly* for evaluating the sufficiency of a complaint attacked by a Rule 12(b)(6) motion to dismiss based on its reading of the governing Federal Rules (there, Rules 8 and 12), and its assessment that those Rules, as drafted, were designed to strike a balance between a plaintiff's legitimate interest in vindicating its rights by pursuing a colorable claim under federal law and a defendant's legitimate interest in avoiding the burdens (including the considerable discovery burdens) of defending against an insubstantial claim under federal law. *See Twombly*, 550 U.S. at 554-59. In adopting the "plausibility" standard in that context, the *Twombly* Court took particular note of the risk of discovery abuse by plaintiffs with insubstantial claims, the difficulties confronted by the federal courts in policing such abuses, and the consequent pressure brought to bear on "cost-conscious defendants to settle even anemic cases before reaching [the next stage of litigation] proceedings." *See id.* at 559-60 & n.6. And, the *Iqbal* Court reaffirmed the applicability of the "plausibility" standard in this context, rejecting the plaintiffs' assertion in that case "that our decision in *Twombly* should be limited to pleadings made in the context of an antitrust dispute." *See* 129 S. Ct. at 1953.

In essence, then, the Court in *Twombly* and *Iqbal* held that Rule 12(b)(6)—read in conjunction with the Rule 8 requirement that a plaintiff plead facts that, if proven, would entitle the plaintiff to relief—plays a vital gatekeeping role in ensuring that only those claims that a plaintiff might "plausibly" succeed in proving are allowed to proceed to the succeeding stages in the litigation process that lead to an ultimate disposition on the merits.

B. The considerations that warranted adoption of the *Twombly/Iqbal* "plausibility" standard in the Rule 12(b)(6) context provide a warrant for adoption of that standard in determining whether, in a Title VII class action lawsuit such as the one at bar, the named plaintiffs' factual showing is sufficient to satisfy the Rule 23(a)(2) commonality requirement.

Like Rule 12(b)(6) in its domain, Rule 23 plays a vital gate-keeping role in the class action litigation context—*i.e.*, the role of determining *ab initio* whether the case "may be maintained" as such. *See* Rule 23(b). And, in discharging its gate-keeping role under Rule 23, the district court must, *inter alia*, make a determination that often (as in this Title VII case alleging a Wal-Mart -wide policy or practice of discrimination against Wal-Mart female store employees in pay and promotion determinations) overlaps with the merits of the claims that the named plaintiffs seek to bring on behalf of the proposed class, *see General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982)—*i.e.*, the determination whether "there are questions of law or fact common to the class," *see* Rule 23(a)(2).

It follows from Rule 23(a)(2)'s manifest gate-keeping function that the Rule's dictate that there be "questions of law or fact common to the class" embodies the dictate that the named plaintiffs' assertion that the case properly is maintainable as a class action case rests on a factual showing that there are "plausible" common questions of law or fact, *Iqbal*, 129 S. Ct. at 1949, *i.e.*, a factual showing that there are common questions of law or fact that provide a fair ground for litigation of the case *as a class action case*.

Moreover, such a reading of Rule 23(a)(2)—like the Court's reading of Rule 12(b)(6) taken in conjunction with Rule 8 in *Twombly* and *Iqbal*—is supported by the same sound assessment that the Rule as drafted was designed to strike a balance between the legitimate litigation rights and interests of plaintiffs and defendants. On the one hand, named plaintiffs who at the class certification stage raise a "plausible" common question of law or fact as to whether the defendant has an unlawful policy or practice that applies to the members of the named plaintiffs' defined, statutorily-protected class—and who meet the various other requirements for the maintenance of a class action imposed by Rule 23—should by all rights be entitled to maintain the case as a class action, both for their own benefit and the benefit of all other plausibly wronged class members. Conversely, if the named plaintiffs cannot manage at the class certification stage to raise such a "plausible" common question of law or fact, then the case is not a case that the named plaintiffs should be entitled to maintain as a class action, and not a case in which the defendant should be made to bear the considerable litigation costs and burdens attendant to defending a class action.

We note that in striking this balance, the *Twombly/Iqbal* "plausibility" standard is different in one important respect in the present, Rule 23(a)(2) context as compared to the Rule 12(b)(6) context. In the Rule 23(a)(2) commonality requirement context, the district court is not limited to placing its sole reliance on the factual allegations in the named plaintiffs' complaint, but may require the plaintiffs to present factual matter outside the pleadings showing that there is a "plausible" common question of law or fact that justifies maintenance of the case as a class action case. *See generally Falcon*, 457 U.S. at 159-61. The opposite is true, of course, in the Rule 12(b)(6) context. That difference follows directly from the difference between the established practice in class action certification proceedings and the established practice in motion to dismiss proceedings, and makes sense in light of the added costs and burdens attendant to class action litigation. And, that established practice in class action certification proceedings provides a more than sufficient safeguard against the fear so vigorously expressed by Wal-Mart and its *amici* that certification of what they term "insubstantial" class action cases exerts inordinate settlement pressures on class action defendants.

Indeed, a key purpose and function of the *Twombly/Iqbal* "plausibility" standard as it applies in the Rule 12(b)(6) context is to relieve defendants of the pressure to settle "even anemic cases," *Twombly*, 550 U.S. at 559, by closing the door on such "anemic cases" at a threshold stage of the litigation. There is every reason to believe that the *Twombly/Iqbal* "plausibility" standard—particularly given its application in the Rule 23(a)(2) procedural context—is fully adequate to serve the same purpose and function with respect to cases that are "anemic" *as class action cases*, and thus are not properly maintainable as such.

II. The Sufficiency of the Named Plaintiffs' Factual Showing

As we demonstrate below, the named plaintiffs' factual showing at the class certification stage was more than sufficient to raise a "plausible" common question as to whether Wal-Mart has a Wal-Mart-wide policy or practice of discrimination against Wal-Mart female store employees in pay and promotion determinations. Before turning to that demonstration, however, we begin by rebutting Wal-Mart's two efforts to dismiss as inadequate as a matter of law the named plaintiffs' factual showing on the Rule 23(a)(2) commonality requirement.

A. (1) Wal-Mart begins its attack on the legal sufficiency of the named plaintiffs' factual showing by fastening on and by repeatedly seeking to exploit, *see* Pet. Br. 6, 10, 20, 39, the Ninth's Circuit's statement that Wal-Mart has not "promulgated" a "specific discriminatory policy," *see* Pet. App. 59a—going so far as to insist that recognition of this point "should have ended the [Rule 23(a)(2) commonality requirement] inquiry" in Wal-Mart's favor, Pet. Br. 20. But Wal-Mart takes the Ninth Circuit's statement entirely out of context.

In context, the court below merely was stating the fact that Wal-Mart has not promulgated a policy that, *on its face*, explicitly or "specifically" discriminates against female store employees in pay and promotions. That unremarkable point is an irrelevancy here, rather than a dispositive point that "end[s] the [Rule 23(a)(2)] inquiry" in Wal-Mart's favor. For as the court below went on immediately to observe in its opinion, it is undisputed that Wal-Mart *does* have a "policy of decentralized, subjective employment decision making," and that the central issue presented here is whether the named plaintiffs have adduced sufficient "reliable evidence" to raise the "common question" of whether that "policy of decentralized, subjective employment decision making"—though neutral *on its face*—does *in practice* "operate to discriminate against female [store] employees." *See* Pet. App. 59a.[2]

(2) As to the central issue framed by the court below, Wal-Mart seeks refuge in the Court's statement in footnote 15 of *Falcon* that an "*entirely* subjective decision-making process" that operates to discriminate against a class of individuals protected under Title VII would be subject to attack through a class action lawsuit. *See* Pet. Br. 11, 20 (emphasis in original). In this regard, Wal-Mart argues that the class claims here fall short because "[t]he district court found only that pay and promotion decisions are '*largely* subjective' . . . and that the company maintains centralized corporate policies that provide *some* constraint on the degree of managerial discretion.'" *See id.* 21 (citing Pet. App. 192a) (first emphasis in original, second emphasis added). This line of argument is doubly flawed.

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[2] In the same vein, Wal-Mart repeatedly points to its written employment policies promoting diversity in the company's workforce, *see* Pet. Br. 3, 10, 20, while ignoring the record evidence (a) that because Wal-Mart "has not translated" these written employment policies "into practical and effective measures, there has been little actual impact on gender differentials in pay and promotion. [Declaration of Dr. William Bielby] at ¶¶ 56-57 (citing former Vice President's view that by failing to tie diversity achievement to manager's incentive pay, the company's diversity efforts remain 'lip service')", and (b) that "although Wal-Mart regularly surveys its employees on a number of job related issues . . ., it has never performed any kind of survey addressing diversity or gender issues. *Id.* at ¶ 61." *See* Pet. App. 194a-195a.

To begin with, it is plain that footnote 15 of *Falcon* cannot be read as suggesting, much less holding, that *only* those decisionmaking processes that are "*entirely*" subjective are subject to attack through a Title VII class action lawsuit. Indeed, Wal-Mart's argument to the contrary cannot be squared with this Court's subsequent decision in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), "that disparate-impact analysis may be applied to [Title VII] claims of discrimination caused by subjective or discretionary selection processes." *Id.* at 1000 (Blackmun, J., concurring in part and concurring in the judgment). The plurality opinion in *Watson* takes note of the reality that employer decisionmaking processes often "combine[ ]" subjective and objective criteria, *see id.* at 994 (O'Connor, J.), *see also id.* at 989, and goes on to state that "in [such] cases," rather than having their claim dismissed as inadequate as a matter of law, "the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities," *see id.* at 994.

Thus, under *Watson*, a Title VII class claim will lie if the named plaintiffs make an adequate factual showing that the subjective elements of an employer decisionmaking process that "combines" subjective and objective criteria are "responsible for" a statistically significant discriminatory impact on a protected class, and the mere fact that the employer's decisionmaking process is not "*entirely*" subjective will not serve to defeat the plaintiffs' claim.

While the foregoing is dispositive with regard to Wal-Mart's misuse of *Falcon*'s footnote 15, we would be derelict if we failed to add that there is no reality in its suggestion that Wal-Mart has not, in practice, committed pay and promotion decisions at the store level to what is effectively "the unchecked discretion of lower level supervisors." *Watson*, 487 U.S. at 990. The district court made a series of factual findings on this point that stand unchallenged by Wal-Mart, including the finding "that subjectivity is a *primary* feature of [both 'salary decisions' and] promotion decisions for in-stores employees," and that in *both* settings the ultimate employment decision is made by a lower level manager "with little guidance and limited oversight" from above. *See* Pet. App. 176a-183a (emphasis added).[3]

This Court's decision in *Watson* approving the use of disparate impact analysis in this context is precisely in point here. For *Watson* rests on the recognition that a corporate policy of allowing lower level managers such substantial discretion in making employment decisions may well operate to discriminate against protected groups in a manner that cannot "be adequately policed through disparate treatment analysis," inasmuch as employment decisions made under such a policy are prone to being infected by "subconscious stereotypes and prejudices." *See* 487 U.S. at 990. Indeed, this is an inherent "problem," *id.*, with excessively subjective decision-making processes that has been widely recognized,[4] and that was the subject of uncontroverted testimony in the district court by the named plaintiffs' social science expert, Dr. William Bielby.[8]

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[3] To state the two most pertinent examples of record: (a) store managers "are granted substantial discretion" to set the pay of hourly employees within a "broad," two-dollar per hour range that is especially noteworthy and "significant" given the relatively low earnings of hourly Wal-Mart in-store employees, *see id.* 177a-178a, 180a, and (b) admittance to the Management Training Program at Wal-Mart is through a process so laden with subjectivity that it "is fairly characterized as a 'tap on the shoulder' process," *see id.* 181a. Moreover, "[t]he subjective nature of [Wal-Mart's] promotion practices is further compounded by the fact that the company does not monitor the promotion decisions being made or otherwise systematically review the grounds on which candidates are selected for promotion." *Id.* 182a.

[4] *See e.g.* Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 Ala. L. Rev. 741, 745 (2005) ("Extensive social psychological literature documents the ways in which uncon

B. While launching these misplaced legal attacks on the named plaintiffs' factual showing, Wal-Mart does next to nothing to attack the named plaintiffs' statistical evidence bearing out the likelihood that Wal-Mart's highly-subjective decisionmaking policies and practices with respect to pay and promotions are infected

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scious racism and sexism, and the consequent stereotyping, operate in employment decisionmaking" characterized by "excessive subjectivity."); *Rowe v. General Motors Corp.*, 457 F.2d 348, 359 (5th Cir. 1972) (""[P]romotion/transfer procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman are a ready mechanism for discrimination against Blacks much of which can be covertly concealed and, for that matter, not really known to management.")

[8] *See* Pet. App. 193a-194a (summarizing Bielby's testimony that where, as with Wal-Mart, managers are allowed to "make decisions with considerable discretion and little oversight," those subjective decisions "are likely to be biased," inasmuch as "substantial decision-maker discretion tends to allow people to 'seek out and retain stereotyping-confirming information and ignore or minimize information that defies stereotypes'").

To be sure, Wal-Mart takes aim at Dr. Bielby's uncontroverted testimony on this point by seizing on (and belaboring) Bielby's "conce[ssion] that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal Mart might be determined by stereotyped thinking" and Bielby's inability to do more than "critique Wal-Mart's equal employment policies and pay and promotion systems as potentially 'vulnerable' to [gender] discrimination." *See* Pet. Br. 7, 28-29. But that self-acknowledged limitation on Dr. Bielby's expert testimony merely reflects the reality that Bielby is a social scientist and not a statistician, and thus, unsurprisingly, claimed no competency to testify as to the actual discriminatory impact of Wal-Mart's policy of allowing its managers to make pay and promotion decisions "with considerable discretion and limited oversight." Pet. App. 193a-194a.

by, and distorted by, "subconscious stereotypes and prejudices" against female employees. Wal-Mart's head-in-the-sand approach with regard to the named plaintiffs' statistical evidence is unsurprising, because that evidence is more than sufficient to raise a "plausible" common question as to whether Wal-Mart has a Wal-Mart -wide policy or practice of discrimination against female store employees in pay and promotion determinations.

In this regard, it is telling that Wal-Mart does not even acknowledge in its Brief, much less attempt to deal with, the *specifics* of the testimony given by the named plaintiffs' statistical expert, Dr. Richard Drogin, bearing on that "'plausible' common question" issue.[6] In brief compass, those *specifics* are as follows:

1. With respect to the "'plausible' common question" issue as it relates to pay determinations, Dr. Drogin "performed separate regression analyses for hourly and salaried employees for each" of Wal-Mart's 41 separate regions across the country, and those multiple regression analyses

> showed statistically significant gender-based disparities for *all* [*of the dozens of*] *in-store job classifications in all 41 Wal-Mart regions*. . . . Specifically, total earnings paid to women ranged between 5 and 15 percent less than total earnings paid to similarly situated men in each year of the class period. . . . Dr. Drogin's regression analyses included seniority, turnover, performance, and other factors, none of which accounted for the disparities, thereby leaving him to conclude that *gender is the only explana-*

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[6] Likewise, Wal-Mart wholly ignores a "benchmarking" study proffered by the named plaintiffs that buttresses Dr. Drogin's testimony on that issue. *See infra* pp. 17-18.

tory factor. [Pet. App. 200a-201a (emphasis added) (citations omitted).][7]

Wal-Mart does nothing in its Brief to substantiate its stated, *ipse dixit* conclusion that the foregoing statistical analysis proffered by the named plaintiffs "is a failure of proof at the most basic level." Pet. Br. 24. But in the court below, Wal-Mart argued, and the dissenters agreed, that the fatal flaw in the plaintiffs' evidence is that, "[a]s Wal-Mart's statistical expert, Dr. Joan Haworth, explained," the demonstrated statistical disparities within a particular Wal-Mart region "could be due to decisions made at only a small percentage of Wal-Mart stores" within that region. *See* Pet. App. 130a (Ikuta, J., dissenting).

The difficulty with this rejoinder is that Dr. Haworth did not testify, and it defies reason to conclude, that the named plaintiffs' evidence of a statistically-significant, gender-based pay disparity of between 5% and 15% in each and every one of the dozens of separate in-store job classifications within each and every one of Wal-Mart's 41 separate regions across the country can be explained away on this basis. That being so, Dr. Drogin's statistical analysis more than suffices to raise a "plausible" common question as to whether Wal Mart has a Wal Mart wide policy or practice of discrimination against female store employees in pay determinations.[8]

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[7] The fact that Dr. Drogan performed multiple regression analyses on the data to rule out other, non-gender-related causes of the aggregated disparities shown by that data, belies Wal-Mart's effort to attribute to the named plaintiffs the "suggestion that liability can be premised on aggregated disparities" standing alone. Pet. Br. 27. Indeed, on this point, Wal-Mart overlooks the district court's apt observation that "[e]vidence that certain disparities exist, however, does not, by itself, explain *why* they exist. Accordingly, Plaintiffs also present inferential statistical evidence in the form of multiple regression analysis to demonstrate that the above disparities can be explained only by gender discrimination and not by chance or other neutral variables." Pet. App. 199a (emphasis in original).

2. With respect to the "'plausible' common question" issue as it relates to promotion determinations, one component of the named plaintiffs' factual showing was that

> Dr. Drogin conducted a statistical analysis of Wal-Mart's internal promotion data during the class period, and concluded that, on a company-wide basis, there is a statistically significant shortfall of women being promoted into *each of the in store management classifications* over the entire class period. [Pet. App. 212a (emphasis added).]

Moreover, in this instance, the named plaintiffs undertook to "buttress" Dr. Drogin's testimony by introducing a "benchmarking analysis" by labor economist Dr. Marc Bendick in which Dr. Bendick "compared, or 'benchmarked,' Wal-Mart against twenty other large general merchandise retailers by comparing workforce data provided by the companies to the [EEOC]." Pet. App. 222a.[8] As summarized by the district court, the essential conclusions of that benchmarking analysis were as follows:

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[8] In an effort to avoid this conclusion, Wal-Mart points to statistical evidence of its own purporting to show that "'more than 90% of [its] stores had no pay rate differences between men and women that were statistically significant.'" Pet. Br. 7 (quoting Dr. Haworth's testimony, J.A. 1344a). But in this regard, Wal-Mart elides all reference to two highly-relevant facts taken note of by the district court: (a) Dr. Haworth's purported "store by store statistical analysis," *id.* 24, was in fact a "store sub-unit" by "store sub-unit" statistical analysis utilizing store "sub unit" departmental groupings unilaterally selected by Wal-Mart; and (b) unlike Dr. Drogin, Dr. Haworth "did *not* perform regression analyses for most salaried positions." Pet. App. 201a (emphasis in original). Thus, at bottom, Dr. Drogin and Dr. Haworth offered "apples to oranges" statistical analyses, neither one of which is sufficient to discredit the testimony of the other and the reasonable inferences to be drawn therefrom.

> Dr. Bendick . . . found that a short-fall in female managers was present in 79.5 percent of all Wal-Mart stores . . . [and that] . . . "it is virtually impossible for [such a] pattern to be geographically localized." . . . He further concluded that while the in-store managerial workforce at the comparison stores was 56.5 percent female, it was only 34.5 percent female at Wal-Mart. Dr. Bendick determined that this differential is highly statistically significant (47 standard deviations).
>
> * * * *
>
> Based on his determination that Wal-Mart has a shortfall of women being promoted to in store management positions [in comparison to its twenty closest competitors], Dr. Bendick also concludes that the shortfall can not be explained in terms of lack of qualifications, interest, or availability among female employees. [Pet. App. 223a-225a (citations omitted).]

In this instance, Wal-Mart again assails Dr. Drogin's data on the ground that it is aggregated at a level above the store level, but at the same time, Wal-Mart says nothing at all about Dr. Bendick's complementary benchmarking study. Taken together, however, these complementary statistical analyses are more than sufficient to raise a "plausible" common question as to whether Wal-Mart has a Wal-Mart -wide policy or practice of discrimination against female store employees in promotion determinations.

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[8] "The practice of benchmarking one company's performance against its competitors is a standard management technique used throughout the private sector and *by Wal-Mart itself*." Pet. App. 222a (emphasis added).

Indeed, in its Brief to this Court—as in the courts below—Wal-Mart is unable even to tender an innocent explanation for why, according to the Drogin analysis, there is, on a company-wide basis, a statistically significant shortfall of women being promoted into each and every one of Wal-Mart's in-store managerial classifications, and for why, according to the Bendick analysis, Wal-Mart promotes women to in-store managerial positions at a rate so dramatically lower than that of its twenty closest competitors.[10]

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[10] Although Wal-Mart itself does *not* challenge the named plaintiffs' use of the Bendick benchmarking study to "buttress" Dr. Drogin's testimony, one of Wal-Mart's *amici* vigorously attacks that usage on the ground that it is at odds with a number of court of appeals' decisions—including a prior Ninth Circuit decision—purportedly "recogniz[ing]" that in a Title VII case such as this, "the relevant [labor] pools" for comparative purposes "are *internal* pools, not external pools such as those measured by the Bendick benchmarks." *See* Brief of Costco Wholesale Corporation As *Amicus Curiae* In Support Of Wal-Mart Stores, Inc., at 14-15 (emphasis in original). This attack by Costco fails at every level.

The prior Ninth Circuit case highlighted by Costco, *Paige v. California*, 291 F.3d 1141 (9th Cir. 2002), was decided at the summary judgment stage, not the class certification stage, and the court's limited holding in *Paige* was that the use of external pool data as the named plaintiffs' *sole method* of proving disparate impact at the summary judgment stage (as distinct from using such external pool data to "buttress" a statistical analysis based on internal pool data at the class certification stage, as here) was improper, not as a general rule, but under the particular factual circumstances of "this case." *See* 291 F.3d at 1146.

Moreover, the Costco *amicus* brief mischaracterizes the decision in *Morgan v. UPS*, 380 F.3d 459 (8th Cir. 2004): the named plaintiffs in *Morgan* did not rely on "expert opinion that the percentage of UPS's black division managers was significantly below the representation of blacks in the general population" (which is not the nature of the benchmarking study at issue here in any event), and, accordingly, the *Morgan* court did not treat with, much less "reject[ ]," such an expert opinion, as Costco asserts. [contd.]

CONCLUSION

For the foregoing reasons, and those stated in the Respondents' Brief and the Briefs of Respondents' other *amici*, this Court should uphold the class action certification decision in this case.

Respectfully submitted,

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Likewise, neither of the court of appeals' decisions cited at p.15 n.10 of Costco's brief—*United v. City of Miami*, 115 F.3d 870 (11th Cir. 1997) and *Middleton v. City of Flint*, 92 F.3d 396 (6th Cir. 1996)—address a benchmarking study of the kind at issue here, much less "specifically reject" the use of such a study in any and all circumstances for any and all purposes, as Costco would have it.

AMICUS
CURIAE
BRIEF

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WAL-MART STORES, INC.,
Petitioner,
v.

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, KAREN WILLIAMSON, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, and CLEO PAGE, on behalf of themselves and all others similarly situated,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amicus curiae addresses the following question only:

Whether the class certification ordered under Federal Rule of Civil Procedure 23(b)(2) was consistent with Rule 23(a).

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF THE *AMICUS CURIAE*

The Washington Legal Foundation ("WLF") is a public interest law and policy center headquartered in Washington, D.C., with supporters nationwide.[1] WLF's primary mission is the defense and promotion of free enterprise, individual rights, and a limited and accountable government. In particular, WLF devotes a substantial portion of its resources to advocating and litigating against excessive and improperly certified class action lawsuits. Among the many federal and state court cases in which WLF has appeared to express its views on the proper scope of class action litigation are *Philip Morris USA, Inc. v. Jackson*, No. 10-735 (U.S., cert. petition filed Dec. 2, 2010); *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), *cert. denied*, 552 U.S. 941 (2007); *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996); and *Conn. Retirement Plans and Trust Funds v. Amgen, Inc.*, No. 09-56965 (9th Cir., dec. pending). WLF also filed briefs in this case when it was before the Ninth Circuit.

WLF is submitting this brief because it believes that the en banc panel committed legal error when it affirmed the district court's consideration of testimony from plaintiff's expert in support of class certification that was not determined reliable under the standards articulated by this Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). WLF submits this brief because it is concerned that failing to test the reliability of expert testimony at class certification runs afoul of this Court's mandate that district courts conduct a "rigorous analysis" of whether Rule 23's prerequisites are met. Certifying a class on untested expert testimony casts aside the carefully crafted balance of plaintiffs' interests, defendant's interests, and judicial efficiency embedded in Rule 23.

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

WLF has no direct interest, financial or otherwise, in the outcome of this case. Because of its lack of a direct interest, WLF believes that it can provide the Court with a perspective that is distinct from that of the parties.

STATEMENT OF THE CASE

Six women brought a nationwide class action on behalf of 1.5 million current and former employees, alleging that Wal-Mart has across-the-board discriminatory policies and practices in all of its 3,400 stores, and that this discrimination is common to all women who work or have worked in a Wal-Mart store over the past decade. In support of class certification and Rule 23(a)'s commonality requirement, plaintiffs and the district court relied in part on the testimony of Dr. William Bielby, a sociology expert who opined that gender stereotyping likely exists at Wal-Mart. As he has done against other companies, Dr. Bielby testified that Wal-Mart's organizational structure made it "vulnerable" to gender stereotyping, but he could not say how often such stereotyping occurred in connection with employment decisions at the company. Pet. App. 195a. Indeed, as noted by the district court, *Dukes v. Wal-Mart*, 222 F.R.D. 189, 192 (N.D. Cal. 2004), Dr. Bielby could not say that gender stereotyping occurred 95% or 0.5% of the time. Nonetheless, Dr. Bielby's testimony was crucial to plaintiffs' attempts to demonstrate how millions of discretionary and subjective decisions made by thousands of individual managers at the local level could meet Rule 23's commonality and typicality requirements.

Wal-Mart moved to strike Dr. Bielby's testimony under Rule 702 and pursuant to *Daubert*, but the district court refused to test the reliability of expert testimony at the class certification stage. The district court reasoned that it was prohibited from applying the full *Daubert* standard under *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). *Dukes*, 222 F.R.D. at 191. Although the Ninth Circuit did not agree that *Eisen* precluded a court from delving into the merits at class certification if those merits overlapped with the Rule 23 inquiry, the court nevertheless rejected the necessity of applying the *Daubert* standard at the class certification stage. Pet. App. 57a n.22; *see also id.* at 133a-137a (Ikuta, J., dissenting) (discussing majority's failure to require the appropriate level of scrutiny of expert opinion in support of class certification as required by *Daubert*).

SUMMARY OF ARGUMENT

Class certification in this case is not consistent with the requirements of Fed. R. Civ. P. 23(a) because the courts below failed to rigorously analyze those requirements. Specifically, the district court relied on the opinion of plaintiffs' expert in concluding that commonality was established but declined at the class certification stage to analyze the reliability and admissibility of that opinion using the standards for doing so mandated by this Court in *Daubert*. By deferring a true *Daubert* analysis to a subsequent phase of the litigation, the district court, as affirmed by the Ninth Circuit, breathed new life into the defunct notion of conditional certification.

As federal courts around the country have acknowledged, because class certification exponentially raises the stakes in litigation, it should not be granted unless the court is fully satisfied that the Rule 23 requirements have been met. This means digging below the surface of a plaintiff's allegations and putting her evidence to the test. That such an inquiry overlaps with the merits is no justification for avoiding it. Likewise, there is no justification for applying a lesser reliability standard at class certification than at other points in the litigation. The district court's failure to conduct a *Daubert* analysis of plaintiffs' expert's opinions, and the Ninth Circuit's failure to require one, was legal error jeopardizing the rights of Petitioner and absent class members.

ARGUMENT

I. RIGOROUS ANALYSIS OF THE RULE 23 REQUIREMENTS COMPELS EVALUATION OF THE RELIABILITY OF EXPERT TESTIMONY AT THE CLASS CERTIFICATION STAGE

This Court has mandated that trial courts conduct a "rigorous analysis" of the Rule 23 requirements, which "generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's causes of action." *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982). A "rigorous analysis" requires courts to make factual determinations and to not merely accept a plaintiff's allegations as true. *Id.*; *see also* Pet. App. 13a ("district courts are not only at liberty to, but must, perform a rigorous analysis to ensure that the prerequisites of Rule 23 have been satisfied, and this will often, though not always, require looking behind the pleadings to issues overlapping with the merits of the underlying claims"); *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 677 (7th Cir. 2001) ("The proposition that a district judge must accept all of the complaint's allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it.").

Evidence proffered in support of the Rule 23 requirements, such as commonality, must be carefully scrutinized and weighed against competing evidence or argument. "A district judge may not duck hard questions by observing that each side has some support

. . . . Tough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives." *West v. Prudential Securities, Inc.*, 282 F.3d 935, 938 (7th Cir. 2002); *see also Tardiff v. Knox County*, 365 F.3d 1, 4 (1st Cir. 2004) ("in our view a court has the power to test disputed premises early on if and when the class action would be proper on one premise but not on another"); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004); *Blades v. Monsanto Co.*, 400 F.3d 562, 575 (8th Cir. 2005) ("a court may be required to resolve disputes concerning the factual setting of the case," which "extends to the resolution of expert disputes concerning the import of evidence"); *Cooper v. Southern Co.*, 390 F.3d 695, 712 (11th Cir. 2004).

Expert testimony is no different than any other form of evidence relevant to a Rule 23 inquiry. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 323 (3d Cir. 2008); *In re Public Offering Securities Litig.*, 471 F.3d 24, 42 (2d Cir. 2006); *West*, 282 F.3d at 938. But before a court may even begin to evaluate whether expert testimony supports a finding that Rule 23's requirements are met, it must first determine whether the expert testimony is reliable. As the Fifth Circuit observed, "[i]n order to consider Plaintiffs' motion for class certification with the appropriate amount of scrutiny, the Court must first determine whether Plaintiffs' expert testimony supporting class certification is reliable." *Unger v. Amedisys Inc.*, 401 F.3d 316, 325 (5th Cir. 2005) (citation omitted) (court "must engage in a thorough [class certification] analysis, weigh the relevant factors, require both parties to justify their allegations, and base its ruling on admissible evidence"); *see also Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 816 (7th Cir. 2010) (per curiam) ("The court must also resolve any challenge to the reliability of information provided by an expert if that information is relevant to establishing any of the Rule 23 requirements for class certification.").

The Seventh Circuit similarly endorsed a rigorous review of expert opinion testimony in *West* when it held that it would "amount[ ] to a delegation of judicial power to the plaintiffs" to permit them class certification merely because they have the support of an expert. *West*, 282 F.3d at 938; *see also Polymedica Corporate Securities Litigation*, 432 F.3d 1, 17 (1st Cir. 2005) (holding that court "must evaluate the plaintiff's evidence . . . critically"). In fact, the Seventh Circuit recently reversed class certification where the lower court relied on expert testimony without first resolving whether the testimony would be admissible under *Daubert*. *Am. Honda Motor Co.*, 600 F.3d at 815-16. Although the district court had "definite reservations" about the reliability of the expert's opinions, the court declined to conduct a full *Daubert* analysis at the early stage of the proceedings. *Id.* at 814-16. This, the Seventh Circuit determined, was an abuse of discretion. *Id.* at 816. Holding that "a district court must make the necessary factual and legal inquiries and decide all relevant contested issues prior to certification," the Seventh Circuit determined that the lower court's failure to evaluate the plaintiff's expert's opinions pursuant to *Daubert* was a return to "provisional" class certification, a practice it has roundly rejected. *Id.* at 817.

It is no wonder then that the Ninth Circuit's opinion in this case is an outlier. Every Circuit Court of Appeal to publish an opinion addressing this issue has determined that expert testimony must be carefully scrutinized during class certification. *See, e.g.*, *Unger*, 401 F.3d at 324 ("[R]eliance on unverifiable evidence [in determining class certification] is hardly better than relying on bare allegations."); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 323 (noting that expert testimony should not be "uncritically accepted" even if it is found reliable under *Daubert*).

This is consistent with the rejection of conditional class certification. Nearly a decade ago, the Civil Rules Advisory Committee amended Fed. R. Civ. P. 23 to remove the provision that class certification "may be conditional." The amendment reflected the growing consensus among federal courts that class certification should be denied unless a critical evaluation of the evidence supported findings that each of the Rule 23 requirements had been met. Gone are the days of certify now and worry later. Yet the Ninth Circuit's failure to compel careful scrutiny of the expert opinion offered by plaintiffs in support of Rule 23(a)'s requirements here effectively resurrects conditional certification in the largest employment class action in history.

II. THE DISTRICT COURT'S FAILURE TO CONDUCT A FULL *DAUBERT* ANALYSIS EQUATES TO A FAILURE TO RIGOROUSLY ANALYZE RULE 23(a)'S CLASS CERTIFICATION REQUIREMENTS

This Court has established a standard for evaluating the reliability of expert testimony in federal court – *Daubert*. *Daubert* established a non-exhaustive list of guideposts to evaluate the reliability, and thus admissibility, of an expert's opinions, including whether the theory has been tested and subjected to peer review and publication, and whether it is generally accepted in the relevant scientific or technical community. *Daubert*, 509 U.S. at 593-94. In addition, the 2000 Advisory Committee's Notes to Rule 702 recommended additional benchmarks, including whether the expert's opinions resulted from independent research or are a product of litigation; whether the expert has accounted for alternative explanations; and whether the expert was as careful in forming his opinions for litigation as he would be in his non-testifying professional work. There is no justification for requiring a lower standard at the class certification stage and every reason to apply the same standard for testing the reliability of expert testimony at every step of the litigation.

The district court, however, did not conduct a full *Daubert* analysis of the expert testimony supplied by plaintiffs in support of the Rule 23 requirements. In support of their arguments that typicality and commonality existed, plaintiffs offered the opinions of Dr. Bielby who opined that Wal-Mart is vulnerable to gender stereotyping because Wal-Mart's managers have too much discretion when making wage and promotional decisions, and that Wal-Mart's equal opportunity policies are not effective in eliminating gender barriers. Pet. App. at 193a-95a. Furthermore, according to Dr. Bielby, Wal-Mart's practices are uniform nationwide due to its strong corporate culture. *Id.* at 190a. Instead of analyzing Dr. Bielby's opinions against the guideposts established by *Daubert* and Rule 702, the district court took comfort in the fact that this Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), considered expert testimony that was based on similar methodology and that two other courts in the Northern District of California had admitted Dr. Bielby's testimony on sex stereotyping. *Dukes v. Wal-Mart*, 222 F.R.D. at 191-92. But reliance on other courts' endorsements of a methodology or an expert's opinion in one case is not an adequate substitute for a reliability analysis under *Daubert* and 702 – particularly where, as here, the expert seeks to apply that methodology and expand his opinions beyond that ever considered by any other court.

First, as Rule 702 makes clear, expert opinion is not admissible simply because it is based on reliable principles and methodology. The *application* of that methodology to the facts of the case must be reliable. *See* Fed. R. Evid. 702(2)-(3). For this reason, whether an expert's opinions were deemed admissible in one case has little bearing on whether such testimony should be admitted in a subsequent case where the expert seeks to apply his methodology in a new, untested way. Although the expert in *Price Waterhouse v. Hopkins* used a methodology similar to Dr. Bielby's, she did not seek to apply her opinions to thousands of employees spread across the country in a nationwide class. On the contrary, the expert in *Price Waterhouse* relied on facts specific to a single plaintiff's employment situation and scrutinized the specific promotional decision at issue to arrive at her ultimate conclusion that Price Waterhouse's partnership process was vulnerable to sex stereotyping. 490 U.S. at 235-36.

Second, none of the cases cited by the district court involved allegations of *nationwide* discrimination. *See Price Waterhouse*, 490 U.S. at 231-32 (discrimination claim by one female employee); *Butler v. Home Depot, Inc.*, 984 F. Supp. 1257, 1266 (N.D. Cal. 1997) (class of females in Home Depot's West Coast Division); *Stender v. Lucky Stores*, 803 F. Supp. 259, 266 (N.D. Cal. 1992) (class consisting of African-American female employees in Lucky's Northern California Food Division). The classes in *Butler* and *Stender* were limited to employees within a specific geographic division of the defendant employer. *Butler*, 984 F. Supp. at 1266; *Stender*, 803 F. Supp. at 266. As Wal-Mart argued below, while Dr. Bielby conceded that the content of stereotypes and the intensity with which they are held will vary significantly based on a variety of demographic factors, including geography, he did not control for geographic differences, or any other variable that may have impacted the thousands of other individual promotional decisions made by Wal-Mart managers across the country. Mtn. to Strike Decl. of William T. Bielby, D.E. 263 (Jun. 12, 2003) at 31-32, 32 n.29, 33-34. Even though Dr. Bielby's principles and methodology may have been deemed reliable enough by some courts to address discrimination practices limited to a specific region in the country, this does not mean the same methodology provides a reliable foundation to assert opinions and conclusions about discriminatory practices by Wal-Mart managers across the board nationwide. Yet the district court accepted Dr. Bielby's opinions at face value and relied upon them in finding Rule 23's requirements satisfied here without evaluating those opinions against the *Daubert* guideposts.

The district court attempted to dismiss Wal-Mart's challenges to Dr. Bielby's opinions as ones that went to the weight of the evidence rather than the reliability of Dr. Bielby's testimony. Such a conclusion ignores that Wal-Mart's challenges went directly to the guideposts established by *Daubert* and Rule 702, including whether the theory can be (and has been) tested, whether the theory has been subjected to peer review and publication, whether there is a known or potential rate of error, whether the expert's theory has gained widespread acceptance within the relevant scientific community, whether the expert's conclusions are reasonable extrapolations from the underlying data, whether the expert has accounted for alternative explanations, and whether the expert has approached his opinions with the same level of intellectual rigor with which he approaches his non-testifying work. *See Daubert*, 502 U.S. at 593-94; Fed. R. Evid. 702.

Wal-Mart challenged Dr. Bielby's opinions on a number of these fronts. For example, Wal-Mart argued that Dr. Bielby conceded that he had not tested his theory nor had such a theory been tested in the working environment to which Dr. Bielby applied his opinions here. Mtn. to Strike at 4-5, 18-20. Wal-Mart pointed out that none of the studies on which Dr. Bielby relied involved a decision-maker who knew the purported target of the stereotyping and had individuating information about her, a situation distinct from that of Wal-Mart's managers. *Id.* at 28-29. And Dr. Bielby acknowledged that he had not reviewed any materials to determine what information Wal-Mart's managers had at their disposal that could have impacted their decisions with regard to any individual employee, although he conceded that Wal-Mart managers likely would have had an abundance of individualized information. *Id.* at 6, 19-20. Wal-Mart also raised the fact that, despite his own failure to do so, Dr. Bielby testified that he would expect experts operating in a non-litigation context to confront contrary data and to incorporate this data into their own conclusions by explaining them, distinguishing them, disagreeing with them, or by modifying their own findings. *See id.* at 44. None of these challenges were addressed by the district court.

In failing to sufficiently scrutinize the reliability and admissibility of Dr. Bielby's opinions, the district court failed to rigorously analyze Rule 23's class certification requirements. If Dr. Bielby's opinions ultimately could not withstand *Daubert* scrutiny, these opinions fail and thus cannot supply evidence of commonality or typicality, as required by Rule 23(a).

On appeal, a panel of the Ninth Circuit initially endorsed the district court's lack of scrutiny of Dr. Bielby's opinions on the grounds that *Eisen* precluded an in-depth analysis of certain issues because a court may not consider the merits at the class certification stage. *Dukes v. Wal-Mart*, 474 F.3d 1214, 1227 (9th Cir. 2007). After a rehearing en banc, the Ninth Circuit abandoned that justification and instead embraced the district court's claim that Wal-Mart failed to challenge Dr. Bielby's methodology. Pet. App. at 56a-57a. Mischaracterizing Wal-Mart's objections as ones attacking the persuasiveness of the evidence, the court reasoned that "testing Dr. Bielby's testimony for '*Daubert* reliability' would not have addressed Wal-Mart's objections." *Id.* As demonstrated above, this was error.

The Ninth Circuit concluded that the district court committed no error in admitting Dr. Bielby's testimony because "Dr. Bielby presented scientifically reliable evidence" demonstrating commonality. Pet. App. at 59a-60a. It is unclear, however, how the court could have arrived at this conclusion when no court subjected the expert's opinions to *Daubert* scrutiny. To further confuse matters, the court went on to say that even if *Daubert* did apply, the district court still did not abuse its discretion in admitting Bielby's testimony because it "considered" *Daubert* and "was within its discretion to limit its inquiry." *Id.* at 57a-58a, n.22. There is no evidence, however, that the district court thoroughly analyzed Dr. Bielby's testimony as required by *Daubert*, and the Ninth Circuit provides no justification for permitting the district court to "limit" its inquiry.

The Ninth Circuit's decision to affirm the district court's decision to consider Dr. Bielby's testimony in support of class certification is not supported by reason or the jurisprudence of this Court and marks a departure from other federal Courts of Appeal. If left undisturbed, the *Dukes* opinion will have far-reaching and adverse consequences on defendants and absent class members and return class action jurisprudence to the days of conditional class certification.

III. PERMITTING COURTS TO CONSIDER EXPERT TESTIMONY IN SUPPORT OF CLASS CERTIFICATION WITHOUT TESTING ITS RELIABILITY UNDER *DAUBERT* IS INEFFICIENT AND PREJUDICES DEFENDANTS AND ABSENT CLASS MEMBERS

Failure to test the reliability of a plaintiff's expert testimony at the class certification stage as compelled by *Daubert* is inefficient at best and at worst prejudices the parties. Class certification dramatically raises the stakes in the litigation for defendants, often creating "insurmountable pressure . . . to settle" even weak claims (a situation tantamount to "judicial blackmail"). *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996). Defendants who bow under this pressure may never get the opportunity to compel the required scrutiny of plaintiffs' experts' testimony. *See Szabo*, 249 F.3d at 676 ("[A]n order certifying the class usually is the district judge's last word on the subject; there is no later test of the decision's factual premises (and if the case is settled, there could not be such an examination . . .)"). Moreover, forcing defendants to conduct classwide discovery and expend the resources necessary to reach the merits phase of a class action only to have it determined that the expert testimony on which the court based its class certification decision is unreliable is fundamentally unfair.

Finally, and perhaps more importantly, absent class members' rights may be substantially impaired or lost altogether when a class is certified based on unreliable expert testimony that is ultimately excluded following a full *Daubert* review. This is precisely why Rule 23 requires courts to probe beyond the pleadings and scrutinize the evidence to ensure that absent class members' interests are adequately represented and their rights are preserved.

As this Court observed in *Falcon*, in Title VII class actions plaintiffs must bridge the gap between their individual claims of discrimination and "the existence of a class of persons who have suffered the same injury . . . such that the individual's claim and the class claims will share common questions of law and fact and that the individual's claim will by typical of the class claims." *Falcon*, 457 U.S. at 157. Here, plaintiffs offered Dr. Bielby's testimony to "bridge the gap" between their individual claims of gender discrimination and those of more than *1.5 million women in 3,400 stores*. Pet. App. 115a-117a (Ikuta, J., dissenting). The district court relied on this evidence, without even considering whether the testimony was reliable under *Daubert*, to determine that plaintiffs satisfied the requirements of Rule 23.

This same evidence will be critical to carrying plaintiffs' burden of proof at trial. If, after conducting the reliability and admissibility analysis required by *Daubert* prior to trial, the court determines that Dr. Bielby's testimony should be excluded, it could have "catastrophic consequences" to absent class members. While the loss of such evidence could lead to decertification of the class, it may also be deemed a failure of proof on the class claims, resulting in a defense verdict:

> Envision the hypothetical attorney with a single client, filing a class action to halt all racial discrimination in all the numerous plants and facilities of one of America's mammoth corporations. One act, or a few acts, at one or a few places, can be charged to be part of a practice or policy quickening an injunction against all racial discrimination by the employer at all places. It is tidy, convenient for the courts fearing a flood of Title VII cases, and dandy for the employees if their champion wins. But what of the catastrophic consequences if the plaintiff loses and carries the class down with him, or proves only such limited facts that no practice or policy can be found, leaving him afloat but sinking the class?

Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1126 (5th Cir. 1969) (Godbold, J., concurring specially).

Daubert affords another level of protection to absent class members in the Rule 23 inquiry by exposing, at a preliminary stage, expert testimony that is unreliable and would not likely be admissible at trial. For this reason, it is important that this Court affirmatively rule that *Daubert*, and not a lesser standard of review, must apply at class certification.

CONCLUSION

Amicus curiae Washington Legal Foundation requests that the Court reverse the judgment below, as inconsistent with Fed.R.Civ.P. 23(a).

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